H.R. 1583, "THE OCCUPATIONAL SAFETY AND HEALTH FAIRNESS ACT OF 2003 SMALL BUSINESS AND WORKPLACE SAFETY"

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

OF THE

COMMITTEE ON EDUCATION AND THE WORKFORCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

HEARING HELD IN WASHINGTON, DC, JUNE 17, 2003

Serial No. 108-20

Printed for the use of the Committee on Education and the Workforce

88-476 pdf

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
FAX: (202) 512-2250 Mail: Stop SSOP, Washington, DC 20402-0001

COMMITTEE ON EDUCATION AND THE WORKFORCE

JOHN A. BOEHNER, Ohio, *Chairman*

THOMAS E. PETRI, Wisconsin
CASS BALLENGER, North Carolina
PETER HOEKSTRA, Michigan
HOWARD P. "BUCK" McKEON, California
MICHAEL N. CASTLE, Delaware
SAM JOHNSON, Texas
JAMES C. GREENWOOD, Pennsylvania
CHARLIE NORWOOD, Georgia
FRED UPTON, Michigan
VERNON J. EHLERS, Michigan
JIM DeMINT, South Carolina
JOHNNY ISAKSON, Georgia
JUDY BIGGERT, Illinois
TODD RUSSELL PLATTS, Pennsylvania
PATRICK J. TIBERI, Ohio
RIC KELLER, Florida
TOM OSBORNE, Nebraska
JOE WILSON, South Carolina
TOM COLE, Oklahoma
JON C. PORTER, Nevada
JOHN KLINE, Minnesota
JOHN R. CARTER, Texas
MARILYN N. MUSGRAVE, Colorado
MARSHA BLACKBURN, Tennessee
PHIL GINGREY, Georgia
MAX BURNS, Georgia

GEORGE MILLER, California
DALE E. KILDEE, Michigan
MAJOR R. OWENS, New York
DONALD M. PAYNE, New Jersey
ROBERT E. ANDREWS, New Jersey
LYNN C. WOOLSEY, California
RUBEN HINOJOSA, Texas
CAROLYN McCARTHY, New York
JOHN F. TIERNEY, Massachusetts
RON KIND, Wisconsin
DENNIS J. KUCINICH, Ohio
DAVID WU, Oregon
RUSH D. HOLT, New Jersey
SUSAN A. DAVIS, California
BETTY McCOLLUM, Minnesota
DANNY K. DAVIS, Illinois
ED CASE, Hawaii
RAÚL M. GRIJALVA, Arizona
DENISE L. MAJETTE, Georgia
CHRIS VAN HOLLEN, Maryland
TIMOTHY J. RYAN, Ohio
TIMOTHY H. BISHOP, New York

Paula Nowakowski, *Chief of Staff*
John Lawrence, *Minority Staff Director*

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

CHARLIE NORWOOD, Georgia, *Chairman*

JUDY BIGGERT, Illinois, *Vice Chairman*
CASS BALLENGER, North Carolina
PETER HOEKSTRA, Michigan
JOHNNY ISAKSON, Georgia
RIC KELLER, Florida
JOHN KLINE, Minnesota
MARSHA BLACKBURN, Tennessee

MAJOR R. OWENS, New York
DENNIS J. KUCINICH, Ohio
LYNN C. WOOLSEY, California
DENISE L. MAJETTE, Georgia
DONALD M. PAYNE, New Jersey
TIMOTHY H. BISHOP, New York

Table of Contents

H.R. 1583, THE OCCUPATIONAL SAFETY AND HEALTH FAIRNESS ACT OF 2003:

SMALL BUSINESS AND WORKPLACE SAFETY ACT

Tuesday, June 17, 2003

Subcommittee on Workforce Protections

Committee on Education and the Workforce

U.S. House of Representatives

Washington, D.C.

The Subcommittee met, pursuant to notice, at 2:00 p.m., in Room 2175, Rayburn House Office Building, Hon. Charlie Norwood, Chairman of the Subcommittee, presiding.

Present: Representatives Norwood, Biggert, Ballenger, Blackburn, Owens, Woolsey, Majette, Payne, and Bishop.

Staff present: Stephen Settle, Professional Staff Member; Travis McCoy, Legislative Assistant; Molly Salmi, Deputy Director of Workforce Policy; Jim Paretti, Professional Staff Member; Kevin Frank, Professional Staff Member; Deborah L. Samantar, Committee Clerk/Intern Coordinator.

Peter Rutledge, Minority Senior Legislative Associate/Labor; Maria Cuprill, Minority Legislative Associate/Labor; Ann Owens, Minority Clerk; and Margo Hennigan, Minority Legislative Assistant/Labor.

Chairman Norwood. The Subcommittee on Workforce Protections of the Committee on Education and the Workforce will come to order.

We're meeting today to hear testimony on H.R. 1583, the Occupational Safety and Health Fairness Act of 2003, the views of smaller employers on the merits of the legislation.

Under Committee Rule 12(b), opening statements are limited to the Chairman and the Ranking Minority Member of the subcommittee. Therefore, if other Members have statements, they may be included in the hearing record. With that, I ask unanimous consent for the hearing record to remain open 14 days to allow Members' statements and other extraneous material referenced during the hearing to be submitted in the official hearing record; without objection, so ordered.

Ladies and gentlemen, we are going to have votes shortly, and we're probably going to have to recess. But I'm going to start with my opening statement, and hope that Major Owens will be able to deliver his, too.

OPENING STATEMENT OF CHAIRMAN CHARLIE NORWOOD, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

Good afternoon, and welcome to all, especially our fine panel of witnesses who have sacrificed their time and resources to be with us today. We are in your debt. Thank you.

Today the Subcommittee will conduct its first hearing on H.R. 1583, the Occupational Safety and Health Fairness Act of 2003. During this first hearing, we intend to focus exclusively on what I consider one of the most important aspects of this legislation, its impact on smaller employers.

Candidly, the primary intended beneficiaries of this legislation are the men and women who work in the many smaller work sites across the country. We think significant progress can be made in decreasing injuries and illnesses in this segment of the industry through voluntary compliance efforts.

Now, since this is our first hearing, I want to spend a few moments introducing H.R. 1583. And before addressing the specific provisions in this proposal, I want to briefly talk about the congressional purpose and intended outcomes.

It is no secret that for years, I have passionately disagreed with those who argue that enforcement alone can achieve an optimal reduction in the number of illnesses and injuries in the nation's places of employment. What I and former Chairman Ballenger and many others, both Democrat and Republican, so firmly believe is that a balanced regulatory approach is necessary to reach meaningful outcomes in workplace safety and health.

Certainly, strong and vigorous enforcement has its place. But what we have advocated is a more balanced approach, including both strategically targeted inspections and cooperative assistance programs.

Let me explain why we believe this so strongly.

Quite obviously, OSHA regulations are among the most complex and difficult legal requirements placed on employers today. Many workplace safety and health standards involve understanding, very sophisticated technologies. And others require activities such as the detection and identification of particles or airborne contaminants too small for even the keenest eye to see. For many employers, and especially small employers, compliance is a challenge without help from the experts.

So get this straight - cooperative programs between government and industry are not about giving industry a pass on its regulatory obligations. Far from it, cooperative programs are very simply all about government helping employers understand what they need to do to comply.

There is no evil intent behind helping a regulated community understand its obligations. That is absurd, because this help is all about voluntary compliance with the law. And that, ladies and gentlemen, will reduce injuries and illnesses, not increase them. This help will better protect working men and women by achieving a safer environment, and that is what workplace safety and health programs are all about!

Let me digress for just a moment.

There is an old saying in the South that there is really very little wisdom in the second kick to the head of an old Georgia mule. Most of the folks who vote for me interpret this to mean that people ought to be able to avoid making the same mistakes over and over again. Instead of repeating mistakes, we use what we learn to make conditions around us better.

Well, if there is one thing we should have learned about OSHA over the past 33 years, it is that because of its confrontational ways, the agency has often been its own worst enemy. If the Occupational Safety and Health Act is built upon the concept of voluntary compliance, it is critical that employers know that good faith efforts toward compliance will be rewarded, not penalized.

Cooperation is built upon trust and respect, and trust and respect must be earned through exhibited conduct perceived as just and fair.

Ladies and gentlemen, breeding an environment conducive to this trust and respect is really what H.R. 1583 is all about. Above all else, its provisions are intended to remove what has been identified as “legal traps” in the act. H.R. 1583 is about removing the “got-yas” from the act, and thereby leveling the litigation playing field so that employers know that they are not going to be tricked or forced into legal submission by a government that has asked for their cooperation.

With that overview, let me briefly explain how this legislation would achieve this end. And if I may, I would like to present this information by using some very sensible principles of fairness that I think justly and accurately describe each provision of the bill.

First, fundamental fairness dictates that employers should have the opportunity for a fair and independent review of any charge against them. What we mean by this is simply that if the Secretary of Labor is going to prosecute a case, she should not also serve as the judge and jury.

This not only makes sense in terms of what is fair, but many may recall that assurances that this independent review would occur is the promise that removed the last hurdle of opposition that stood in the way of passage of this Act. This promise should be honored.

Second, no employer should be deprived of their chance for a day in court based upon a legal technicality. When lawyers use legal technicalities to influence the outcome of a case, it reeks of unfairness and really leaves a bad taste in everyone's mouth. If we want to encourage cooperation, employers should not be allowed to fall victim to these legal technicalities - the basis for accountability should be conduct, not anything else.

Third, employers should have a clear and unambiguous understanding of the types and degree of conduct that will lead to a violation. Legal terminology should be well-defined and uniformly applied when possible.

Fourth, employers should not be deprived of their day in court because they cannot afford to hire a lawyer. An employer's decision about whether or not they challenge OSHA should be based upon what they think is the right thing, not because it is cheaper to pay the fine than it is to hire legal help.

And finally, employers should be guaranteed as much stability in the legal system that they confront as possible. The fair and independent hearing of the charges leveled against them should never be subject to delays and uncertainties due to the court not being open for business.

These are the five simple propositions of fairness that underlie the provisions currently contained in H.R. 1583. We assemble here today to ascertain if, from the perspective of a small employer, these provisions are adequate to level this adjudicative playing field and begin the process of creating trust between OSHA and smaller employers.

I have invited one of the best legal experts in the area of OSHA law to help us dissect the provisions contained in H.R. 1583, and I invite the Members assembled here today to put to the test the specific provisions we propose to deliver the fairness I have been speaking about. I've also invited several small employers to help us understand how these legal traps I have talked about actually work under current law. I look forward to them helping us all understand.

With that said, I look forward to working with my colleague from New York, Mr. Owens, and each of the Members on his side, and want to ask him to help us foster this relationship of trust between small employers and OSHA, because it is critical that we do so.

WRITTEN OPENING STATEMENT OF CHAIRMAN CHARLIE NORWOOD, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE – SEE APPENDIX A

Chairman Norwood. And now I yield to the distinguished Ranking Minority Member from New York, Mr. Owens, for whatever opening statement he wishes to make.

OPENING STATEMENT OF RANKING MINORITY MEMBER MAJOR OWENS, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

Let me begin, Chairman Norwood, by thanking you for announcing that you were going to have more than one hearing. That's an unusual pattern. The past couple of years, we've only had one hearing. I hope that if you're going to have additional hearings, then we will be able to have more witnesses, and we'll actually hear from some workers who have worked in some of these plants.

I want to take this opportunity to welcome some people who are here with us today, because we think that this is a life-and-death matter. This is not a matter of a bureaucratic technical set of adjustments in the law. There are lives at stake here. And we're pleased to have men and women representing the United Steelworkers of America, who work in some of the most dangerous conditions in our country.

I especially would like to recognize Mrs. Pam Cox, who is a widow of a foundry worker killed at the Atlantic State Foundry in Phillipsburg, New Jersey, one of the sites of the McWane Corporation. Is Mrs. Cox here? Mrs. Cox, please stand.

So we take this very seriously and hope that we'd have a lengthy dialogue to make you understand the fairness issue is, of course, of great concern. We think that the present OSHA laws are not fair enough to workers, and any changes should be made in the direction of making the situation fairer to workers.

We also would like to note the fact that small businesses are not the problem. Most of our workers work in situations involving large businesses, and the deaths and injuries occur in those areas, but your changes in the law would affect all businesses.

I'd like to thank the witnesses for taking time out of their busy schedule to be with us today, all of them. We're here to consider what you call the Occupational Safety and Health Fairness Act, a bill that, in my opinion, would severely weaken an already damaged agency. OSHA is already weakened by the policies of the Republican majority over the last four years.

The Occupational Safety and Health Administration was established to liberate the American workforce from unnecessary exposure to safety and health conditions which cause injuries and death. H.R. 1583 threatens to roll back the basic protections that the present law offers to workers. Instead of liberation from high risks, H.R. 1583 will result in new oppressive acts of employers against employees. The fairness that already exists in the law will be bulldozed away by the deceptive machinery which has been proposed by H.R. 1583.

The Republican assault on working families has escalated one step further by this Act. Despite recent scandals highlighted by the New York Times and by front-line *exposes* of the McWane Corporation's pattern of OSHA violations, Republican policy makers are demanding that

an already inadequate law be weakened further.

The McWane sites which have been cited for more than 400 federal health and safety violations generated at least 4,600 injuries and 9 deaths since 1995. Changes in OSHA law to provide more fairness for McWane's type of evasive tactics, but they're deadly tactics, would represent gross injustice and the abandonment of working families.

Senator John Corzine's proposed bill, Wrongful Death Accountability Act, which would increase the maximum penalty for willfully ignoring workplace safety regulations from six months to ten years imprisonment, is a fair and just direction that we should be taking in any new law.

OSHA's criminal statutes have not been updated since the 1970s. I want the record to note the fact that if you harass a “burrito” on federal lands, you can get five years in jail. Yet the maximum OSHA penalty for willful wrongdoing is only six months.

There are many examples. I won't go into it in great detail. But this H.R. 1583 can be most accurately described as a maze wired with steel threads to strangle those who enter looking for justice. No dirty tricks have been left untried, ranging from excusing employers who miss the appropriate time frame for contesting citations, to a misuse of the powers of a more partisan Occupational Safety and Health Review Commission.

In its boldest sabotage effort, this bill significantly narrows the definition of willful violation, making it even more difficult than it currently is to cite employers for willful violations. Less than 1 percent of all violations given to employers are categorized as willful.

Between fiscal year 2001 and 2002, the number of willful violations decreased by 67 percent. For fiscal year 2002, federal OSHA issued only 392 willful citations in the 35,700 inspections that they conducted. Clearly, there is no excessive use of these citations by OSHA. There's no unfairness against small businesses.

Furthermore, the narrow definition will significantly restrict the current definition of willful violation that has already been developed through 30 years of case law.

For the working families of America, H.R. 1583 unfortunately indicates a continuing escalation of the Republican assault on working families, which was begun at the beginning of the Bush Administration, when the united Republican Senate, House, and White House juggernaut rapidly repealed the ergonomic standards developed over a 10-year period. This assault continues to ignore the vital role of working families in the makeup of America. This assault refuses to recognize the truth documented by several studies that showed that more than two-thirds of the men and women in uniform on the front lines to protect the nation are members of working families.

If American labor laws accomplish nothing else, certainly our government must not become the enemy subjecting workers to greater risk of injury and death. The Republican majority should stop the war on workers by withdrawing H.R. 1583. I urge a bipartisan defeat of this dangerous

legislation.

Mr. Chairman, I would also like to ask unanimous consent to submit for the record a chart taken from the New York Times which shows that of 200,000 OSHA cases of worker deaths, 200,000 worker deaths from 1972 to 2001, only 151 were of the cases where it was investigated for worker deaths, and only 8 cases resulted in any jail time for anybody. Out of 200,000 cases, eight cases resulted in the maximum jail time for the perpetrator. I'd like to submit this for the record.

Chairman Norwood. Thank you, Mr. Owens. Usually I don't turn to the New York Times for the correct information, but if you'd like that submitted for the record, I'd be delighted to do so.

I would now like to introduce our panel of witnesses for this afternoon's hearing. First we will hear from Mr. Brian Landon, who owns a small business in Canton, Pennsylvania, called Landon's Car Wash and Laundry. Mr. Landon is testifying on behalf of the National Federation of Independent Businesses.

Our second witness is Mr. Ephraim Cohen. Mr. Cohen is a small business owner in the state of New York. And gentlemen, we welcome you both.

Our next witness, and one that we've seen before, is Mr. Arthur Sapper. Mr. Sapper is an attorney with the law firm of McDermott, Will & Emery. He has been involved in OSHA law for the past 29 years. He has served as the Deputy General Counsel for the Occupational Safety and Health Review Commission. He was Special Counsel for the Federal Mine Safety and Health Review Commission. He spent nine years as Adjutant Professor at Georgetown University Law Center, where he taught a graduate course in OSHA law, and he has spent 16 years advising employers on their OSHA obligations. Mr. Sapper will be testifying on behalf of the U. S. Chamber of Commerce.

Our final witness that we will hear from today is Mr. John Molovich. Mr. Molovich is a Health and Safety Specialist with the United Steelworkers of America in Pittsburgh, Pennsylvania.

Members of the Committee, I think that we need to recess now and get these votes behind us so we can hear all the testimony in one context. So with that, we'll recess. I think it will take about 30 minutes. We'll return here immediately following the last vote.

[Recess.]

Chairman Norwood. Before the witnesses begin their testimony, I would like to remind the Members that we will be asking questions after the entire panel has testified. In addition, Committee Rule (2) imposes a five-minute limit on all questions. And I'd like to say to our panelists that if you would keep your testimony to as close to five minutes as you could, we will be grateful, and then get into some questions and answers.

Now I'd like to recognize Mr. Landon for five minutes for his statement. Mr. Cohen, you're on deck.

STATEMENT OF BRIAN LANDON, OWNER/OPERATOR, LANDON'S CAR WASH AND LAUNDRY, CANTON, PA, TESTIFYING ON BEHALF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS (NFIB), WASHINGTON, D.C.

Chairman Norwood, Ranking Member Owens, and Members of the Subcommittee on Workforce Protections, thank you for the opportunity to speak on the merits of H.R. 1583, the Occupational Safety and Health Fairness Act and to discuss how the provisions in this bill give small employers the tools we need to defend ourselves against unjust Occupational Safety and Health Administration citations.

My name is Brian Landon. I am owner/operator of Landon's Car Wash and Laundry in Canton, Pennsylvania. Besides the obvious services my business provides, we also remanufacture, install, and service equipment used in the car wash industry.

Currently I have two employees, one full time and one part time. Today I am speaking not only for myself, but also on behalf of the National Federation of Independent Business, of which I have been a member since I began my business in 1975. It is my honor to take part in the hearing today.

Employers like me put the highest premium on the safety and health of our employees. First of all, we certainly would not want to see family members or friends injured. Secondly, from a business perspective, it just makes sense to avoid injuries. It costs much more in lost time and potential court fees and fines than it does to provide safety equipment and to do routine maintenance. Employers like me aren't looking for ways to get around OSHA. We're just trying to decipher the myriad of regulations that the laws present.

That is why I would like to thank you and your staff, Chairman Norwood, for introducing this legislation that will truly make a difference to small employers. H.R. 1583 provides small business with the help we need to navigate the difficulties presented by OSHA, and it gives us the tools we need to defend ourselves against an OSHA citation we feel is unjust. These tools are important, because in small businesses like mine, we don't have experts on staff or an employee whose only job is to track OSHA regulations. It is the owner, like me, who is forced to interpret OSHA mandates, while also making the day-to-day management decisions, paying the bills, and oftentimes working the front counter. Consultants are available, but they are costly, and they take up valuable time and resources needed to run the business.

That is why this bill is so important to small business. OSHA is a daunting regulatory force that most businesses don't interact with until they receive a citation in the mail, or have investigators at their door. If you only have a couple of employees, it is hard to imagine taking on a bureaucracy the size and power of OSHA. It usually doesn't make good business sense to battle

an OSHA citation, and most small businesses don't.

The reality is that if OSHA cited me for a violation, I most likely would not dispute the citation, even if I believed I was in the right. The court costs, attorneys' fees, and the cost of being distracted from the running of my small business are too high, and the burden of proof is stacked against me. The truth of the matter is that while OSHA has made some modest improvements in balancing enforcement with compliance assistance, small businesses like mine need this bill to level the playing field.

There are several sections of the bill that I want to highlight in my testimony today, the first being Section 2 of the bill contesting citations under the Occupational Safety and Health Act. This section simply ensures that a legal technicality will not deny a businessperson his or her fair day in court when disputing an OSHA citation. This is very important for well-meaning small business owners who are denied their right to question an OSHA citation that results from an honest mistake, inadvertent surprise, or excusable neglect. Under current law, if an employer receives an OSHA citation, but does not respond to it within 15 working days, the citation is deemed final.

Although longstanding precedent gives the Occupational Safety and Health Review Commission the power to consider contests of citations that are excusably late, that power has been eroded by a recent Second Court decision, Chao v. Le Frois Builders, Incorporated. In that case, OSHA sent a citation to a small employer, Russell B. Le Frois Builders, Incorporated, at the company's post office box by certified mail. A secretary for Le Frois received and signed for the citation, and then put it among the day's mail on the seat in her car. During the drive, the citation fell behind the seat, and it was not found until after the 15-day deadline.

Although the Review Commission held that, one, lateness may sometimes be excusable, and two that the employer's excuse for lateness here was a good one, the Department of Labor appealed the first holding. The NFIB Legal Foundation filed a brief defending the Commission's decision and the right of conscientious employers to their day in court.

H.R. 1583 addresses this by allowing the Review Commission to use a fairer standard used by federal courts for late filings and not a drop-dead arbitrary deadline. It is important to note that this standard would not apply to all filings, just those deemed to be late because of an excusable reason.

This brings me to another provision of the bill that will have a great impact on small employers, Section 6, the award of attorneys' fees and costs. Under the Equal Access to Justice Act, employers can recover attorneys' fees and costs if they prevail in the case and if OSHA fails to show that it was substantially justified in bringing the citation against the employer. In other words, even if an employer wins, they can be stuck with thousands of dollars in fees and costs if OSHA shows the citation was substantially justified. So even if the employer wins, he loses. Section 6 of the bill would allow small employers with 100 employees or less, and earning less than $1.5 million annually, to recover costs if the employer prevails in the suit, and on that condition alone.

By allowing the smallest of employers to recover costs, this would encourage employers to take a stand against OSHA claims that are without merit. Why shouldn't employers be reimbursed for costs and attorneys' fees if they prove that OSHA was wrong? Lack of money to pay attorneys' fees should not be the deciding factor in whether you defend your business against a non-justified claim.

Chairman Norwood, in my written testimony, I discuss how Section 7, giving deference to the Commission, is beneficial to small business, as well as how OSHA can support small business through compliance assistance.

Finally, this bill is very important to small business, because it would help to level the playing field while dealing with OSHA. For that reason, I support this bill. I thank you for allowing me the opportunity to testify on this important legislation, and will be happy to answer any questions you may have.

Chairman Norwood, in the interest of time, I brought along two briefs filed by the NFIB Legal Foundation that explains the Le Frois case in more detail. I ask that it be submitted for the record to be included in my written testimony.

WRITTEN STATEMENT OF BRIAN LANDON, OWNER/OPERATOR, LANDON'S CAR WASH AND LAUNDRY, CANTON, PA, TESTIFYING ON BEHALF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS (NFIB), WASHINGTON, D.C. – SEE APPENDIX B

Chairman Norwood. So ordered and thank you very much, Mr. Landon, for your testimony. And I failed to point out the traffic light is on the front of the table, the green, yellow, and red. Try your best to stay within that.

Now, Mr. Cohen, I'm going to recognize you next, and Mr. Molovich, you will follow Mr. Cohen. So Mr. Cohen, we would be pleased to hear your testimony now.

STATEMENT OF EPHRAIM COHEN, SMALL BUSINESS OWNER

Chairman Norwood and Members of the Subcommittee, my name is Ephraim Cohen, and I am honored to be here today. I am a small businessman, and I would like to tell you about my experience with OSHA. I would rather not mention the name or location of my business or the details of my case. I want, however, to share my OSHA experience with you as much as I can, and to respectfully urge that H.R. 1583 be passed as soon as possible.

I run a small business, and it had an accident. One of my employees was badly hurt, and my facility was severely damaged. As a result of the accident, I was seriously contemplating

bankruptcy. Several months later, we received a citation in the mail. I showed the citation to my attorney, who fortunately had experience with OSHA.

The first item in the citation, and the one with the largest penalty, was directly related to the accident. This hurt. Not so much because of the penalty, but because we had not broken the law. It was the principle. The citation alleged that the machine that failed was not properly installed. But I had not installed the machine. I had paid someone to install it, someone with expertise in its installation.

My lawyer told me that the case law from Occupational Safety and Health Review Commission held that employers who reasonably rely on specialized contractors to correctly install machinery are not guilty of OSHA violations. So we asked for an informal settlement conference.

During the settlement conference, we showed the OSHA supervisor that we did not install the system, and that we had paid someone with expertise to do so. We had the documents to prove it. My lawyer mentioned the Commission case law about specialized contractors. We asked that the first citation be withdrawn.

None of this moved the OSHA official, and not because he did not believe us. He had nothing to indicate that we were wrong. The main reason for his refusal was that he had never heard of the OSHA law principle my lawyer told him of. I later found out the reason for his ignorance. There was nothing about it in the OSHA field handbook. Apparently, OSHA had no incentive to tell its field inspectors about the decisions of the Review Commission. This surprised me.

We argued and argued, but nothing would move this OSHA official. He could not give a reason for his refusal that made sense. He would say, “It's your machine.” My lawyer would respond that under the law, that is beside the point. He would ask who installed the machine, and we told him. But nothing was enough. One time, he let slip his real reason. This is the machine that caused the accident, someone was hurt, and so the citation had to stand.

We all knew this was no reason at all, for not every accident is caused by a violation of the law. I think that even he was embarrassed by his response. He then stopped giving reasons for his refusal to withdraw the citation. He flatly declared that he would refuse to settle the other citation items unless I accepted this one.

So we had a choice. Either accept this unjust citation and settle the other items, or litigate. My lawyer told me that I had a very good chance of winning. He also told me what it would cost to litigate. I am a small businessman, and everyone involved, including this OSHA official, knew that I could not afford to litigate. He knew that he had me over a barrel. I had to give in. So he forced me to confess to a wrong that I did not commit.

I do not want this to happen again to anybody. I believe that two provisions of this bill would have made a difference in my case. Section 7 would have made a big difference, for it would have meant that the OSHA official would not be ignorant of the legal principle we had relied upon. If OSHA cannot ignore Review Commission decisions anymore, it would be forced to

educate its officials about Commission decisions, and would require that they be followed. Please adopt Section 7 soon.

Section 6 would have also have been a help to me, for it would have forced OSHA to pay my fees if I won. I am small enough to qualify under this provision. I have less than 100 employees, and the net worth of my business is under $1.5 million.

If this provision were in place, I may well have defended myself against this unjust citation, for the threat of paying my lawyer's fees would have given OSHA a strong reason to not prosecute. Please pass this provision as well.

And I thank you for hearing me out.

WRITTEN STATEMENT OF EPHRAIM COHEN, SMALL BUSINESS OWNER – SEE APPENDIX C

Chairman Norwood. Thank you very much, Mr. Cohen.

Mr. Molovich, you are now recognized, sir.

STATEMENT OF JOHN MOLOVICH, SAFETY AND HEALTH SPECIALIST, TESTIFYING ON BEHALF OF THE UNITED STEELWORKERS OF AMERICA (USWA), AFL-CIO, PITTSBURGH, PA

Thank you, Mr. Chairman. Good afternoon. My name is John Molovich, and I've worked as a Safety and Health Specialist for over three decades. I have served for 23 years in the Health, Safety, and Environmental Department of the United Steelworkers of America, AFL-CIO.

During my career, I also served as a United States Department of Labor inspector. I also was a safety and health instructor at the training institute in Des Plaines, Illinois. And I also headed up the Indiana State program from August of 1989 through 1991. My work at the USWA, it included plant tours, inspections, OSHA compliance, OSHA training for thousands of United Steelworkers of America members. Earlier this year, I retired from the USWA.

H.R. 1583 would significantly weaken the Occupational Safety and Health Act of 1970, resulting in less safe workplaces throughout the United States. The lives of millions of workers are literally at stake, which makes the issue of concern today a life-and-death matter.

It is no surprise that the Republican leaders today are advocating for further weakening of OSHA. President Bush, in a Republican-led 107th Congress, oversaw one of the most shameful acts against American workers in decades, the congressional repeal of the ergonomic standard that President Clinton promulgated in 2000. In fact, signing the repeal of the ergonomic standard was

one of George W. Bush's first actions in office.

In talking about the specifics of the bill, Section 2, Contesting Citations Under the Occupational Safety and Health Act, it is the view of the Steelworkers Union that the addition of words such as “inadvertent,” “surprise,” or “excusable neglect” will do nothing more than add confusion to a well-established rule, a rule, by the way, that has been forged over the last 30 years by OSHA and through the courts.

Section 3 talks about willful violation. Again, the addition of words such as “without a good-faith belief in the legality in its conduct” and “recklessly disregarded the exposure of employees to the hazard” will make it extremely difficult, if not impossible, to issue a willful citation.

The United Steelworkers of America has experience dealing with rogue employers. One recent example was a pipe manufacturer, McWane, Incorporated, with its headquarters located in Alabama and a number of production facilities located in several states and Canada. McWane was the subject of a three-part series in the New York Times and a television documentary on PBS Front Line that were extremely critical of McWane's safety and health program and the horrible accident rate at McWane.

I personally toured the McWane facility in Tyler, Texas, very soon after the first newspaper article in January 2003. I can report that McWane had recognized the need to work with OSHA, its employees, and its unions to improve working conditions and comply with the requirements of OSHA. I firmly believe that if OSHA was restricted or prohibited from issuing a willful citation in this case, the final outcome may have been significantly different, or taken much longer to achieve.

Section 4, Fairness of Penalty Assessment: This section affects Section 17(j) of the OSHA Act and seeks to increase the number of factors to be considered by the OSHRC, the Occupational Safety and Health Review Commission. Most, if not all, of the factors proposed in this bill are taken into account currently by OSHA and the Commission. In addition, some of the wording tends to shed the responsibility for safety of the employees and/or other persons. The employer is the sole responsible party for occupational safety and health in a plant.

Section 5, Occupational Safety and Health Review Commission: This Review Commission has worked well over the last 30 years with just three commissioners, and does not need two more. If the Subcommittee wants to spend the significant amount of money involved, you should put it into the OSHA enforcement budget.

Section 6, Award of Attorneys' Fees and Costs: The union believes that the provisions of the current Equal Access to Justice Act provide employers sufficient protection. In addition, the union believes OSHA should have the same equal protection.

Section 7, Independent Review: This section affects Section 11(a) of the OSHA Act, and seeks to give deference to the Commission. Current law gives deference to the Secretary as the official responsible for enforcing the OSHA Act. The union believes this provision would take away the authority held by the Secretary to bring cases to the Court of Appeals in the United States

Supreme Court.

In closing, the union strongly opposes H.R. 1583. There are several actions that the Congress and OSHA could initiate now that would not only strengthen the OSHA Act, but also provide better protection for workers. The Congress could change the Act by strengthening the whistle-blower protection for employees that are discriminated against for safety activity. This would be under Section 11(c) of the Act.

The Congress should also significantly increase the criminal sanctions against Section 17(e). Their current penalties are insulting to victims and their families. The penalties for such behavior should be raised to at least 10 years in prison, as has been proposed by Senator John Corzine.

I made a statement before to a group. There are approximately 6,000 people killed every year in the United States in occupations. There are about 240 passengers on a 747. That equals 25 747's crashing every year. If that were to occur, there would be such an outcry, such an outrage in this country. Yet and still, we're killing 6,000 people and not thinking strongly about strengthening the OSHA Act.

Additionally, OSHA could be given the authority to order immediate correction of extremely dangerous hazards. Currently, they don't have that authority. They have to go to the courts to get that authority.

The agency also could be directed by Congress and the Administration to promulgate a new ergonomic standard. Ergonomic-related injuries and illnesses remain the largest single source of injury across all American industry.

I would like to thank you, Chairman Norwood, and Ranking Member Owens, and the entire Subcommittee for affording me the opportunity to participate and testify at this hearing, and I'm happy to answer any questions at the appropriate time. Thank you.

WRITTEN STATEMENT OF JOHN MOLOVICH, SAFETY AND HEALTH SPECIALIST, TESTIFYING ON BEHALF OF THE UNITED STEELWORKERS OF AMERICA (USWA), AFL-CIO, PITTSBURGH, PA – SEE APPENDIX D

Chairman Norwood. I thank the gentleman.

Mr. Sapper, you are now recognized.

STATEMENT OF ARTHUR G. SAPPER, ESQ., MCDERMOTT, WILL & EMERY, OSHA PRACTICE GROUP, WASHINGTON, D.C., TESTIFYING ON BEHALF OF THE U.S. CHAMBER OF COMMERCE, WASHINGTON, D.C.

Thank you, Mr. Chairman and Members of the Subcommittee. My name is Arthur Sapper. I'm a member of the OSHA Practice Group of the law firm of McDermott, Will & Emery here in Washington. I'm testifying today on behalf of the Chamber of Commerce of the United States. And the Chamber asks that this bill be favorably reported.

I have been involved in OSHA law for 29 years, both in the government and out. I have written about it. I have taught about it. I have served at both the Occupational Safety and Health Review Commission, and a kindred agency, the Federal Mine Safety and Health Review Commission, and I've examined this bill with those eyes.

H.R. 1583 is a moderate bill, and it is a very limited bill. It's narrowly targeted at some of the worst problems with the fairness of OSHA enforcement. It doesn't affect OSHA's rule-making ability. It doesn't affect OSHA's inspection authority. It doesn't take away any power that Congress intended OSHA to have when Congress passed the act in 1970. Yet it will make improvements in the enforcement of the Occupational Safety and Health Act, which is essential if the act is to be effective.

As Mr. Landon has already eloquently pointed out, Section 2 would alleviate a real degree of unfairness in this statute. Without going into the facts of the Le Frois case again, I can tell you that it is a very odd and unfair result. OSHA conceded in that case, and I was actually the attorney for the amicus curiae, the NFIB, in that case. OSHA conceded in that case, but the employer had shown excusable neglect. But OSHA also succeeded in proving to the Court of Appeals that excusable neglect was irrelevant, on a legal technicality.

That is a very irrational result, Mr. Chairman. In any other court in the country, had that excuse for failure to answer a complaint been offered, it would have been accepted, and the employer would have been allowed to have his day in court, but not under the Occupational Safety and Health Act. This inequality of treatment should be ended. There's no reason for it. And I would commend Section 2 of the bill for that reason, Mr. Chairman.

On Section 3 of the bill, which would define “willfulness,” I can tell the Subcommittee that the biggest problem with trying to defend an employer against a charge that he's a willful lawbreaker is that there's no definition of “willfulness” in the statute. The case law has established a very mushy test for willfulness, intentional disregard or plain indifference to the Act's requirements.

That's an employer's nightmare, Mr. Chairman, and a lawyer's dream. Almost anybody could be called a willful lawbreaker on very debatable evidence, and the lawyers will be able to

debate whether it's willful for many years. Clarity is needed for the sake of fairness.

The definition of "willfulness" in Section 3 essentially codifies a Supreme Court decision in a case called Richland Shoe under the Fair Labor Standards Act. It's a clear test. It's a fair test. It basically says if you know you're breaking the law, or you recklessly disregard the health or safety of your employees, you are a willful lawbreaker. That strikes the right note. It's clear, it's straightforward, and it's predictable. If you pass this revision, no longer will innocent employers be terrorized by willful accusations. That does nothing for safety, I can tell you.

On Section 4, which would preserve the fairness of penalty assessment, the interesting thing about Section 4, Mr. Chairman, is that it would preserve fairness. It actually wouldn't change anything. It would codify the sound holdings of present case law. It would even codify, in effect, the provision of OSHA's own field manual. It just preserves the fairness that's already there, and it insulates the case law against attacks by OSHA's lawyers.

For example, OSHA's lawyers have been arguing on and off that the Review Commission, which is supposed to assure fairness under the statute, may not consider the financial condition of the employer when the Review Commission is going to assess a penalty. Well, that makes no sense. And so this bill would simply codify the Review Commission's holding to that effect and insulate it against legal attack by OSHA's attorneys.

On Section 5, which would expand the Review Commission to five members, Mr. Chairman, I've served on the Review Commission. I'm sorry. I've served with the Review Commission, rather, as its Deputy General Counsel. I was also an employee, the Special Counsel of the Federal Mine Safety and Health Review Commission. I can tell you that the difference between those two agencies is like night and day, principally because, Mr. Chairman, the Federal Mine Safety and Health Review Commission has five members, and the OSH Review Commission has only three.

The instability of membership basically prevents the Review Commission from doing its job. Once two years pass, a member leaves, and the staff has to reeducate a new member all over again, cases sit and sit. And even if you have two members, which the Commission has had for about half the time in the last 20 years, well, two members is basically a recipe for paralysis. OSHA cases today are so complicated and so large that it's rare for two members to agree on everything and get the case out the door, so the cases sit. I've had one case that I'm personally involved in that has been sitting before the Review Commission for eight years.

On Section 6, Mr. Chairman, I will add very little to what Mr. Landon has said about that. I have represented small employers in the past, and I can tell you that they don't get justice because they can't afford it. I've had to tell small employers that they're right, and the judge may agree with them, but they can't afford to take the case to court. They're better off settling it, paying the fine, and moving on.

I shouldn't have to tell employers that. And the Equal Access to Justice Act is no answer, because as a practical matter, you can't get your fees paid under it. All OSHA's lawyers have to do is prove that they were substantially justified, which is too easy a target to hit, and the employer

gets no fees. And then he has to mount another case in order to get those fees, and he can't afford that either.

On Section 7, Mr. Chairman, this basically says that it's the Review Commission that should get deference from the Courts of Appeals. This would simply restore the Act to what Congress indisputably intended in 1970. Why do I say that? Because the only piece of legislative history that speaks to this issue says that the Review Commission is not supposed to be, in effect, dictated to by OSHA with respect to legal interpretations.

But there is an unfortunate Supreme Court decision that, in effect, tells the Review Commission it can't throw out a citation even if it thinks the citation is wrong, so long as OSHA is reasonable but wrong. OSHA wins if it's reasonable, even if it's wrong. It gets a home run, even if the Review Commission really thinks it hit a foul ball.

That, I can tell you, breeds contempt of the Commission, and undermines the rule-making process, because OSHA can just prescribe rules through interpretation, through the back door, if you will, Mr. Chairman, and it results in injustice for employers. I've had to tell employers again, "You're right, but it won't make a difference. Even if the Commission thinks you're right, you lose." OSHA just has to be reasonable.

Mr. Chairman, I thank you and the Members of the Subcommittee for your time and your patience.

WRITTEN STATEMENT OF ARTHUR G. SAPPER, ESQ., MCDERMOTT, WILL & EMERY, OSHA PRACTICE GROUP, WASHINGTON, D.C., TESTIFYING ON BEHALF OF THE U.S. CHAMBER OF COMMERCE, WASHINGTON, D.C. – SEE APPENDIX E

Chairman Norwood. Thank you very much, Mr. Sapper.

I appreciate all of your testimony. And I recognize myself now for five minutes for questioning.

I'm going to follow-up on your testimony, because I'm interested in something that I heard. Mr. Sapper, the gentleman from the Steelworkers Union said that if in Section 3 our definition of "willfulness" should pass, OSHA would be unable to allege willfulness ever again against an employer. I think the exact words were "willful situation will be impossible to enforce." I'd love to know if that is right, and your opinion on that.

Mr. Sapper. I'm afraid it's not correct, Mr. Chairman. If this definition should pass, OSHA would be able to accuse an employer of willfulness by simply showing the employer knew of the OSHA standard, and knew he wasn't following it. Or even if the employer was ignorant of the OSHA standard, OSHA could prove willfulness by showing that the employer's conduct was reckless.

Now, that is, of course, beyond negligence, but there are current provisions of the statute that already govern negligent conduct. So it simply would prescribe a very clear definition. And there are many, many cases, like the McWane case, Mr. Chairman, in which OSHA would have very little difficulty proving willful violations.

For example, I went through the three New York Times articles that described the behavior of the employer in that case. Let me tell you, taking these facts, OSHA would have no difficulty proving willfulness under H.R. 1583. For example, there were supervisors who knew that legally-required machine guards were off the machines for weeks at a time. That's like shooting fish in the barrel under H.R. 1583. It would be an easy willful charge to prove.

The same would hold with throwing flammable liquids into an incinerator. Employees had told the managers this is dangerous. That too would be an easy charge to prove with regard to willfulness under H.R. 1583. Actually, I don't think it would change the results in the McWane case at all.

Chairman Norwood. So you believe that we are correct in finally putting into legislative language a definition, rather than this nebulous term out there that who knows where it goes when it gets to court.

Mr. Sapper. I absolutely agree, Mr. Chairman; absolutely right. You need a definition of this. It's a very powerful provision. It's very productive for unfairness. It needs to be cabined by some procedural protection.

Chairman Norwood. Mr. Cohen, I want to take a minute to go back and remind us of your testimony. I find it a little disturbing and I hope maybe you can help me understand a little better.

This compliant officer that you dealt with had never heard of an OSHA law principle? Is that what you said? Or is that what he told you?

Mr. Cohen. Basically, yes. It was, just to go back on my notes, a case law from the Occupational Safety and Health Review Commission. It had been decided there that if you rely on a specialized contractor to do the work, you are not responsible. The OSHA supervisors claimed not to have any knowledge of that.

Chairman Norwood. Even after it was pointed out to them?

Mr. Cohen. Even after it was pointed out, correct.

Chairman Norwood. So at that point, he did have knowledge of it. He chose to ignore it.

Mr. Sapper, you are our legal expert today, and I'm sure you are familiar with the legal principles Mr. Cohen is talking about. Explain this business to us about OSHA law principle, and explain how in the world an employee of OSHA would, first of all, not have heard of it. Secondly, if they have heard of it, but it was pointed out by the employer, why would they ignore it?

Mr. Sapper. Well, I'd be happy to, Mr. Chairman.

First of all, the legal principle that Mr. Cohen is speaking of is derived from a line of cases called the Sasser line of cases, Mr. Chairman. Essentially, that case holds that if you hire a specialized contractor to do something for you, and you trusted him, and you had no reason to distrust him, and he does it wrong, you're not guilty of an OSHA violation. He is, but you're not, which sounds fair.

It is a corollary of another principle under the Occupational Safety and Health Act that OSHA has to show that an employer knew or, with reasonable diligence, could have known of a violation. It's just a corollary of that. And that's been the case law for almost 30 years.

The problem is if you look in the OSHA field information reference manual, it's not there. OSHA has never instructed its field enforcement officials to follow the Review Commission and the Courts of Appeals on this point. The reason is OSHA's lawyers harbor hopes of being able to eventually convince the Courts of Appeals or the Supreme Court that there is no such doctrine.

So in the meantime, even though we have longstanding, decades-long Review Commission precedent saying that this is the law, and Court of Appeals precedent saying this is the law, OSHA has never instructed its employees in it. And that causes the following result.

I go into an informal settlement conference. I argue on behalf of my client that either we had a specialized contractor do it, or the employer otherwise lacked knowledge. And the area director sits there and gives me a blank look, as if he'd never heard of the principle before. And sometimes they actually haven't. And the reason is because under current case law, OSHA is allowed to ignore the Review Commission, basically, because of the CF&I Steel decision. OSHA can essentially say to itself, “Well, look, my position is reasonable, so I have hopes of being able to prevail eventually. I'm not going to acquiesce. I'm not going to follow the law.”

Chairman Norwood. My time has expired.

Mr. Sapper. Sorry, Mr. Chairman.

Chairman Norwood. But we're going to come back there in a minute, or sometime this afternoon.

Major Owens, you're recognized now for five minutes.

Mr. Owens. Thank you very much, Mr. Chairman. Mr. Landon, did I understand you correctly, you have one-and-a-half employee?

Mr. Landon. Yes. I have one full-time and one part-time employee.

Mr. Owens. Do you work in the same environment; the same site?

Mr. Landon. I certainly do. I work side-by-side with my employees.

Mr. Owens. What problem did you have in health and safety at your establishment?

Mr. Landon. Fortunately, I have not.

Mr. Owens. Have you ever been cited by OSHA?

Mr. Landon. No, I have not.

Mr. Owens. Are you on a preventive mission in terms of you think this law here should be in place to prevent small employers like you from ever having to have a citation?

Mr. Landon. I think it would make things fairer for small employers such as me who, even though I'm not currently subject to OSHA enforcement inspections, I am still subject to OSHA rules and regulations. And even though I've never been cited by OSHA, many of my fellow small business members and NFIB members have.

Mr. Owens. You know people who have one-and-a-half employees that have been cited by OSHA?

Mr. Landon. I can't say that specifically.

Mr. Owens. Would you say that the provisions of this particular H.R. 1583 should apply only to employers with 10 or less employees?

Mr. Landon. I'm not prepared to make that statement, no.

Mr. Owens. That might be a good compromise.

Mr. Landon. I can speak from my perspective as a very small employer.

Mr. Owens. Thank you.

Mr. Sapper with all of your extensive knowledge, do you contest the statistics that have been quoted here, two hundred thousand deaths over that period, and one hundred fifty-one were investigated? Only eight actually ended up with employees being jailed? Will you accept those statistics, or do you think they're fabricated?

Mr. Sapper. Oh, I don't think they're fabricated, Mr. Owens. I don't really have any personal knowledge. I've heard figures like that over the years. I'd be willing to accept them.

Mr. Owens. Well, you've followed this very closely, so you've done more than just heard the figures. You've examined the figures, I'm certain.

Mr. Sapper. Actually, I have not personally examined figures on criminal prosecution, Mr. Owens. I have not had personal occasion to do so. I've heard of these figures.

Mr. Owens. Do you doubt that there have been 200,000 deaths in the period cited? Was it '72 to the present?

Mr. Sapper. I've heard that. I will assume it's correct.

Mr. Owens. Well, you said you read the New York Times articles in great detail.

Mr. Sapper. Yes, Mr. Owens.

Mr. Owens. You don't dispute most of the statistics that were contained in there.

Mr. Sapper. I don't dispute them, but I have no particular reason to really know if they're correct or not. I assume that they are. I will trust them for purposes of this discussion.

Mr. Owens. In the most important area, death, would you say there has been any harassment, or that OSHA is overbearing? OSHA harasses its small industries, or even large industries, 8 versus 200,000? Where's the harassment? Where's the abuse? Why is there a problem that we have to fix? What's broken?

Mr. Sapper. The problem, Mr. Owens, is that over 99 percent of the willfulness charges are not in the criminal sphere. They're civil charges. You end up with an OSHA inspection. The OSHA citation comes. Not an indictment, a citation. And it accuses you of willfully breaking the law.

And yes, I have seen OSHA use that extremely unfairly. I have seen OSHA accuse employers of willful violations when all they've done is arguably negligent conduct.

Mr. Owens. Do you think OSHA has an ideological bent? Some of the same people there now were appointed during the Reagan Administration, the Bush administration, the Clinton. They're civil servants. Is there an ideological bent that leads them to want to go after businesses?

Mr. Sapper. No. I think that they have a natural prosecutorial zealousness. They are supposed to have it. They wouldn't be doing their job if they didn't.

However, where you have an intended prosecutorial zealousness, you also need fairness to constrain it. You need a court that can correctly review that zealousness, make sure that the rules are obeyed, and make sure that employers are not cited unfairly.

Mr. Owens. Mr. Molovich, would you say that the OSHA employees, since you have a long history also in this area, approach their work with great pride and objectivity, or do they have a winning prosecutorial zealousness?

Mr. Molovich. Mr. Owens, the OSHA compliance officers and the OSHA field staff work according to the field operations manual. Now it's the FIRM, the Field Information Reference Manual. The issuance of willful violations has to be approved by the regional office. These are not just things that are willy-nilly done at the area office. They've got to approve those things at the

regional office.

The words that are in this document that talk about, you know, the degree of willfulness and how a willful violation is going to be arrived at clearly fly in the face of case law that's been around for 30 years. There are two major reasons why a "willful" is either plain indifference or intentional disregard. And those principles and concepts have been around for many, many years.

There was one circuit court in the United States tried to say that a willful violation had to have an evil intent. There were at least three, possibly four, circuits that said no, evil intent is not possible. All you need is plain indifference or intentional disregard. The OSHA compliance officers are conscientious, hard workers, and they try to apply the law fairly to all parties.

Mr. Owens. Thank you. I'm afraid I've got a fast five minutes, and then I'm finished.

Chairman Norwood. That's why we're not trying to get rid of willful violations; we're trying to define it so that it can be fairly attributed to anyone who needs it attributed to them.

Mrs. Biggert, you're recognized for five minutes.

Mrs. Biggert. Thank you, Mr. Chairman. Mr. Sapper, I think in your testimony, you had a chart that shows that the Review Commission operated without the full membership, the three members, for more than half of its total existence. So what does this mean? And I know the bill raises this to five members. If you could comment on that.

Mr. Sapper. Yes. The problem is that the Review Commission is so riddled with vacancies. It is well, it's paralyzed. It can't do its job. Either it has one member or no members, or most of the time, only two members. If it has only two members, they're paralyzed. Very few cases will you see in which two members are going to agree on everything in the case. The cases are just too big, too complicated nowadays. And so the cases, as I said before, just sit.

Mrs. Biggert. Well, if it's paralyzed, then they just don't act on it, or don't make a decision? Or how long does that take? Or can they bring back a third member to make a decision?

Mr. Sapper. Correct. They have to await the appointment of a third member. Unfortunately, if you look at the time line, by the time a third member comes aboard, there's not too much time remaining before another one of the previous two members is about to leave. And then when that third member comes aboard, well, the experienced legal staff at the Review Commission has to spend time, shall we say, helping that new member climb the learning curve. By the time he's ready to vote on all the pending cases, a goodly proportion of his term has expired, and then it's time, perhaps, for another member to get ready to leave.

It's been very difficult. And if you had five members, you'd have a flywheel effect. You would have enough members there at one time to be able to at least get a case out the door.

Mrs. Biggert. With five members, what happens if, let's say, there's only four members present, and two go one way and two the other? Would that make that Commission paralyzed?

Mr. Sapper. I don't think so, as a practical matter, because this bill permits the Commission to sit in panels of three. And so you are not going to have that kind of a deadlock.

Mrs. Biggert. The statement was made that changing the membership of the OSHA Commission to five is modeled after the Federal Mine Safety and Health Review Commission? Has that Commission had any problems with lack of a quorum?

Mr. Sapper. It has, but few. I mean, far, far, far fewer. And plus, it has a more stable membership, and it has a stable case law as a result. It works. It's an agency that works. The OSHRC doesn't work.

Mrs. Biggert. How are the three members or the five members picked, or selected, for the Commission?

Mr. Sapper. They are nominated by the President and confirmed by the Senate for staggered terms of six years.

Mrs. Biggert. Would anybody else like to comment on changing the Commission from three to five?

Mr. Molovich. Again, to my mind, and in my opinion, it's not necessary. This Commission has worked well over the last 30 years. When Mr. Sapper talks about, you know, a quorum, two is a quorum. If they have two commissioners on the three-member Commission, that is a quorum. And they can get cases passed through with just two of the three sitting commissioners. I believe at this current time, all three commissioners are sitting on the Commission right now.

Mrs. Biggert. Do you know how many times there's only been one, when there is no quorum?

Mr. Molovich. Off the top of my head, no, ma'am. I know what Mr. Sapper is saying is true to a certain degree, but I don't think it's as paralyzed as he's trying to make it out to be.

Mrs. Biggert. How old are some of the cases, then, that are at the Commission?

Mr. Molovich. I wouldn't know. I wouldn't have any information along those lines.

Mrs. Biggert. Mr. Sapper, do you know?

Mr. Sapper. Well, I couldn't give you statistics about averages, but I can tell you from my own personal knowledge. There is a very important case that's been pending for almost eight years. There's another case that's been pending before the body probably about seven years total. These are large cases, the ones that tend to sit.

Mrs. Biggert. Have there ever been any cases where, you know, the parties have gone out of business by the time that the case comes up?

Mr. Sapper. Oh, yes. Oh, yes, that has happened. I remember when I was at the Review Commission, we sent out a decision to an employer and it came back. It was not an employer anymore.

By the way, at the moment, the Review Commission doesn't have three members, it has only two. And, in fact, even though as Mr. Molovich says, two is a quorum, two is a recipe for deadlock.

Chairman Norwood. The gentlewoman's time has expired.

New Hampshire has five?

Mr. Sapper. Yes, sir.

Chairman Norwood. Ms. Woolsey, you are now recognized for five minutes for questions.

Ms. Woolsey. Thank you, Mr. Chairman.

I was a human resources manager for twenty years before I was elected to the House of Representatives. And for the first ten of those years, I was with a telecommunications manufacturing company that started with 13 engineers and me. And it grew to 800 people.

So you can imagine we went through a lot of challenges over a 10-year period, and one of them, of course, was our safety standards. And it was my responsibility as the HR person to make sure that was all in place. I became really good friends with OSHA and with CALOSHA. I mean, I had no problem calling them in and asking questions, and giving tours of my plant, so I knew exactly what was happening and knew what was expected of my company and my management.

We knew that if one of our employees had an accident, and pulled their back; I mean, it was light industry, so they probably weren't going to die of anything. Well, but we had chemicals. We knew that if an employee didn't do the right thing, if the employee was injured, or they or somebody else got injured because of some employee's actions, it was the company's responsibility. We knew it. We never questioned it. And therefore, we trained our employees. We made sure they followed the rules. And if they didn't, that was a disciplinary action.

They participated on the safety and health committees. They had pride in their company. They bragged that we didn't have accidents. They bragged that they were safe, that their co-workers were safe. So I tell you all that because I'm bragging, I guess.

But with this bill, with 1583, what I see is legislation for a company's bottom line being valued above the safety of American workers. I see a narrowing of the definition of willful violations, making it easier for employers to avoid blame when they have disregarded a safety standard or some requirement. I see it helping business by extending the 15-day filing date that

employers must meet to respond to OSHA's citations, among other things.

I'll start with you, Mr. Molovich. Where in this legislation are the OSHA standards strengthened? Where are employees helped?

Mr. Molovich. Ma'am, there are no places in this legislation that will help the employees nor help the Agency. The things that are being done here are an attempt to rectify and to correct court decisions that have been made over the past 30 years. All this bill is trying to do is take back what OSHA and the workers have won over the past 30 years, either in court litigation or through OSHA's mandate.

So I see nothing more here than trying to take back something that's been hard earned and hard fought for. And by the way, many people have died since then, and they paid the price. OSHA's regulations are written in blood. Someone died for them. And if you look at the way the regulations are promulgated, how they adopt draft standards, you'll find that's exactly how they do it. When enough dead bodies appear, then they will write a regulation.

So when we're talking about these kinds of things that infringe upon the rights of working people, the people that are paying the bills, it bothers me no end.

Ms. Woolsey. I can see your passion. That's nice. Thank you.

Can any of the three of you tell me where these new regulations, this new law, will help the worker? Yes?

Mr. Sapper. I would say that this bill is simply neutral on the issue. That is to say, it restores enforcement fairness. For example, it assures that you have an impartial court. It doesn't put the thumb on either scale. It simply ensures impartiality.

By the way, I would also point out that it doesn't weaken the standards one iota. This bill does not do that at all.

Ms. Woolsey. Well, it depends on who is reading it, because as far as I can see it, it makes it easier for the employer to skin under the standards.

When you look at strengthening and what we need to be doing, I mean, we need to be doing something with ergonomics. And there's no question that employees in these high-tech companies, unless they're sending everything overseas now to get their printed circuit boards filled or whatever, with their tendonitis, they're getting it. And I don't see anything in the law that says we're going to take care of ergonomics.

I mean, it's like we're going in the wrong direction. We want to undo what we have that works, and we refuse to strengthen the things that we need to work on.

I'm sorry. I see that my time is completed.

Chairman Norwood. I thank the gentlewoman.

I'd just like to make it very clear that this bill does not eliminate the 15 days citation response period. Remember, the citation is given. The 15 days stays in the law. What it does is make it a little more reasonable, in case from time to time there's a legitimate reason why somebody didn't respond. And what that does is give them an opportunity to have their day in court. I can't believe anybody would basically believe that not true.

Secondly, I don't think there's going to be any deaths in the workplace from health or safety because we're going from three commissioners to five.

All right, let me tell you, I might argue but not with Ms. Majette, because she's from my home state. You are recognized for five minutes.

Ms. Majette. Thank you, Mr. Chairman. I'm glad you recognized me. And thank you, gentlemen, for being here and for your interest in trying to resolve issues that you see are impeding the ability of the Agency to do what it needs to do.

Now, in the interest of full disclosure, I need to let you know that I'm a former administrative law judge from the Worker's Compensation Board in the State of Georgia, and served in that capacity for about two weeks shy of a year before then-Governor Miller, now Senator Miller, appointed me to the State Court of De Kalb County, and I served there for almost 10 years before resigning to run for Congress. And so I'm very interested in this particular issue, and particularly some of the language that's included here in the bill H.R. 1583.

I'll begin with Mr. Sapper?

Mr. Sapper. Yes, ma'am.

Ms. Majette. Now, you stated during your testimony that you were aware of a case, at least one case, that's been pending for eight years?

Mr. Sapper. Almost eight years.

Ms. Majette. And as far as you understand that, has that case not moved because of the lack of enough people on the Commission to consider it, or is there some other reason? Because I guess I would think that over the period of eight years, there would have been some point in time at which there were enough people to make a decision on that case.

Mr. Sapper. Well, I'm only an outside observer, as you understand. But it seems obvious that the instability of the Review Commission's membership has prevented that case from being decided. It is a difficult case. It's a large case. And it exemplifies perfectly the problems with the Review Commission having only three members. By the time they get up to speed on the case, they lose another member.

They have a lot of cases like this before them. This is not an easy job for them to do. I have a lot of admiration. By the way, that's eight years pending before the review commissioners. That doesn't even count the time before the ALJ.

Ms. Majette. All right, thank you.

And regarding Section 32, the Award of Attorneys' Fees and Costs, as I understand it, reading the bill, the language would not give any regard to whether or not the position of the Secretary was substantially justified, or whether special circumstances make an award unjust. So I guess putting that another way, it would be an automatic award of attorneys' fees to the prevailing party, the employer?

Mr. Sapper. Yes, but to the very tiniest employers. If they win, they collect their attorneys' fees if they're really tiny, as I understand it.

Ms. Majette. And would you suggest that the converse of that should be true, that if it's found that an employer was at fault, then the employer should pay those costs, that there should be some additional penalty for the value of the attorneys' fees?

Mr. Sapper. No, I don't. I think the United States Government attorneys have an enormous advantage over any employer. They are not paid by the hour. They have enormous leverage. I don't think we should discourage employers from seeking justice in that kind of a case. I think if you adopted such a provision, small employers would never seek justice.

Ms. Majette. And so is it your opinion that OSHA has sufficient resources to monitor and to pursue these cases to the point at which a decision is made? And I'm asking the question in light of what I understand the statistics are, that OSHA only has 2,214 inspectors that cover 6 million workplaces, and that the number of employees covered by inspections decreased by nearly 20 percent between fiscal year 1999 and 2002. And the average number of hours per inspection decreased from 22 to 19.1 for safety inspections, and 40 to 32.7 for health inspections, and that the number of willful violations decreased.

I mean, with all of that, do you think that that creates a level playing field, or unlevel playing field, that favors the employer?

Mr. Sapper. I don't think it favors the employer at all, Madam. I think that it is very difficult for an employer to get his side heard before the Review Commission if he can't afford to pay a lawyer.

Also, I would point out that the Congressional Budget Office has estimated that the cost of this section of the bill would be extremely modest, only about $3 million a year. Spread over the entire United States economy, that's a very small price to pay to assure the smallest employers some enforcement fairness.

Ms. Majette. And what do you think the price should be for an employee who is permanently injured or killed as a result of the violations that occur when an employer has violated the rules? You're saying that the cost of implementing this is fairly minimal. But the other side of that is that

there is a significant cost to employees who are injured, and particularly when the inspections may not be done so that the employee has some recourse against the employer. What's the value of that? What do you think we should do about that?

Mr. Sapper. Actually, Madam, I would say that this provision of the bill would not affect employee rights at all, nor would it diminish employee safety and health at all. You're talking about the very smallest employers. And they have to win in order to collect. They have to be right in order to collect.

Also, to make another point about a previous question, if you don't mind.

Ms. Majette. Well, let me ask if the Chair will allow. I see my time is up.

Mrs. Biggert. [Presiding] The gentlewoman's time has expired.

The gentleman from New Jersey, Mr. Payne?

Mr. Payne. Yes. I'll yield a moment to the lady, if you would like to continue. Is this an answer you're looking for?

Ms. Majette. Yes. Go ahead, please.

Mr. Sapper. Thank you, Madam.

Ms. Majette. Thank you for yielding, Mr. Payne.

Mr. Sapper. Let's keep in mind that it's the OSHA lawyers that are bringing this case. They're prosecuting. They're prosecutors. We should give them an incentive to spend the extra time to focus on the case against the tiniest employers, and make sure that their time is being correctly spent.

Right now, they have no incentive to do so; none. If they win, they collect penalties. If they lose, nobody pays the employers time and attorneys' fees. They have no incentive to focus heavily on the case against a small employer.

Thank you, Madam.

Ms. Majette. But maybe I'm missing the point. It seems to me that you're suggesting that the OSHA attorneys are spending inordinate amounts of time going after smaller employers?

Mr. Sapper. I'm saying that they have no incentive to closely examine the case against the small employer. I'm saying that they have no more an incentive to closely examine the case against the small employer than any other employer. And they should be given that incentive. This bill would just give them an extremely modest incentive just to look at the case a little bit more closely.

And I've seen them bring cases into court and they really don't look at the case. They really don't.

Ms. Majette. All right.

Mr. Payne. Thank you, just reclaiming my time. I've been in and out, as you can see. But your opinion is that you feel that OSHA is not doing the type of job it's capable of doing.

Mr. Sapper. Well, sir, as I used to tell my students, the employees of OSHA are good people. They do about as good a job as we could reasonably expect. I can't say that they're not trying as hard as they can. I think they are. I think they have the amount of prosecutorial zealousness that they're supposed to have. It just needs to be controlled, and it's not controlled now. They do about as good a job as you can reasonably expect.

Mr. Payne. Okay, great.

One of my concerns is that it seems like in the last decade or so, there has been a weakening of OSHA, in my opinion. We have not had the requisite number of investigators, et cetera, that I think we need. I recall when chemicals were not even required to be labeled at one point in time, and OSHA came, and there was a tremendous opposition to that. So there's been opposition to OSHA in general that I've found in small businesses. And I would just hope that we could find some way to protect the worker, to strengthen OSHA.

I did hear the gentleman from the United Steelworkers testify, and I would like to associate myself with your remarks, Mr. Molovich. And with that, I'll yield. I think that the Subcommittee wants to adjourn, so I won't ask any further questions. Thank you.

Mrs. Biggert. The gentleman yields back.

The gentlewoman from Tennessee, Mrs. Blackburn, is recognized for five minutes.

Mrs. Blackburn. Thank you very much, Madam Chairman. And I apologize. We've had two hearings going on. I've been in Government Reform, for one. But I thank you all for submitting testimony ahead of time and allowing us to work and prepare.

I come from Tennessee, as the Chairwoman said, and we have a lot of small businesses there. And sometimes I think that we have a love/hate relationship going on with some of these rules and regulations.

Mr. Sapper, I will begin with you, if you will, please, sir. You state in your testimony that allowing the Review Commission to make exceptions to the 15-day deadline for filing a notice of contest would, and I quote, “Give to employers the same right possessed by nearly every other litigant in the U.S.” What are these rights, and why are they different for OSHA?

Mr. Sapper. The right is to seek relief from a default judgment. If somebody files a lawsuit against you, and for some reason, you don't file an answer on time and a default judgment is

entered against you, you can go into court, show good reason why you didn't answer on time, and be relieved of the default judgment.

Today, because of the Second Circuit decision, we don't have that right under the Occupational Safety and Health Act. There's no reason for this inequality.

The reason that we have it is because of some very peculiar language in the Occupational Safety and Health Act, language that I believe was really written to address a different problem, but it's been, shall we say, turned around to create this irrational result.

I might also add that the standard for relief in this bill, although it's going to solve that problem, is actually less generous than that afforded to parties in other cases throughout the country. So it's still a tight standard. It's going to be hard to meet. But at least it's a standard that's realistic. At least it will address excusable neglect cases. The current case law does not even grant you that right now.

Mrs. Blackburn. So what you're saying is if a small employer is excused for not filing in a timely fashion under 60(b), then what it means is that they will have a day in court, and these employers still could be found to be guilty of having violated the law, correct?

Mr. Sapper. Absolutely right.

Mrs. Blackburn. All right. And if all the employer gets under the use of 60(b) is a day in court, it does not seem that OSHA would be affected by this change at all, except for perhaps having to handle a few extra cases per year that otherwise would have been disposed of using a legal technicality; is that correct?

Mr. Sapper. That's absolutely right, Madam.

Mrs. Blackburn. Okay. Thank you.

Mrs. Biggert. The gentlewoman yields back? Thank you.

I would like to thank both the witnesses and the Members for their valuable time and participation. If there's no further business, the Subcommittee stands adjourned.

Whereupon, at 4:08 p.m., the Subcommittee was adjourned.

APPENDIX A - WRITTEN OPENING STATEMENT OF CHAIRMAN CHARLIE NORWOOD, SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

Opening Statement of Congressman Charlie Norwood (GA-10)
Chairman, Subcommittee on Workforce Protections
House Education and the Workforce Committee
Hearing on
"H.R. 1583, the Occupational Safety and Health Fairness Act of 2003: Hearing the Views of Smaller Employers on the Merits of the Legislation"

June 17, 2003

Good Afternoon, and welcome to all, especially our fine panel of witnesses who have sacrificed time and resources to be with us today. We are in your debt.

Today the Subcommittee will conduct it's first hearing on H.R. 1583, the "Occupational Safety and Health Fairness Act of 2003." During this first hearing, we intend to focus exclusively on what I consider one of the most important aspects of this legislation –its impact on smaller employers.

Candidly, the primary intended beneficiaries of this legislation are the men and women who work in the many smaller worksites across the country. We think significant progress can be made in decreasing injuries and illnesses in this segment of industry through voluntary compliance efforts.

Now, since this is our first hearing, I want to spend a few moments introducing H.R. 1583. And, before addressing the specific provisions in this proposal, I want to briefly talk about the congressional purpose and intended outcomes.

It is no secret that for years, I have passionately disagreed with those who argue that enforcement alone can achieve an optimal reduction in the number of illnesses and injuries in the nation's places of employment. What I, former Chairman Ballanger, and many others, both Democrat and Republican, so firmly believe is that a balanced regulatory approach is necessary to reach meaningful outcomes in workplace safety and health.

Certainly, strong and vigorous enforcement has its place, but what we have advocated is a more balanced approach, including both strategically targeted inspections and cooperative assistance programs.

Let me explain why we believe this so strongly.

Quite obviously, OSHA regulations are among the most complex and difficult legal requirements placed on employers today. Many workplace safety and health standards involve understanding very sophisticated technologies. And, others require activities such as the detection and identification of particles of airborne contaminants too small for even the keenest eye to see. For many employers, and especially smaller employers, compliance is a challenge without help from experts.

So, get this straight – cooperate programs between government and industry are not about giving industry a pass on its regulatory obligations. Far from it, cooperative programs are very simply all about government helping employers understand what they need to do to comply.

There is no evil intent behind helping a regulated community understand its obligations. That is absurd, because this help is all about voluntary compliance with the law. And that, ladies and gentlemen, will reduce injuries and illnesses, not increase them. This help will better protect working men and women by achieving a safer environment, and that is what workplace safety and health programs are all about!

Let me digress for a moment [pause]

There is an old saying in the South that there is really very little wisdom in the second kick to the head of an old Georgia mule. Most of the folks who vote for me interpret this to mean that people ought to be able to avoid making the same mistakes again and again. Instead of repeating mistakes, we use what we learn to make conditions around us better.

Well, if there is one thing we should have learned about OSHA over the past 33 years, it is that because of its confrontational ways, the agency has often been its own worst enemy. If the Occupational Safety and Health Act is built upon the concept of voluntary compliance, it is critical that employers know that good faith efforts toward compliance will be rewarded, not penalized.

Cooperation is built upon trust and respect. And, trust and respect must be earned through exhibited conduct perceived as fair and just.

Ladies and gentlemen, breeding an environment conducive to this trust and respect is really what H.R. 1583 is all about. Above all else, its provisions are intended to remove what have been identified as "legal traps" in the Act. H.R. 1583 is about removing the "got- yas" from the Act and thereby, leveling the litigation playing field so that employers know that they are not going to be tricked or forced into legal submission by a government that has asked for their cooperation.

With that overview, let me briefly explain how this legislation would achieve this end. And, if I may, I would like to present this information by using some very simple principles of fairness that I think justly and accurately describe each provision of the bill.

First, fundamental fairness dictates that employers should have the opportunity for a fair and independent review of any charge against them. What we mean by this is simply that if the Secretary of Labor is going to prosecute a case, she should not also serve as the judge and jury.

This not only makes sense in terms of what is fair, but many may recall that assurances that this independent review would occur is the promise that removed the last hurdle of opposition that stood in the way of passage of the Act. This promise should be honored.

Second, no employer should be deprived of their chance for a day in court based upon a legal technicality. When lawyers use legal technicalities to influence the outcome of a case, it reeks of unfairness and really leaves a bad taste in everyone's mouth. If we want to encourage cooperation, employers should not be allowed to fall victim to these legal technicalities – the basis for accountability should be conduct, not anything else.

Third, employers should have a clear and unambiguous understanding of the types and degree of conduct that will lead to a violation. Legal terminology should be well defined and uniformly applied, when possible.

Fourth, employers should not be deprived of their day in court because they cannot afford to hire a lawyer. An employer's decisions about whether or not they challenge OSHA should be based upon what they think is the right thing, not because it is cheaper to pay the fine than it is to hire legal help.

And finally, employers should be guaranteed as much stability in the legal system that they confront as possible. The fair and independent hearing of the charges leveled against then should never be subject to delays and uncertainties due to the court not being open for business.

These are the 5 simple propositions of fairness that underlie the provisions currently contained in H.R. 1583. We are assembled here today to ascertain if, from the perspective of a small employer, these provisions are adequate to level this adjudicative playing field and begin the process of creating trust between OSHA and smaller employers.

I have invited one of the best legal experts in the area of OSHA law to help us dissect the provisions contained in H.R. 1583, and I invite the Members assembled here today to put to test the specific provisions we propose to

deliver the fairness I have spoken about. I have also invited several small employers to help us understand how these legal traps I have talked about actually work under current law. I look forward to them helping us understand.

With that said, I look forward to working with my colleague from New York, Mr. Owens, and each of the Members on his side and want to ask them to help us foster this relationship of trust between small employers and OSHA because it is critical that we do this.

And, I now yield to the distinguished Ranking Minority Member from New York, Mr. Owens, for whatever opening statement he wishes to make.

APPENDIX B - WRITTEN STATEMENT OF BRIAN LANDON, OWNER/OPERATOR, LANDON'S CAR WASH AND LAUNDRY, CANTON, PA, TESTIFYING ON BEHALF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS (NFIB), WASHINGTON, D.C.

Testimony of Brian Landon
on behalf of the NFIB
before the
Subcommittee on Workforce Protections
Committee on Education and the Workforce

Hearing on
H.R. 1583, The Occupational Safety and Health-Fairness Act

June 17, 2003

Chairman Norwood, Ranking Member Owens and Members of the Subcommittee on Workforce Protections, thank you for the opportunity to speak on the merits of H.R. 1583, the Occupational Safety and Health-Fairness Act, and to discuss how the provisions in this bill give small employers the tools we need to defend ourselves against unjust Occupational Safety and Health Administration (OSHA) citations.

My name is Brian Landon. I am the owner operator of Landon's Car Wash & Laundry in Canton, Pennsylvania. Besides the obvious services my business provides, we also re-manufacture, install and service equipment used in the car wash industry. I have been a small business owner for 28 years. Currently I have two employees, one full time and one part time. Today I am speaking not only for myself, but also on behalf of the National Federation of Independent Business (NFIB) of which I have been a member since I began my business in 1975. With two employees, and gross sales of approximately $300,000, I am fairly typical of NFIB's 600,000 members. I want to also stress that the $300,000 figure is gross sales, not take home pay.

It is my honor to take part in the hearing today. In 1997, I had the opportunity to testify before the House Small Business Committee on a proposed Safety and Health program. Since then, I have taken part in OSHA stakeholders meetings and OSHA public hearings as well as participated in the OSHA/SBREFA review process.

As I said in my testimony before the Small Business Committee in 1997:

> "I, like other NFIB members, have a strong commitment to employee safety and health. In my small business, as with many other small businesses, this commitment to safety is rooted in the unique

> relationship that I have with my employees. This is a relationship that comes about by working side by side with my employees... in an atmosphere where there are no strict job descriptions and daily tasks are often shared and traded between myself and my employees. I am typical of many small businesses whose employees are family or friends. These personal relationships drive my concern for safety."

Those words are as true today as they were in 1997. Employers like myself put the highest premium on the safety and health of our employees. First of all, we certainly would not want to see family members or friends injured. Secondly, from a business perspective, it just makes sense to avoid injuries. It costs much more in lost time and potential court fees and fines than it does to provide safety equipment and do routine maintenance. Employers like myself, aren't looking for ways to get around OSHA, we are just trying to decipher the myriad of regulations that the laws present.

That is why I would like to thank you and your staff, Chairman Norwood, for introducing this legislation that will truly make a difference to small employers. H.R. 1538 provides small business with the help we need to navigate the difficulties presented by OSHA and the tools we need to defend ourselves against an OSHA citation that we feel is unjust. These tools are important because in small businesses like mine, we don't have experts on staff or an employee whose only job is to track OSHA regulations. It is the owner, like myself, who is forced to interpret OSHA mandates while also making the day-to-day management decisions, paying the bills and, often times, working the front counter. Consultants are available but they are costly and take up valuable time and resources needed to run the business.

That is why this bill is so important to small business. OSHA is a daunting regulatory force that most businesses don't interact with until they receive a citation in the mail or have investigators at their door. If you only have a couple of employees, it is hard to imagine taking on a bureaucracy of the size and power of OSHA. It usually doesn't make good business sense to battle an OSHA citation and most small businesses don't. The reality is that if OSHA cited me for a violation, I most likely would not dispute the citation, even if I believed I was in the right. The court costs, attorney's fees, and the costs of being distracted from the running of my small business, are too high and the burden of proof is stacked against the employer. The truth of the matter is, that while OSHA has made some modest improvements in balancing enforcement with compliance assistance, small businesses, like mine, need this bill to level the playing field.

There are several sections of this bill that I want to highlight in my testimony

today, the first being section 2 of the bill, Contesting Citations Under the Occupational Safety and Health Act. This section simply ensures that a legal technicality will not deny a businessperson his or her fair day in court when disputing an OSHA citation. This is very important for well-meaning small business owners who are denied their right to question an OSHA citation that results from an honest mistake, inadvertence, surprise or excusable neglect. Under current law, if an employer receives an OSHA citation but does not respond to it within 15 working days, the citation is deemed final.

Although long-standing precedent gives the Occupational Safety and Health Review Commission (Commission) power to consider contests of citations that are excusably late, that power has been eroded by a recent Second Circuit court decision, Chao v. Le Frois Builders, Inc.

In that case OSHA sent a citation to a small employer, Russell B. Le Frois Builder, Inc., at the company's post office box, by certified mail. A secretary for Le Frois received and signed for the citation, and then put it among the day's mail on the seat in her car. During the drive, the citation fell behind the seat and it was not found until after the 15-day deadline. Although the Commission held that (1) lateness may sometimes be excusable; and (2) that the employer's excuse for lateness here was a good one, the Department of Labor appealed the *first* holding. The NFIB Legal Foundation filed a brief defending the Commission's decision and the right of conscientious employers to their day in court. H.R. 1583 addresses this by allowing the Commission to use a fairer standard used by federal courts for late filings and not a drop-dead arbitrary deadline. It is important to note that this standard would not apply to all filings, just those deemed to be late because of an excusable reason.

As a result of Le Frois, the federal courts are not giving proper deference to Commission decisions but are favoring interpretations of the law by OSHA instead. OSHA was never intended to be the final judge and jury over employer disputes. Congress set up the Commission to be an independent adjudicator of employer claims. Section 7, Independent Review, does this by having the courts place more weight on interpretations of the law made by the Commission. Chairman Norwood, in the interest of time I brought along two briefs filed by the NFIB Legal Foundation that explain all this in better detail. I ask that it be submitted for the record to be included in my written testimony.

This brings me to another provision of the bill that will have a great impact on small employers, Section 6, the Award of Attorney's Fees and Costs. Under the Equal Access to Justice Act (EAJA), employers can recover attorney's fees and court costs if they prevail in the case and if OSHA fails to show that it was 'substantially justified' in bringing the citation against the

employer. In other words, even if an employer wins, they can be stuck with thousands of dollars in fees and costs if OSHA shows the citation was 'substantially justified.' So even if the employer wins, he loses. The reason for this is that the law is very technical and complex. OSHA has become very good at justifying the reasons behind citations, making it difficult for businesses to recover court costs. Section 6 of the bill would allow small employers with 100 employees or less and earning less than $1.5 million annually to recover costs if the employer prevails in the suit and on that condition alone.

By allowing the smallest of employers to recover costs, this would encourage employers to take a stand against OSHA claims that are without merit. As I've already discussed, taking on the bureaucracy is a difficult decision. What makes that decision more daunting is the fact that, at the end of the day, you can be tens of thousands of dollars in the hole - even if you prevail in the case. Why shouldn't employers be reimbursed for court costs and attorney's fees if they prove that OSHA was wrong? Lack of money to pay attorneys should not be the deciding factor in whether you defend your business against an unjustified claim.

Besides enacting the provisions in this bill, there is something else OSHA can do to aid small business: compliance assistance. As I said at the beginning of my statement, employers like me aren't trying to get around OSHA regulation. In fact, we strive to make our workplaces as safe as possible. As a businessman, I think one of the most important things OSHA can do to reduce injuries and violations is to assist small employers with compliance. It only makes sense that if it is OSHA that will be investigating me, as an employer, if a complaint is filed or someone is injured, why shouldn't OSHA be there for me if I have questions about compliance BEFORE a violation occurs. But I don't feel like I or other small businesses can approach OSHA for help. Instead of receiving the help I needed, when I needed it most, I most likely would receive a fine if a violation were found. OSHA has made some improvement in this area, but change from within is necessary.

Finally, this bill is very important to small business because it would help to level the playing field when dealing with OSHA. For that reason I support this bill. I thank you for allowing me the opportunity to testify on this important legislation and I will be happy to answer any questions you may have. Thank you.

APPENDIX C - WRITTEN STATEMENT OF EPHRAIM COHEN, SMALL BUSINESS OWNER

Testimony of Mr. Ephraim Cohen
before the
Subcommittee on Workforce Protections
Committee on Education and the Workforce

H.R. 1583 -- Assessing of Impact on Small Business

June 17, 2003

Chairman Norwood and Members of the Subcommittee, my name is Ephraim Cohen. I am honored to be here today.

I am a small businessman, and I would like to tell you about my experience with OSHA. I would rather not mention the name or location of my business, or the details of my case. I want, however, to share my OSHA experience with you as much as I can, and to respectfully urge that H.R. 1583 be passed as soon as possible.

I run a small business, and it had an accident. One of my employees was badly hurt and my facility was severely damaged. As a result of the accident, I was seriously contemplating bankruptcy. Several months later, we received a citation in the mail. I showed the citation to my attorney, who knew fortunately had experience with OSHA.

The first item in the citation, and the one with the largest penalty, was directly related to the accident. This hurt, not, so much because of the penalty, but because we had not broken the law. It was the principle. The citation alleged that the machine that failed was not properly installed. But I had not installed the machine. I had paid someone to install it, someone with expertise in its installation. My lawyer told me that case law from the Occupational Safety and Health Review Commission held that employers who reasonably rely on specialized contractors to correctly install machinery are not guilty of OSHA violations. So we asked for an informal settlement conference.

During the settlement conference, we showed the OSHA supervisor that we did not install the system and that we had paid someone with expertise to do so. We had the documents to prove it. My lawyer mentioned the Commission case law about specialized contractors. We asked that the first citation be withdrawn.

None of this moved the OSHA official, and not because he did not believe us.

He had nothing to indicate that we were wrong. The main reason for his refusal was that he had never heard of the OSHA law principle my lawyer told him of. I later found out the reason for his ignorance – there was nothing about it in the OSHA field handbook. Apparently, OSHA has no incentive to tell its field inspectors about decisions of the Review Commission. This surprised me.

We argued and argued, but nothing would move this OSHA official. He could not give a reason for his refusal that made sense. He would say, "It's your machine." My lawyer would respond that, under the law, that is beside the point. He would ask who installed the machine, and we told him. But nothing was enough. One time, he let slip his real reason – this is the machine that caused the accident, someone was hurt, and so the citation had to stand. We all knew that this was no reason at all, for not every accident is caused by a violation of law. I think that even he was embarrassed by his response. He then stopped giving reasons for his refusal to withdraw the citation. He flatly declared that he would refuse to settle the other citation items unless I accepted this one.

So we had a choice: Either accept this unjust citation and settle the other items, or litigate. My lawyer told me that I had a good chance of winning. He also told me what it would cost to litigate. I am a small businessman, and everyone involved, including this OSHA official, knew that I could not afford to litigate. He knew that he had me over a barrel. I had to give in. So he forced me to confess and pay the government for to a wrong that I did not commit.

I do not want this to happen again to anybody. I believe that two provisions of this bill would have made a difference in my case. Section 7 would have made a big difference, for it would have meant that the OSHA official would not be ignorant of the legal principle we had relied upon. If OSHA cannot ignore Review Commission decisions any more, it would be forced to educate its officials about Commission decisions and would require that they be followed. Please adopt Section 7 soon.

Section 6 would also have been of help to me, for it would have forced OSHA to pay my fees if I won. I am small enough to qualify under this provision; I have less than 100 employees and the net worth of my business is under $1.5 million. If this provision were in place, I may well have defended myself against this unjust citation, for the threat of paying my lawyer's fee would have given OSHA a strong reason to not prosecute. Please pass this provision as well.

Thank you for hearing me out.

APPENDIX D – WRITTEN STATEMENT OF JOHN MOLOVICH, SAFETY AND HEALTH SPECIALIST, TESTIFYING ON BEHALF OF THE UNITED STEELWORKERS OF AMERICA (USWA), AFL-CIO, PITTSBURGH, PA

TESTIMONY OF JOHN R. MOLOVICH
HEALTH AND SAFETY SPECIALIST EMERITUS
UNITED STEELWORKERS OF AMERICA

BEFORE THE

U.S. HOUSE OF REPERSENTATIVES
SUBCOMMITTEE ON WORKFORCE PROTECTIONS

JUNE 17, 2003

Good afternoon. My name is John R. Molovich, and I have worked as a health and safety specialist for over three decades. I have served for 23 years in the Health, Safety and Environment Department of the United Steelworkers of America (USWA), AFL-CIO. During my career, I served as a U.S. Department of Labor OSHA Compliance Officer, a Safety and Health Compliance Instructor and the head of OSHA in the state of Indiana as the Deputy Commissioner of Labor. My work at the USWA included plant tours/inspections, OSHA compliance and OSHA training for thousands of USWA members. Earlier this year, I retired from the USWA.

I appreciate the opportunity to testify today on behalf of the United Steelworkers of America and the labor movement regarding H.R. 1583, the so-called "Occupational Safety and Health Fairness Act of 2003." The United Steelworkers of America and the AFL-CIO strongly oppose this bill and my testimony today will address the major provisions of the bill.

H.R. 1583 would significantly weaken the Occupational Safety and Health Act of 1970 (OSHA), resulting in less safe workplaces throughout the United States. American workers cannot afford to have OSHA watered down as H.R. 1583 would accomplish. If anything, OSHA must be strengthened to improve the health and safety for America's number one asset – its workers.

The lives of millions of workers are literally at stake, which makes the issue of concern today a life and death matter. More than 6 million American workers are injured or become sick on the job every year. Every year, 50,000 American workers die from occupational illness, and nearly 6,000 are killed on the job. In the 33 years since the passage of OSHA, only a handful of employers have been charged criminally for willfully violating an OSHA standard resulting in the death of a worker. A death due to a clear refusal by an employer to clean up an unsafe workplace is no less amoral than murder or

manslaughter, and it should be treated as such under the law.

It is no surprise that Republican leaders today are advocating for further weakening of OSHA. President Bush and the Republican-led 107th Congress (2001-2002), oversaw one of the most shameful acts against American workers in decades – the Congressional repeal of the ergonomics standard that President Clinton promulgated in 2000. In fact, signing the repeal of the ergonomics standard was one of George W. Bush's first actions as President.

Musculoskeletal disorders (MSDs) caused by ergonomic hazards are the one of the biggest problems that workers face today. MSDs cause 1.8 million injuries every year. Each year 600,000 workers suffer serious workplace injuries caused by repetitive motion and overexertion that require them to miss time from work, according to the Bureau of Labor Statistics. According to the National Academy of Sciences, these injuries cost the country $45 billion to $54 billion annually. It is hard to believe that a Republican Congress and President who so expeditiously repealed a standard that would have prevented millions of MSDs are serious about strengthening OSHA.

After reading and analyzing H.R. 1583, I have come to the following conclusions about this deeply flawed legislation. My comments are based on my decades of experience as an OSHA inspector and as a representative of workers whose lives often depend on the implementation of OSHA.

Section 2. Contesting citations under the Occupational Safety and Health Act

This provision affects Section 10(a) and (b) of the OSHAct and seeks to excuse employers that do not contest citations in the 15 working days after issuance and in the case of failure to abate the 15 working days after issuance. The 15 working day requirement currently in effect is a well-established and well-publicized requirement and should not be confounded with vague words such as "inadvertence, surprise or excusable neglect." The whole idea of the fifteen 15 day requirement is to give all affected parties a reasonable timeframe to take action, and more importantly, to ensure that the case is moved along as quickly as possible so the hazards cited will be addressed in as short a period of time as possible. This provision will produce absolute confusion and will be a windfall for the legal profession. Current practice is that the Occupational Safety and Health Review Commission (OSHRC) reviews all missed deadlines on a case by case basis and this should be continued.

Section 3. Willful Violations

This provision affects Section 17(a) of the OSHAct and seeks to significantly

narrow the definition of a willful violation. If this provision is inserted into the OSHAct, it will make it extremely difficult, if not impossible, to issue a willful violation. If OSHA is severely restricted or outright loses the ability to issue willful violations, they will have lost the single most important tool to deal with unscrupulous employers. For some employers, the fear of a willful violation is the only thing that keeps them somewhat in line with the minimum health and safety requirements of OSHA. If that threat is severely restricted or eliminated, those employers might revert back to the way it was before OSHA with non-compliance and high injury and death rates.

The United Steelworkers of America has experience dealing with rogue employers. One recent example was a pipe manufacturer, McWane Inc., with its headquarters located in Alabama and a number of production facilities located in several states and Canada.

Following an incident at their Texas facility that resulted in a worker being killed by an unguarded sand conveyer, OSHA made an investigation and issued a citation with a penalty in excess of one million dollars. McWane was the subject of a three-part series in the *New York Times* and a television documentary on PBS's *Frontline* that were extremely critical of McWane's safety and health program and the horrible accident rate at McWane. For a number of years, the United Steelworkers of America applied pressure on this company to convince them to change their ways and provide a safe place for employment, but for too many years pressure was ignored by a company that placed profit above the lives of its workers. According to the *New York Times*, since 1995 there were at least 4,600 injuries recorded at McWane foundries and nine workers lost their lives, the highest injury and death rate of any foundry company in America. Many more workers lost their limbs and were disfigured for life.

I personally toured McWane's Tyler, Texas facility very soon after the first newspaper articles ran in January 2003. I can personally attest to the improvements that McWane made in improving workplace health and safety conditions in this facility. I can report that McWane had recognized a need to work with OSHA, its employees and their unions to improve working conditions and comply with the requirements of OSHA. In this case, the media attention did provide the company with one trigger to work more closely with OSHA and the union, but the improvements being made had started before the January 2003 media attention.

I am happy to report that this company has devoted significant resources to the safety and health program and is, in fact, working closer with the workers and their unions to improve safety in the plants. I firmly believe that if OSHA was restricted or prohibited from issuing a willful citation in this case, the final outcome may have been significantly different or taken much longer to

achieve. In tough cases, OSHA needs greater authority, not less authority, to prosecute employers for refusing to obey the law.

Section 4. Fairness of Penalty Assessment.

This section affects Section 17(J) of the OSHAct and seeks to increase the number of factors to be considered by the OSHRC. Most of the factors listed are taken into account by OSHA when it calculates the original penalty. In addition, the Review Commission currently has broad authority and discretion to reduce penalties and they routinely do so.

The USWA strongly objects to the language that states "the degree of responsibility or culpability for the violation of the employer, the employees and/or other persons". First, the OSHAct clearly states under Section 5(a)(1) that the employer has the responsibility for safety and health at the workplace. Second, the words "and/or other person" may be an attempt to compromise OSHA's multi-employer citation policy. In addition, there is no evidence that current penalty amounts are excessive.

Section 5. Occupational Safety & Health Review Commission

This section affects Section 12 of the OSHAct and seeks to increase the number of Review Commissioners from three to five and requires the Review Commissioners to be lawyers. In addition, the bill will permit members whose terms have expired to continue serving until a successor is confirmed.

The Review Commission has operated with three Commissioners since it was first formed in 1970. The Commission has operated satisfactorily since its inception and the United Steelworkers of America believes the addition of two more Commissioners is not necessary. The United Steelworkers of America would suggest that the resources used for two additional Commissioners be put into OSHA's enforcement budget where it will be put to a better use.

The requirement that the Commissioners be lawyers would exclude a large pool of extremely talented persons from service. Some past Commissioners were not lawyers and they served in an acceptable manner.

Permitting Commissioners to continue to serve after their term has expired and until a new appointee is confirmed may mean a sitting Commissioner could possibly sit on the Commission for years depending on the political makeup of the Senate and the White House. The United Steelworkers of America believes that the current requirement of a Commissioner stepping down after his or her term expires is appropriate. This system maintains pressure on all parties to work together to select a qualified person for the

Commission.

Section 6. Award of Attorney's Fees and Costs

This section would designate a new Section 32 of the OSHAct and attempts to increase small employer's ability to collect legal fees in Review Commission cases.

The United Steelworkers of America strongly opposes this entire provision. First, the union believes that the provisions of the current Equal Access to Justice Act adequately provides employers sufficient protection. Second, this may encourage employers to more readily contest their citation on the outside chance the employer may prevail regardless of whether the action was substantially justified. This would result in health and safety hazards not being corrected expeditiously.

The United Steelworkers of America would ask the sponsors of this bill if they would consider granting OSHA the same protection, namely in cases in which OSHA prevails, OSHA would be capable of recovering their legal fees from the employer. This definitely would reduce the large number of frivolous contests.

The United Steelworkers of America believes that this provision would have a chilling effect on both OSHA enforcement and OSHA Standard setting. The union believes OSHA would be hesitant to cite employers for violations of the OSHAct unless there is absolute certainty that the enforcement action will not be challenged, will be upheld, or there will be no modifications in the terms of action. This would also apply to Standard setting as well.

Section 7. Independent Review

This section affects Section 11(a) of the OSHAct and seeks to give deference to the Commission. Current law gives deference to the Secretary as the official responsible for enforcing the OSHAct. The union believes this provision would take away the authority held by the Secretary to bring cases to the Court of Appeals and the Supreme Court.

In closing, the union strongly opposes H.R.1583. The union believes this bill would significantly weaken the OSHAct and severely affect OSHA's ability to provide safe and healthful workplaces. There are several actions both the Congress and OSHA could initiate that would not only strengthen the OSHAct, but also provide better protection for workers.

The Congress could change the Act by strengthening the Whistle Blower

Protection for employees that are discriminated against for OSHA activity. This would be under Section 11(c) of the OSHAct.

The Congress should also significantly increase the criminal sanctions under Section 17(e). The current penalties are insulting to the victims and their families. The current law that allows for only six months in jail for an employer that willfully ignores a hazard resulting in a worker's death is inadequate. The penalty for such behavior should be raised to at least 10 years in prison, as has been proposed by Senator Jon Corzine (D-NJ).

Additionally, OSHA should be given the authority to order immediate correction of extremely dangerous hazards. Currently, employers are required to correct cited hazards only after there is a final order of the Commission. This can take several years and undermines worker safety.

The agency could be directed by Congress and the Administration to promulgate a new ergonomic standard. Ergonomic related injuries and illnesses remain the largest single source of injury across all American industry.

I would like to thank Chairman Norwood, Ranking Member Owens and the entire subcommittee for affording me the opportunity to participate and testify at this hearing. I am happy to answer any questions.

APPENDIX E - WRITTEN STATEMENT OF ARTHUR G. SAPPER, ESQ., MCDERMOTT, WILL & EMERY, OSHA PRACTICE GROUP, WASHINGTON, D.C., TESTIFYING ON BEHALF OF THE U.S. CHAMBER OF COMMERCE, WASHINGTON, D.C.

Testimony of Arthur G. Sapper
before the
Subcommittee on Workforce Protections
Committee on Education and the Workforce
on behalf of
The United States Chamber of Commerce
on
H.R. 1583 – Assessing the Impact on Small Business

June 17, 2003

Good afternoon, Chairman Norwood and Members of the Subcommittee. My name is Arthur G. Sapper. I am a member of the OSHA Practice Group of the law firm of McDermott, Will & Emery, an international firm. The OSHA Practice Group is one of the most prominent of its kind in the United States.

I am testifying today on behalf of the U.S. Chamber of Commerce. I am a member of the Chamber's Labor Relations Committee and its OSHA Policy Subcommittee.

For over twenty-nine years, I have been deeply involved in OSHA law. For twelve of those years, I served in the Government. I spent over ten years at the Occupational Safety and Health Review Commission, where I became Deputy General Counsel. I also spent two years at the Federal Mine Safety and Health Review Commission as its Special Counsel. For the past sixteen years, I have advised employers regarding their obligations under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, and I have litigated some of the path-breaking cases under the statute. I have written and lectured on OSHA law. I have helped to co-author treatises on the OSH Act, including the well-known American Bar Association treatise, Occupational Safety and Health Law (2d ed. 2002). I was for nine years an adjunct professor at Georgetown University Law Center, where I taught a graduate course in OSHA law.

Many of the U.S. Chamber's members are small- and medium-size companies. The burden of OSHA enforcement falls with special weight upon them, for they can but rarely afford to defend themselves against OSHA charges. Unfair aspects of OSHA enforcement – and there are unfair aspects – make it especially difficult for them to assert their rights and even sometimes deprive them of a fair hearing entirely. We therefore encourage the subcommittee to favorably report H.R. 1583, the Occupational Safety and

Health Fairness Act of 2003.

H.R. 1583 is a moderate and limited bill. It is narrowly targeted at some of the worse problems with OSHA enforcement. It does not affect OSHA's rulemaking authority. It does not affect OSHA's inspection authority. It does not take away any power that Congress in 1970 intended that OSHA have. Yet, it will make important improvements in the OSH Act, for it will enhance public respect for the fairness of OSHA enforcement, which is essential if the Act is to be effective.

I will discuss the provisions of the bill in order.

Section 2 – Giving Small Employers A Needed Break

This provision gives to employers – especially small employers – the same right to seek relief from a default judgment possessed by nearly every other litigant in the Nation. If a small employer fails to file an answer to a complaint on time in almost any other court, that court has the power to relieve the small employer of the default, and give him a day in court. But that is not true under the OSH Act. According to a recent decision by the U.S. Court of Appeals for the Second Circuit, which I will soon describe, an employer flatly loses its opportunity to defend itself before the Occupational Safety and Health Review Commission, and will be deemed guilty, if it misses a rigid fifteen working-day deadline to file a notice contesting an OSHA citation, even if the employer had a good excuse for missing that deadline. The employer is out of luck and the government wins without even proving its case.

The Facts of the *Le Frois* Case – An Undisputed Case of Excusable Neglect

Take the case of Russell P. Le Frois Builder, Inc. OSHA issued citations and $11,265 in proposed penalties to that company by certified mail. A secretary for the company got the envelope from the post office, and put it with the day's other mail on the front seat of her car. The envelope with the OSHA citation apparently slipped behind the seat, where it was found after the fifteen-working-day contest deadline expired. The company had used the same mail pickup system for 18 years and had not previously had a problem with it. Le Frois promptly filed a notice of contest, and asked the independent Occupational Safety and Health Review Commission for "a chance to tell our side and to defend ourselves." The Commission excused the lateness of the notice of contest, finding this to be a case of excusable neglect.

OSHA agreed that the *Le Frois* case involved excusable neglect. But OSHA appealed anyway to the U.S. Court of Appeals for the Second Circuit – and

won, with one judge dissenting. *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219 (2d Cir. 2002). OSHA convinced the court that the Review Commission lacked the power to relieve an employer from a default on the ground of excusable neglect.

The Upshot – Excusable Neglect is Irrelevant

The Review Commission thus stands nearly alone among the courts of the Nation in lacking the power to relieve an employer of a procedural default caused by neglect that is excusable. If this result makes no sense, that is because sense has nothing to do with it. OSHA's litigation position and the decision of the Second Circuit turn instead on a hyper-technical reading of the OSH Act and judicial deference to OSHA. The decision holds that Section 12 (g) – in which Congress ordered the Commission to apply court rules, including a rule permitting relief from default judgments – was overridden by Section 10(c) of the OSH Act, which makes uncontested citations final and not subject to review.

I will spare the Subcommittee my technical analysis of the matter. Suffice it to say that Section 2 of H.R. 1583 would do away with this unequal result and put employers on the same footing as nearly every other litigant in the Nation: They will have the right to to ask for relief from a default judgment and, after explaining, have a reasonable opportunity to obtain that relief. This section would permit the Commission to grant relief in rather narrow circumstances – when the default is due to "mistake, inadvertence, surprise, or excusable neglect." That language is taken directly from Federal Rule of Civil Procedure 60(b), which has long been interpreted by the Commission and the courts to permit relief if there is a legitimate reason.

For that reason, the change brought about by this section will be modest. Under the bill, comparatively few employers will qualify for relief from default. The effect on OSHA's enforcement program will be small. But small employers will notice it. They will know that under the OSH Act they can at least have a shot at justice. Why is a shot at justice important? Because the consequences of being unable to appeal an OSHA citation can be severe and far-reaching. They include:

> Payment of proposed penalties. Penalties can range up to $7000 for "serious" and non-serious violations, from $0 to $70,000 for each "repeated" violation, and $5000 to $70,000 for each "willful" violation.
>
> Inclusion of the citation on the employer's "history of previous violations," which raises subsequent penalties, and which is available to the public to see on the Web.

Exposure to subsequent "repeated" or "willful" violations, even if the subsequent violation occurred at a different workplace or years later.

Disqualification in some jurisdictions from bidding on public construction contracts. *E.g.*, Cal. Gov't Code § 14661(d)(2)(B)(vi)(II).

Use of the citation against the employer in civil litigation.

A requirement to abate the cited condition. This might require that a factory be rebuilt or a construction method be abandoned. It might require that a machine be modified to meet specifications in an inapplicable standard. *See, e.g., Losli, Inc.*, 1 BNA OSHC 1734 (OSHRC 1974), where a failure to contest a citation meant that a metal shear had to be modified to meet inapplicable specifications for power presses – a nonsensical result.

Moreover, there is more than one way that small employers can innocently fail to timely contest a citation, aside from losing a mail envelope. For example, a notice of contest sent to the wrong agency – to the Review Commission rather than OSHA – is ineffective.

Equitable Tolling – An Unequal and Empty Promise

OSHA in the *Le Frois* case mentioned to the court that employers might still be able to get relief, under a doctrine known as equitable tolling. The problems with that suggestion are two-fold. First, it results in pointless inequality. Inasmuch as equitable tolling is a narrower doctrine than excusable neglect, employers like Le Frois or Losli, who should get a hearing, would not. There is no reason why employers should not be granted the same right to obtain relief from a default judgment as any litigant in the Nation.

Second, equitable tolling would grant employers an avenue of relief so narrow as to be illusory. Generally, equitable tolling is available only where OSHA's behavior was improper or misled the employer with respect to the requirements for contesting a citation and the employer has been diligent in preserving its rights. Again, it would never reach cases like *Le Frois* or *Losli*. There is also a grave doubt that equitable tolling would apply at all; even the Second Circuit had doubts on this point.

Section 2 of H.R. 1583 is a much-needed corrective, and we respectfully urge that it be reported favorably.

Section 3 – Reserving Willful Charges for The Truly Willful

An accusation of a "willful" violation against an employer is a serious matter, and is not taken lightly by an employer. It is an accusation that you are lawless. The penalties are increased ten-fold, to $70,000 per violation with a $5,000 minimum. The allegation can expose you to criminal prosecution and could help strip you of the protection of the workers' compensation system from personal injury lawsuits. OSHA issues a harsh press release castigating you. You are treated as a near criminal.

One might expect that a provision such as this would be surrounded by protections to prevent its abuse. Sadly, that is not so. In fact, no penalty provision of the Act is more susceptible to abuse by OSHA, and no penalty provision is *in fact* abused like this one is. I can tell you from decades of experience that OSHA regularly accuses employers of committing "willful" violations even though the employer was guilty at most of negligence. Negligence is bad, but it is not willfulness. Other provisions of the OSH Act penalize negligent employers.

Why is this provision of the Act so abused by OSHA? Because there is no definition of willfulness in the Act and, as a result the courts and the Commission have been all over the lot on what it means. "Willful," as the Supreme Court has stated, is "a word of many meanings." *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994). Judge Learned Hand stated: "It's an awful word! It is one of the most troublesome words in a statute that I know. If I were to have the index purged, 'willful' would lead all the rest in spite of its being at the end of the alphabet." Model Penal Code and Commentaries, § 2.02, at 249 n.47 (Official Draft and Revised Comments 1985), *quoting* ALI Proceeding 160 (1955).

The case law on willfulness under the OSH Act has vindicated Judge Hand's view. It has supposedly established this "test" for willfulness – "intentional disregard of, or plain indifference to, the Act's requirements." *E.g., Conie Construction, Inc. v. Reich*, 73 F.3d 382, 384 (D.C. Cir. 1995). Any litigator will tell you that this vague formula fails to answer the most fundamental question, "What must the employer know to violate the law 'willfully?'" Must the employer know what the law is, *i.e.*, what the OSHA standard says? Must the employer know that he or she is breaking the law? Suppose the employer knows what the OSHA standard says but believes in good faith that that a legal defense applies, such as infeasibility? Suppose the employer knows nothing about OSHA or its standards; then what must OSHA show? That there was arguably a hazard? That there *was* a hazard? That there was so clearly a hazard that the employer's behavior was reckless? Suppose the employer does not think that there is a hazard but a reasonable person would think so? That is negligence, but is it willfulness?

The case law on willfulness is in such a state of confusion that it is impossible to answer these questions confidently or to summarize it rationally. Take, for example, the following statements from the Commission's decision in *Morrison-Knudsen Co.*, 16 BNA OSHC 1105 (OSHRC 1993): "Willfulness is negated by evidence that the employer had a good faith opinion that the conditions in its workplace conformed to OSHA requirements. ... But the test of good faith is an objective one, *i.e.*, whether the employer's belief concerning the factual matters in question was reasonable ...." This is a nonsensical statement, for good faith is necessarily subjective, not objective. Yet, the Commission has repeated it numerous times. Worse, this statement permits OSHA to accuse employers of willfulness for being merely negligent. For example, in *Atlantic Battery Co.*, 16 BNA OSHC 2131 (OSHRC 1994), the Commission stated that a violation was willful because the employer "should have known" that its behavior was "incorrect." Another example of the vagueness and unpredictability of the plain indifference "test" can be found in *Anderson Excavating & Wrecking Co.*, 17 BNA OSHC 1890 (OSHRC 1997), *aff'd*, 131 F.3d 1254 (8th Cir. 1997), where both a sharply-divided Commission and the Eighth Circuit found willfulness on a rationale that amounted to negligence.

A further indication of the nebulousness of the case law on willfulness can be found in OSHA's own Field Information Reference Manual. It permits OSHA officials to allege that an employer who did not know that he was breaking any law nevertheless committed a willful violation if the employer knew that a hazard was present but made "little ... effort" to correct it. This "little effort" test is easily susceptible to abuse. Suppose the employer honestly believed that he had done all he feasibly could? Suppose that the employer's actions were wrong but not reckless? I have seen employers in these circumstances – and even weaker circumstances – get accused of willful violations.

The upshot is that we have a "I know it when I see it" test for willfulness. The uncertainty resulting from the lack of a clear definition permits almost anyone to be called a willful violator, fosters litigation, and results in similarly situated persons being treated differently. The OSH Act is national legislation and its words require a uniform meaning.

There is a test for willfulness that is sensible and clear. In *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988), the Supreme Court held under the Fair Labor Standards Act that a violation is willful only if the employer knew that he was breaking the law or recklessly disregarded whether he was. That is basically the right approach, for it states in clear and plain terms what the employer's state of mind must be.

H.R. 1583 takes that same approach. It essentially codifies *Richland Shoe* and

applies it to the OSH Act. Under that definition, willfulness charges will be reserved for employers who deserve it. Negligence alone will not suffice. The bill states that –

> A violation is willful only if the employer
>
> (1) knew that the alleged condition violated a standard, rule, order or regulation and, without a good faith belief in the legality in its conduct, knowingly disregarded the requirement of the standard, rule, order, or regulation, or
>
> (2) knew that employees were, or that it was reasonably predictable that employees would be, exposed to a hazard causing or likely to cause death or serious physical injury and recklessly disregarded the exposure of employees to that hazard.

Paragraph (1) essentially permits a willful violation to be found if the employer knew that he was breaking the law – not should have known he was violating the law. Paragraph (2) essentially permits a willful violation to be found if the employer knew of a condition endangering employees and recklessly disregarded it – not negligently disregarded it. The great merit of this definition is that it is clear and understandable, and we much commend this definition to the subcommittee.

Section 4 – Preserving the Fairness of Penalty Assessment

This section of the bill preserves those features of penalty assessment under the OSH Act that make it fair and reasonable. It does not overrule or change anything. This section is nevertheless helpful because OSHA's lawyers have attacked some of these features. This section of the bill would end the controversy by codifying the case law.

For example, the case law to date has made clear that penalty assessment by the Review Commission is *de novo – i.e.*, the Commission is not bound by what OSHA proposes but is to assess a penalty based on the record made at trial. Nevertheless, OSHA's lawyers have repeatedly tried to get the Review Commission and the courts to be initially bound by OSHA's proposal. The Commission has so far rejected the attempts. This is surely correct, for OSHA's argument would take penalty assessment away from the Commission, turn it over to the prosecutor, and put the burden on the employer to disprove the propriety of OSHA's proposed amount. The phrase "and de novo" in the bill would put an end to that attempt, and make clear that penalties are to be set by the impartial Commission, not a zealous prosecutor, and are to be based on evidence, not the fact that OSHA proposed them.

Another example concerns the financial condition of the employer and whether the employer rapidly complied after being notified of a violation. OSHA's attorneys have argued that the financial condition of the employer may not be taken into account because the Act does not explicitly say that the Commission may consider that factor. They point, by contrast, to Section 110 (i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq*. That statute expressly requires consideration of "the effect on the operator's ability to continue in business, ... and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." The bill would codify the Commission's holdings.

The bill would also codify repeated holdings by the Commission that the number of endangered employees is a relevant factor in penalty assessment. It would also codify holdings that, unless a violation is peculiar to an individual employee, the number of endangered employees pertains to the gravity of the violation rather than to the number of violations. These holdings keep penalties from artificially attaining grossly inflated levels. The bill would also make explicit what, in my experience, has so far been implicit – that if an employer is found to have committed a "repeated" violation, relevant factors in determining the proper amount of the penalty include the recentness and proximity of substantially similar previous violations by the employer. OSHA's Field Information Reference Manual looks to similar factors to determine to whether to allege a "repeated" violation at all. The bill would just make clear that these same factors may be considered with respect to the penalty amount as well.

Mr. Chairman, in reviewing Section 4, it occurred to us that it may perhaps impose on OSHA a greater administrative burden than is warranted. It might be read as requiring OSHA to discover and consider in every case the employer's financial condition, the employer's efforts to comply or abate, and the degree of responsibility or culpability for the violation by persons other than the employer. Although OSHA may know some of the facts pertaining to these factors, OSHA should not in every case have to gather evidence about these particular factors and consider them before initially proposing a penalty. To relieve OSHA of this implied burden, we respectfully suggest that the substance of Section 4 be retained but that it be recast along the following lines:

> (j)(1) The Commission shall have authority to assess all civil penalties provided in this section, giving due and *de novo* consideration to the evidence of the appropriateness of the penalty with respect to at least the following factors:
>
> (i) the size of the business of the employer;

(ii) the gravity of the violation, considering at least the probability of harm, the nature and extent of the harm, and the number of affected employees;

(iii) the good faith of the employer;

(iv) the history of previous violations; and

(v) in the case of repeated violations, the recentness and proximity of substantially similar previous violations by the employer.

(2) The Commission may additionally consider other appropriate factors, including:

(i) the employer's efforts to comply or abate;

(ii) the degree of responsibility or culpability for the violation by employees or other persons; and

(iii) the financial condition of the employer.

With or without these suggestions, Mr. Chairman, Section 4 would preserve those features of penalty assessment that make it fair and proportional, and we much commend its common sense provisions.

Section 5 – The Vacancy Problem

Section 5 would expand the Review Commission from three to five members. This is a much-needed reform, and we most respectfully urge that it be passed.

For over two thirds of its existence, the Commission has been so paralyzed by frequent vacancies that it has been unable to do its job. For over half the time since 1982, the Commission has had two or fewer members and, for over a third of that time, it has had only two members. For twenty percent of that time, it lacked even a quorum of two. Between 1996 and 1999, it had a full complement for only a third of the time. Recently, the Commission had only one member for nine months during fiscal year 2002, from the end of December 2001 until late August 2002. This chart, based on a table (attached) on the Commission web site, illustrates the problem:

Although two members constitute a quorum, having two members often results in paralysis, for most cases today are so complex that it is rare for two

members to vote exactly alike on all the many citations at issue. So cases sit, often for many years, and the backlog mounts as new cases come in. One large and important case has been pending before the Commission for almost eight years. Below is a chart from the Commission's web site, dated last week, showing the effect on case production of the departure of Commissioner Thomasina Rogers on April 27, 2003, which left the Commission with only two members:

Case Name	Docket Number	Final Order Date
AMSCO, Inc.	02-0220	02/12/03
CB&I Constructors, Inc.	01-0279	01/31/03
C.T. Taylor Company Inc., and Esprit Construction, Inc.	94-3241 & 94-3327	04/26/03
84 Components Company	02-0363	02/24/03
84 Components Company	02-0363	04/18/03
FABI Construction Company, Inc.	96-0097	05/30/03
Interstate Brands Corp.	00-1077	04/24/03
Ormet Primary Aluminum Corporation, Hannibal Reduction Division, and USWA, Local 5724	02-0250	03/10/03
Rawson Contractors, Inc.	99-0018	04/04/03
Red-Hawk Construction, Corp.	02-1180	04/24/03
Safeway, Inc.	99-0316	03/12/03
Stahl Roofing, Inc.	00-1268 & 00-1637	02/21/03
The Timken Company	97-0970	04/15/03
Trinity Industries, Inc.	95-1597	04/26/03
Villa Marina Yacht Harbor, Inc.	01-0830	03/03/03

Last Updated: June 11, 2003 [source: http://www.oshrc.gov/decisions/comm03.html]

The chart shows that, since the reduction to two members, only one no decisions (a brief affirmance of a judge) haves been issued. As the Commission stated in its Fiscal Year 2001 Budget Request (March 2000) <http://www.oshrc.gov/budget/fy01_budget_1.html>:

> Production of cases in the Commission Review function has been plagued in recent years by vacancies among the three

> Commissioners. In the FY 1996-1999 period, three Commissioners were on board for only approximately twelve months out of thirty-six. For more than ten months in FY 1998, only one Commissioner was on board. For the remainder of the FY 1996-1999 period, the Commission operated with only two Commissioners. The ... Act requires a vote of two Commissioners to take official action. With only one Commissioner, no cases can be decided. Even when two Commissioners are available to vote, deadlocks can occur which prevent rendering a decision. As a result, case production has suffered substantially during the FY 1996-1999 period.

Similar accounts of paralysis can be found in the Commission's more recent budget requests, all of which are on the Web at <http://www.oshrc.gov/budget/budget.html>.

The absence of members has greatly damaged public respect for the Commission and prevented it from doing what Congress expected – decide cases expeditiously and keep a watch on OSHA's excesses. This would be far less likely to happen if the OSHRC had five members. As I mentioned above, I have served at both the OSRHC , and its counterpart under the Mine Safety Act, the Federal Mine Safety and Health Review Commission (FMSHRC), which has five members. The difference between the two agencies is like night and day. A major reason for this is that the FMSHRC has five members while the OSHRC has only three. Because it has five members, the FMSHRC has enjoyed a much more stable membership than the OSHRC. The FMSHRC can usually be assured of having at least a quorum of three to decide cases. The OSHRC cannot.

We respectfully urge the Congress to expand the Commission to five members.

Section 6 – Leveling the Playing Field Just A Bit

Section 6 of the bill is a modest step in the right direction. It would award attorneys' fees and expenses to the very smallest employers if they win. It applies to employers with not more than 100 employees and a net worth of not more than $1,500,000.

The Equal Access to Justice Act (EAJA) has not succeeded in protecting small employers from erroneous OSHA prosecutions. The principle reason is that, under the EAJA, even if an employer wins, OSHA does not have to pay the employer's attorneys' fees unless OSHA's position was not "substantially justified." That is far too easy a target for OSHA to hit. OSHA's specialized lawyers can almost always come up with a plausible justification for the

prosecution, and that is in practice all that they need to show. And it is difficult and expensive to prove that OSHA's position was not "substantially justified" even if it was. Even if a small employer proves that he or she is innocent and OSHA should not have brought the case, that employer must still start another proceeding, incurring even more expenses, to prove that OSHA's position was not "substantially justified." This is a formidable deterrent to seeking fees, particularly since OSHA can meet this test relatively easily.

Section 6 will help solve this problem, and somewhat re-open the door to the courthouse for small employers. To be sure, the effect of Section 6 will be modest, as it covers only the smallest of the small employers covered under the EAJA, which applies to employers of 500 employees and not more than $7 million. Few small employers will want to gamble on winning in court. Few will beat OSHA's specialized attorneys. Nearly all will continue to settle at the informal conference stage, to which this provision does not apply. Nevertheless, the prospect of having to pay attorney's fees and expenses will concentrate the minds of OSHA's lawyers and force them to be sure of their legal ground before prosecuting a small employer. It will force them to focus on employers that truly deserve their attention. That will assuredly be a good thing.

This is not the first time that the Congress has considered this issue. This Committee has reported out similar legislation, H.R. 1987, the Fair Access to Indemnity and Reimbursement Act, H. Rep. 385, 106th Cong., 1st Sess. (Oct. 14, 1999), which documented the ineffectiveness of the EAJA. The full House on March 26, 1998 passed legislation containing a similar provision as part of a broader bill, Title IV of H. R. 3246, the Fairness for Small Business and Employees Act, 105th Cong., 2d Session (1998).

Now some will argue that this provision will "chill" legitimate enforcement by OSHA, because the expenses will be paid from OSHA's budget. However, the Congressional Budget Office estimated the cost of a previous version of this legislation to OSHA at about only three million dollars per year. This seems to be a small price to pay to make OSHA think twice about the strength of its case before going after the small employer and to inject a little justice into a system that grinds up small employers in litigation costs and effectively denies them the opportunity to vindicate themselves.

Section 7 – Restoring the Review Commission to Its Proper Place

Mr. Chairman, there is a pathology in the enforcement of the OSH Act. It causes unfortunate decisions such as the one discussed earlier concerning an employer's inability to be relieved from a default judgment. It is responsible for a palpable arrogance in OSHA's attitude toward employers. It undermines

the rulemaking process. That pathology is the emasculation of the agency that Congress established to be a check on OSHA's excesses – the Review Commission.

That emasculation occurred in *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144 (1991), where the Supreme Court held that an OSHA interpretation of an ambiguous regulation must be upheld if the interpretation is merely "reasonable" – even if the court believes that the interpretation is wrong. The decision awards OSHA a home run even if the Review Commission and a court think that OSHA has hit only a foul ball. Some courts have even extended that decision to require deference to OSHA even when OSHA interprets the OSH Act, as opposed to OSHA's own standards. As I shall show later, this course of decisions is contrary to *known* congressional intent.

I can hardly exaggerate the adverse effects of this decision on the fairness of enforcement under the OSH Act.

As I have said, the decision emasculates the Review Commission as a check on OSHA. Chief Justice John Marshall once said in the landmark case of *Marbury v. Madison* that the duty of the courts is "to say what the law is." The Review Commission, however, a kind of court, may no longer say what the law is. It may say only whether OSHA is reasonable – not right – when ***OSHA*** says what the law is. This prevents the Review Commission, the body that Congress established to act as a check on OSHA, from doing its job.

A clear example of the destructiveness of this doctrine is the Second Circuit's 2-1 decision in *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219 (2d Cir. 2002), which, because of *CF&I Steel* decision, held that the Commission had no power to relieve deserving employers from defaults. The court reached this result because it first held that, as between the impartial Commission and the prosecuting agency, it was OSHA to which the court should defer; about a third of the opinion discussed this deference question.

Another example is *Martin v. American Cyanamid Co.*, 5 F.3d 140 (6th Cir. 1993), *rev'g* 15 BNA OSHC 1497 (OSHRC 1992), which permitted OSHA to require the re-writing of millions of product labels. After the Hazard Communication Standard was adopted, OSHA decided that chemical labels must state the bodily organs they affect. So, "Do Not Inhale" was not good enough; only "Causes Lung Damage" would do. OSHA could not point to anything in the standard or its legislative history to support its position; it relied only on an ambiguous statement in an appendix to the standard. The Commission held that OSHA's interpretation was wrong. A court of appeals upheld OSHA's interpretation and overruled the Commission – *not* because OSHA was right, but because it was merely "reasonable."

The *American Cyanamid* decision illustrates also how the *CF&I Steel* decision undermines the rulemaking process, in which important policy questions are supposed to be resolved in an open and public manner. The *CF&I Steel* decision encourages OSHA to resolve important policy questions through the back door, in interpretation letters and compliance directives. The decision encourages OSHA to evade congressionally-imposed requirements for OSHA standards, such as proving "feasibility" and "significant risk." It encourages OSHA to evade congressional oversight, oversight by the Office of Management and Budget under the Paperwork Reduction Act, and the requirements of the Small Business Regulatory Enforcement Fairness Act. For example, in *American Cyanamid*, OSHA was able to impose a major policy decision without rulemaking and without scrutiny by the Office of Management and Budget under the Paperwork Reduction Act. This is lawmaking without law.

The *CF&I Steel* decision has the perverse effect of encouraging OSHA to write ambiguities into its standards. Ambiguity enhances OSHA's litigating position and permits it to resolve major policy issues through "interpretation." That is why key provisions of the ill-fated ergonomics standard, for example, repeatedly used the words "reasonable" or "reasonably" to describe the employer's duty.

The decision also encourages in OSHA a palpable arrogance. A safety expert I once knew complained to me shortly after the *CF&I Steel* decision came out that OSHA had suddenly become arrogant in its behavior. We should have expected this. As a great legal scholar once said, "There is nothing so calculated to make officials and other men disdainful of the rights of their fellow men, as the absence of accountability."

It Wasn't Supposed to Be This Way

The great irony is that it was not supposed to be this way. This we know *for certain*. The legislative history of the compromise that permitted the passage of the OSH Act indisputably proves that.

In 1970, the Act almost did not pass. Many feared that, if all functions under the Act were placed in the U.S. Labor Department, that agency would become too powerful and the confidence of employers in the fairness of the Act would be shattered. Proponents of giving all powers to the Labor Department argued that a departmental appeals board (*i.e.*, a board established by Cabinet agencies to adjudicate cases brought by an enforcement bureau) would afford sufficient oversight and independence. Such boards decided cases *de novo* and their views were given deference by the courts. But distrust of internal appeals boards was widespread, and a veto was threatened by the President. To permit the passage of the Act, a

compromise was agreed upon: An independent Review Commission would be established as a check on prosecutorial excess.

The legislative history directly addresses whether the Review Commission would defer to OSHA. The author of the compromise, Senator Jacob Javits, specifically assured Congress that the Commission would decide cases **"without regard to"** OSHA. He stated that adjudication would be conducted by "an autonomous, independent commission which, *without regard to the Secretary,* can find for or against him on the basis of individual complaints." On the strength of that assurance, Senator Holland immediately declared his support, stating that "that kind of independent enforcement is required …." These remarks appear to be the only piece of legislative history that directly addresses the deference issue.

Deference to OSHA is, of course, contrary to congressional intent, for one cannot both decide cases "without regard to" OSHA and defer to its views. Moreover, deference makes the Commission even more subservient than the department appeals boards that Congress in 1970 specifically rejected as insufficiently independent.

So why did the *CF&I Steel* decision come out the other way? Unfortunately, the employer's brief in that case did not bring Senator Javits's statement to the Supreme Court's attention. The brief did not quote or cite the remark and, apparently as a result, the Court did not discuss it. The employer, CF&I Steel, was then in bankruptcy, used a sole practitioner with almost no OSHA experience, and apparently could not afford the cost of thorough legal research. The remark was mentioned in only an *amicus curiae* brief and apparently overlooked.

The Effect on Small Employers

The emasculation of the Commission falls particularly hard on small employers. Large employers can afford to hire experienced OSHA counsel, find the evidence proving that OSHA's position is "unreasonable," and bear the litigation costs. But small employers have no such hope. The result is occasional justice for large employers and no justice for small ones. I have seen with my own eyes small employers have to accept OSHA citations and penalties that the Commission would throw out if it were free to do so. I have had to tell small employers and medium-size employers, "Yes, you are right, OSHA is wrong, but you can't afford to prove it."

But worst of all is the contempt that these decisions breed for the Commission. I will give you an example. For over a quarter century, the Commission has held that a violation cannot be found unless OSHA shows that the employer knew or should have known of the violative condition. The

courts have accepted this holding. One would think that OSHA would, therefore, educate its employees and compliance officials on this principle and that it would be reflected in OSHA's Field Information Reference Manual. But neither is the case. I have had settlement conferences with long-time area directors who give me blank stares when I mention the knowledge principle. Their ignorance means that the client will have to contest the citation and then spend time and money tussling with OSHA's lawyers. But small- and medium-size employers can't afford to do that. They often have to accept unjustified citations because OSHA refuses to apply decisions of the Review Commission that it dislikes.

We urge the Congress to restore the Review Commission's proper place under the OSH Act and pass H.R. 1583.

Thank you for permitting me to participate in this afternoon's panel; I look forward to answering any questions that you may have.

APPENDIX F – SUBMITTED FOR THE RECORD, LETTER TO CHAIRMAN NORWOOD, FROM WENDY LECHNER, PRINTING INDUSTRIES OF AMERICA, INC., ALEXANDRIA, VA, JUNE 12, 2003

Printing Industries of America, Inc.

June 12, 2003

The Honorable Charlie Norwood
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Norwood:

On behalf of the 13,000 commercial printers who are members of the Printing Industries of America, thank you for sponsoring HR 1583, the Occupational Safety and Health Fairness Act. Your bill would provide fair and equitable treatment of employers during the enforcement of the Occupational Safety and Health Act while maintaining safety standards in the workplace.

I commend you for recognizing that due process is a critical component of OSH Act enforcement. There are times when the 15 day deadline for responding to a citation is missed for understandable reasons. Providing a reasonable amount of discretion to ensure fair implementation of the OSH Act would be an important change.

Similarly, providing more consistent application of what constitutes a "willful" violation of the OSH Act is necessary to ensure that justice is evenly applied. One of the most frustrating problems we face in dealing with OSHA inspections is the variation in the way enforcement is handled by different inspectors. While a certain amount of discretion is important, the consequences of citations of a "willful" nature are so great that more standardization, and therefore predictability, is desirable.

I also support your provision on appropriate attorney's fees for small employers. Often a small business pays a fine just to avoid the legal costs of fighting an erroneous citation. This, of course, can result in higher citations in the future since the first citation is on the company's record. Recovery of attorney's fees in appropriate cases will increase fairness in the enforcement process.

I also strongly support your efforts to improve the ability of the Occupational Safety and Health Review Commission to expedite case review by increasing the number of commissioners; to have the authority to take into account the financial stability of cited companies and the actual causes of violations' and to give the Commission's decisions the proper weight before appellate courts.

Your legislation will do a great deal to provide fairer enforcement of the OSH Act without any harm to safety in the workplace. The regulatory framework in a democratic country must provide equitable treatment to all parties in disputes. Your legislation is an important tool to ensure balance and impartial treatment during the enforcement of the OSH Act.

Sincerely,

Wendy Lechner

Wendy Lechner
Senior Director, Federal Policy

100 Daingerfield Road, Alexandria, Virginia 22314-2888 703/519-8100 *fax* 703/548-3227

APPENDIX G – SUBMITTED FOR THE RECORD, LETTER TO CHAIRMAN NORWOOD, FROM RICHARD A. JENNISON, BRICK INDUSTRY ASSOCIATION, RESTON, VA, JUNE 13, 2003

Richard A. Jennison
President & CEO

BRICK INDUSTRY ASSOCIATION

June 13, 2003

The Honorable Charles Norwood, M.C.
Chairman
Subcommittee on Workforce Protections
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

On behalf of the $9 billion clay brick industry, and the scores of companies that manufacture and distribute clay brick products, I wanted to commend you on the introduction of H.R. 1583 to bring fairness into the way in which the Occupational Health and Safety Administration (OSHA) does its business.

The Brick Industry Association, and its member companies, go to great lengths to protect the safety and health of all employees. However, we also believe that OSHA regulatory efforts deserve substantial change.

For example, we applaud the effort to empower OSHA with the authority to extend time limits for an employer to respond to a citation. We think that it's only common sense to actually define the term "willful" violation. We support a bolstering of the role played by the Review Commission in interpreting the law. We also support your work to enable small employers to more readily recover attorneys' fees.

Again, Mr. Chairman, we appreciate your insightful effort to improve the way in which OSHA does its important work.

Sincerely,

Richard A. Jennison

11490 Commerce Park Drive, Reston, Virginia 20191-1525
Phone: 703-620-0010, Ext. 107 Fax: 703-620-3928 E-mail: Jennison@bia.org

APPENDIX H – SUBMITTED FOR THE RECORD, LETTER TO CHAIRMAN NORWOOD, FROM ROBB MACKIE, AMERICAN BAKERS ASSOCIATION, WASHINGTON, D.C., JUNE 16, 2003

American Bakers Association
Serving the Baking Industry Since 1897
Robb MacKie, Vice President, Government Relations *rmackie@americanbakers.org*

June 16, 2003

The Honorable Charlie Norwood
Chairman
Workforce Protections Subcommittee
Committee on Education and the Workforce
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Norwood:

On behalf of the American Bakers Association, we wish to applaud your recent introduction of legislation to provide fair and balanced Occupational Safety and Health Act enforcement. We greatly appreciate your leadership in introducing H.R. 1583, the Occupational Safety and Health Fairness Act and wish to lend our support to your efforts.

Many employers, including wholesale baking companies, often face enormous difficulties in understanding their rights and obligations under the Occupational Safety and Health Act. No where is this more true than in the enforcement area, where the deck is clearly stacked in OSHA's favor, especially against smaller baking companies. In addition to ambiguous requirements, there are many enforcement terms and concepts that defy common-sense in the OSHA setting. In many cases, there is no clear definition at all. Given all of these problems, it is no wonder many companies simply settle cases instead of exercising their rights – even in the face of particularly egregious OSHA behavior.

Your legislation is a very positive first step to providing some clarity and fairness to the enforcement process. H.R. 1583 would help balance the playing field for all employers facing OSHA enforcement activity. It also would force OSHA to go after real safety and health problems instead of targeting employers who are doing the right thing but concede their due process rights out of confusion or sense of hopelessness.

Again, we applaud your efforts and leadership and look forward to working with you and your staff on the successful passage of H.R. 1583.

Sincerely,

Robb MacKie

P.S. - Sorry you had to run out of the reception so quickly last night!

1350 I Street, NW • Suite 1290 • Washington, DC • 20005-3305 • 202-789-0300 • FAX 202-898-1164 • www.americanbakers.org

APPENDIX I – SUBMITTED FOR THE RECORD, LETTER TO CHAIRMAN NORWOOD, FROM DANIELLE RINGWOOD, ASSOCIATED BUILDERS AND CONTRACTORS, INC., ARLINGTON, VA, JUNE 16, 2003

June 16, 2003

The Honorable Charles Norwood
Chairman, Subcommittee on Workforce Protections
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Norwood:

On behalf of Associated Builders and Contractors (ABC), and its more than 23,000 contractors, subcontractors, suppliers and construction-related firms from across the country, I am writing to voice my strong support of your legislation, H.R. 1583 the "Occupational Safety and Health-Fairness Act of 2003".

In the federal court system, litigants are guaranteed certain due process rights to ensure all have the opportunity for fair and impartial settlement of disputes. Many of these rights, however, are unfairly denied to employers facing allegations under the Occupational Safety and Health Act (OSH Act).

For example, employers can be denied a fair hearing under the OSH Act based on legal technicalities that would be excused in federal court. Other OSH Act provisions have stacked the cards against employers so high that businesses – particularly small businesses like those found in the construction industry – are frequently forced to settle even the most frivolous claims.

The current system invites abusive prosecution and unjustly imposes costs on employers. While damaging to all businesses, it is particularly harmful to small businesses, like ABC member companies, who lack the resources to defend against unreasonable prosecution.

ABC strongly believes H.R. 1583 would bring greater balance to the adjudication of the OSH Act, and commends you for your action on this vital issue.

Sincerely,

Danielle Ringwood

Danielle Ringwood
Director, Legislative Affairs

CC: Members of the Subcommittee on Workforce Protections

APPENDIX J – SUBMITTED FOR THE RECORD, LETTER TO CHAIRMAN NORWOOD, FROM BOB STALLMAN, THE AMERICAN FARM BUREAU FEDERATION, JUNE 16, 2003

VIA FACSIMILE
202-225-9571

June 16, 2003

The Honorable Charlie Norwood, Chairman
House Subcommittee on Workforce Protections
Committee on Education and the Workforce
2181 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

The American Farm Bureau Federation thanks you for your leadership in introducing and holding a hearing on H.R. 1583, the Occupational Safety and Health Fairness Act.

H.R. 1583 enhances fairness for employers, especially small businesses, by giving them new tools to defend themselves against Occupational Safety and Health Administration (OSHA) citations they believe are not justified. The current system invites abusive prosecution and unjustly imposes costs on employers. While damaging to all businesses, it is particularly harmful to small businesses that lack the resources to defend against unreasonable prosecution.

H.R. 1583 allows small employers to recover attorney's fees if the employer successfully defends against a citation issued by OSHA. This will ensure that farmers are not forced into settlement when they believe OSHA is wrong, simply because it is the most cost-effective option available. It will also ensure that OSHA does not waste taxpayer resources on fruitless cases and frivolous claims.

H.R.1583 replaces the draconian, absolute 15-day deadline for contesting a citation with the well developed and fairer standard used by federal courts, which permits late filings when the tardiness is based on "mistake, inadvertence, surprise, or excusable neglect." This ensures that employers will have their day in court and will not be denied a fair hearing based on legal technicalities.

Thank you for your leadership on such an important piece of legislation.

Sincerely,

Bob Stallman
President

BS: ap/mw
F:\stm\labor-osha03.616

APPENDIX K – SUBMITTED FOR THE RECORD, LETTER TO CHAIRMAN NORWOOD, FROM KELLY M. KRAUSER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ALEXANDRIA, VA, JUNE 16, 2003

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
333 John Carlyle Street, Suite 200 • Alexandria, VA 22314
Phone: (703) 548-3118 • FAX: (703) 548-3119 • www.agc.org

JACK KELLEY, President
SAM HUNTER, Vice President
STEPHEN E. SANDHERR, Chief Executive Officer
JAMES D. WALTZE, Senior Vice President
JAMES STEPHENS, Treasurer
DAVID R. LUKENS, Chief Operating Officer

June 16, 2003

The Honorable Charlie Norwood
Chairman
House Workforce Protections Subcommittee
House Education and Workforce Committee
U.S. House of Representatives
B-346 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Norwood:

On behalf of the Associated General Contractors of America (AGC), I would like to thank you for your leadership of the Occupational Safety and Health Fairness Act, H.R. 1583. AGC appreciates your support on this important issue and looks forward to working with you on this legislation. Such legislation would assist employers in resolving disputes with the Occupational Safety and Health Administration (OSHA) in a more fair and timely manner.

AGC is the nation's largest and oldest construction trade association, representing more than 33,000 firms, whose membership is made up of both union and open-shop contractors. AGC of America and our over 100 chapters around the country support this legislation as a way to enhance fairness for employers while still ensuring proper safety rules are followed and we would like to see quick action in the House of Representatives.

There are many components worthy of support in this legislation. Several sections of H.R. 1583 contain provisions that any business, large or small, can support. The clarifications that are proposed and the suggested changes are viewed in a positive light with regard to how they may affect our members.

It seems logical that OSHA should give consideration to factors such as the size and financial condition of the business, the gravity of the violation, and whether the company had previous violations of similar regulations. The proposed change of enlarging the membership of the Occupational Safety and Health Review Commission would increase the number of times that a quorum would be available to hear cases that are being challenged by businesses, helping to ensure that there are fewer delays in the process.

It also makes sense for those small companies that face legal action to be able to recover attorneys' fees and costs should they prevail in court and such a provision could serve as a deterrent against OSHA filing cases that may not be warranted. AGC agrees that what constitutes a willful violation should be clarified. "Willful" should be better defined instead of allowing the courts to make varying interpretations across the country. Overall, H.R. 1583 is a strong bill that would help level the playing field for businesses around the country.

Again, AGC would like to thank you for your leadership and support of the Occupational Safety and Health Fairness Act. We look forward to working with you to see H.R. 1583 enacted into law.

Sincerely,

Kelly M. Krauser

Kelly M. Krauser
Director, Congressional Relations
Human Resources and Labor

APPENDIX L – SUBMITTED FOR THE RECORD, LETTER TO CHAIRMAN NORWOOD, FROM THE OSHA FAIRNESS COALITION, JUNE 16, 2003

OSHA Fairness Coalition

Advocating for Balance

June 16, 2003

The Honorable Charles Norwood
Chairman, Workforce Protections Subcommittee
Committee on Education and the Workforce
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Norwood:

On behalf of the OSHA Fairness Coalition, we wish to express our strong support for your legislation, the Occupational Safety and Health Fairness Act of 2003 (H.R. 1583). We appreciate your strong leadership in this important area of safety and health oversight.

Employers, especially small ones, often face the daunting task of trying to navigating the ambiguous provisions of the Occupational Safety and Health Act (OSH Act) and deal with its slanted "due process" system without much success. Indeed, the current system has the bar set so high against employers that businesses – particularly small businesses – are often forced to settle even the most frivolous claims. The Occupational Safety and Health Fairness Act of 2003 is a good first step to bringing fairness to the OSH Act in that provides employers with the same rights and fair process they have in other jurisdictions without altering any of the safety standards or penalties in the OSH Act.

H.R. 1583 has six main provisions. These provisions would:

1. Provide the OSHA Review Commission some flexibility in the application of the 15-day period employers have to contest citations/proposed penalties. The exceptions would be tightly limited to legitimate excuses and are intended to give employers the opportunity to make their case on the merits rather than losing automatically by a technicality.
2. Define a "willful violation" under the OSH Act and making it clear that Occupational Safety and Health Administration (OSHA) bears the burden of establishing that an employer actually had direct knowledge of an alleged violation.
3. Expand from three to five the number of members sitting on the OSHA Review Commission in order to address the common situation in which the commission does not have a quorum.
4. Provide recovery of attorney's fees and costs incurred by small employers who prevail in cases brought by OSHA beyond what is currently available.
5. Clarify that courts may defer to OSHA on matters of regulatory interpretation, but, deference would be given to the Review Commission on matters of law.
6. Add statutory factors that the Review Commission must consider in assessing penalties, *e.g.*, size, financial condition, good faith, etc in its penalty assessment.

We look forward to working with you on this proposal, and moving it forward in the legislative process.

Sincerely,
The OSHA Fairness Coalition

The OSHA Fairness Coalition is Group of Employers, National Trade Associations and Professional Organizations Advocating for Reforms that Bring Greater Balance to the OSH ACT

For More Information
Please Contact Josh Ulman (202) 463 5342, Chris Tampio (202) 637 3126
or Patrick Lyden (202) 314 2002

APPENDIX M – SUBMITTED FOR THE RECORD, LETTER TO CHAIRMAN NORWOOD, FROM JIM WHITTINGHILL, AMERICAN TRUCKING ASSOCIATIONS, WASHINGTON, D.C., JUNE 17, 2003

AMERICAN TRUCKING ASSOCIATIONS
430 First Street, S.E. ★ Washington, D.C. ★ 20003-1875
www.truckline.com

★ Driving Trucking's Success

Legislative Affairs

June 17, 2003

The Honorable Charles Norwood
Chairman, Workforce Protections Subcommittee
Committee on Education and the Workforce
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Norwood,

On behalf of the American Trucking Associations (ATA), we would like to convey our support for the changes in legislation that you are proposing in the Occupational Safety and Health Fairness Act of 2003 (H.R. 1583). We appreciate your effort to ensure that businesses have an equal opportunity to fairly and impartially resolve disputes under the Occupational Safety and Health Act (OSH Act).

ATA is the national trade association of the trucking industry. Through our direct dues-paying members, our affiliated trucking associations located in every state, and their 30,000 motor carrier members, affiliated conferences and other organizations, ATA represents every type and class of motor carrier in the country.

Our members strive to provide employees with a safe work environment, but are sometimes forced to settle frivolous claims because of the unfair provisions of the OSH Act. Your proposed bill (H.R. 1583) provides employers the opportunity for fair adjudication by:

- Providing exceptions if an employer provides a legitimate excuse for missing the 15-day deadline for contesting citations;
- Defines "willful violation" so that OSHA has the responsibility for establishing that the employer knew the conduct violated the law;
- Expands the OSHA Review Commission membership to five members to alleviate the problem of attaining a quorum;
- Allows small businesses to recover attorney's fees if the employer successfully defends a citation; and,
- Requires the Review Commission to look at additional factors (e.g., size of the business being charged, good faith effort of the employer, the gravity of the violation, etc.) when determining penalty assessments.

We strongly support the provisions outlined in H.R. 1583 and we look forward to assisting you in moving it forward in the legislative process.

Sincerely,

Jim Whittinghill
Senior Vice-President, Legislative Affairs
American Trucking Associations

(202) 544-6245 ★ Fax: (202) 675-6568

APPENDIX N – SUBMITTED FOR THE RECORD, BRIEF OF THE AMICUS CURIAE, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, OSHRC DOCKET NO. 01-0830

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ELAINE L. CHAO, Secretary of Labor, Complainant, v. VILLA MARINA YACHT HARBOR, INC., Respondent.	OSHRC Docket No. 01-0830

BRIEF OF THE *AMICUS CURIAE*, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION

I. IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

A. Identity of the *Amicus Curiae.*

The National Federation of Independent Business Legal Foundation ("NFIB Legal Foundation" or "*amicus*") is a 501(c)(3) organization established to protect the rights of America's small business owners by, among other things, filing *amicus* briefs in precedent-setting cases stating the views of the small business community. NFIB Legal Foundation is the legal arm of the National Federation of Independent Business (NFIB), which is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all 50 states. The approximately 600,000 members of the NFIB own a wide variety of America's independent businesses from mom-and-pop grocery stores to bowling alleys to construction firms.

B. Interest of the *Amicus Curiae* in This Case.

The *amicus* is interested in this case because an adverse decision will, as a practical matter, close the door to relief from citations that were not timely contested. Closing that door would be particularly harmful to small businesses, whose lack of resources and unfamiliarity with the Act often lead them to make procedural missteps in dealing with OSHA. Small employers have the greatest difficulty shouldering the monetary penalties, abatement requirements, and the other collateral consequences of citations that were not timely contested. Even the cost of litigation is a great burden to them.

The very great majority of small employers who fail to timely or properly contest citations will not qualify for relief under Federal Rule of Civil Procedure 60. Nevertheless, a few will. A few will be able to show a legally excusable mistake or inadvertence under Rule 60(b)(1). A few will be able to point to final orders in which are embedded prospective requirements so clearly inequitable as to warrant relief under Rule 60(b)(5). A few will be able to point to important clerical errors in citations that must be corrected under Rule 60(a). It is to preserve the rights of those employers that this brief is filed.

II. STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. *General Statutory Provisions and Background*

The Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the OSH Act") established the Occupational Safety and Health Review Commission ("OSHRC" or "Commission") as "an autonomous, independent" body that would decide cases "without regard to the Secretary." Senate Subcommittee on Labor, *Legislative History of the Occupational Safety and Health Act of 1970*, 92d Cong., 1st Sess. 463 (Comm. Print. 1971) ("Leg Hist.") (remarks of Senator Javits, author of compromise that created the Commission).

Section 12(g), 29 U.S.C. § 661(g), states: "Unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure."[1] Federal Rule of Civil Procedure 60 allows a court to correct clerical errors in the judgments, orders, or record in a case, Fed. R. Civ. P. 60(a), or to "relieve a party . . . from a final judgment, order, or proceeding" for several reasons including "mistake, inadvertence, surprise, or excusable neglect ." Fed. R. Civ. P. 60(b). Rule 60 applies to the Commission under section 12(g) of the OSH Act, 29 U.S.C. § 661(g), because the Commission has not adopted a different rule.

---

[1] *See also* 29 C.F.R. § 2200.2(b) (Federal Rules apply unless Commission rule governs a point).

If an employer does not contest the citation, then it "shall be deemed a final order of the Commission and not subject to review by any court or agency." OSH Act § 10(a), 29 U.S.C. § 659(a). The consequences of a failure to contest include:

- An implied order to abate the cited condition by the abatement date. Failure to timely abate exposes the employer to penalties of up to $7,000 a day. OSH Act §§ 10(b) and 17(d), 29 U.S.C. §§ 659(b) and 666(d). The Commission[2] may later extend that time in limited circumstances. OSH Act § 10(c), 29 U.S.C. § 659(c).

- Characterization of the violation as "repeated," "willful," "serious" or "other than serious."

- An obligation to pay the proposed penalty. Penalties can range from $0 to $7000 for each "other than serious" violation, $1 to $7000 for each "serious" violation, from $0 to $70,000 for each "repeated" violation, and $5000 to $70,000 for each "willful" violation. § 17(a) -(c), § 666(a) -(c). There is no cap on the penalties that can result from an inspection, and total penalties of $100,000 are not uncommon.

- Inclusion of the citation on the employer's "history of previous violations," which raises all subsequent penalties. OSH Act § 17(j), 29 U.S.C. § 666(j). OSHA maintains that history on an Internet database.

- Exposure to subsequent "repeated" or "willful" violations under § 17(a), 29 U.S.C. § 666(a), even if the subsequent violation occurred at a different workplace or years later. *See Potlatch Corp.,* 7 BNA OSHC 1061, 1064 (OSHRC 1979) (no time or location limit on "repeated" violations).

---

[2] The reference to "the Secretary" instead of "the Commission" in this provision is a typographical error. *H.K. Porter Co.,* 1 BNA OSHC 1600 (OSHRC 1974).

- Upon request to a court clerk, the issuance "forthwith" of a court order, enforceable by contempt and other penalties, to comply with the Commission's final order. OSH Act § 11(b), 29 U.S.C. § 660(b).

- Disqualification in some jurisdictions from bidding on public construction contracts. *E.g.,* Cal. Gov't Code § 14661(d)(2)(B)(vi)(II).

- Collateral use of the final order against the employer in civil litigation. *E.g., Felden v. Ashland Chemical Co.*, 631 N.E.2d 689 (Ohio App. 1993) (admitting OSHA citation); *Industrial Tile v. Stewart,* 388 So.2d 171 (Al. 1980) (same).

The ramifications of a citation are often not obvious. An employer unfamiliar with OSHA's complex standards might easily fail to realize that a citation's implied abatement order requires that parts of a factory be rebuilt or a construction method be abandoned. An employer might not realize that a citation requires that a machine be modified to meet specifications in an inapplicable standard. *See, e.g., Losli, Inc.*, 1 BNA OSHC 1734 (OSHRC 1974) (uncontested citation required metal shear to be modified to meet inapplicable specifications for power presses), discussed on page 19 below.

There are various ways that employers can fail to timely contest an OSHA citation, aside from making a clerical error. An employer whose notice of contest mentions only the "penalty" rather than the "citation" has contested only the penalty amount – and not the citation – unless the employer shows that he intended during the contest period to contest both; afterthoughts will not suffice.[3] A letter that contests only an "abatement

[3] *Marshall v. Haugan,* 586 F.2d 1263, 1266 (8th Cir. 1978); *see Monarch Water Systems, Inc.*, 12 BNA OSHC 1897, 1900 (OSHRC 1986); and *A.R. Butler Constr. Co.,* 14 BNA OSHC 2140 (OSHRC J. 1991). OSHA has consistently refused to adopt the suggestion

period" is not considered a notice of contest at all, but rather a petition for modification of the abatement period under § 10(c), which shifts the burden of proof to the employer.[4] A notice of contest sent to the wrong agency – to OSHRC rather than OSHA – is ineffective. *See Fitchburg Foundry,* 7 BNA OSHC 1516 (OSHRC 1979) (alternative holding; § 10(a) requires notice of contest to be sent to "the Secretary"). An oral contest is ineffective. *E.g., Craig Mechanical Inc.,* 16 BNA OSHC 1763 (OSHRC 1994), *aff'd without opinion,* 55 F.3d 633 (5th Cir. 1995).

2. *Case Law.*

The Commission in one of its earliest cases held that it could not apply Rule 60 because it lacked "subject matter jurisdiction" if a notice of contest were not timely filed. *Plessy, Inc.,* 2 BNA OSHC 1302, 1306-07 (OSHRC 1974). There, *the Secretary* had moved to vacate an uncontested citation item because "further investigation" indicated that "there was, in fact, no violation . . . ."

In *J.I. Hass Co. v. OSHRC,* 648 F.2d 190, 193 (3d Cir. 1981), the Third Circuit disagreed, and held that Rule 60 may be applied. This caused the Commission to re-examine the issue, and in *Branciforte Builders Inc.,* 9 BNA OSHC 2113 (OSHRC 1981), it agreed with *Hass.* Other tribunals have also followed *Hass. McLaughlin v. Keefe*

---

of the Fifth and Eight Circuits and the Commission that this problem be solved by including a contest check sheet with a citation, as its sister agency, the Mine Safety and Health Administration has done. *Brennan v. OSHRC (Bill Echols Trucking Co.),* 487 F.2d 230, 234 n.7 (5th Cir. 1973); *Haugan,* 586 F.2d at 1266 n.2.

[4] *Gilbert Manufacturing Co.,* 7 BNA OSHC 1611 (OSHRC 1979). *Compare* § 10(c), 29 U.S.C. § 659(c), *and* 29 C.F.R. § 2200.37(d)(3) (employer has burden of proof) *with* 5 U.S.C. § 556(d) (proponent of order has burden of proof).

Earth Boring Co., 702 F. Supp. 705 (N.D. Ill. 1989) (penalty collection stayed until Commission acts on Rule 60 motion); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89, 1993 CCH OSHD ¶ 30,081 (FMSHRC 1993) (Federal Mine Safety and Health Review Commission, applying Fed. R. Civ. P. 60 (b) under Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, to "final order of the Commission . . . not subject to review by any court or agency"); *Alman Constr. Co. v. Tennessee Department of Labor*, 1992 WL 151434, 1992 CCH OSHD ¶ 29,763 (Tenn. App. 1992) (applying Tenn. R. Civ. P. 60(b) to final orders under Tennessee Occupational Safety and Health Act of 1972, Tenn. Code Ann. §§ 50-3-101 *et seq.)*.

In addition, two other courts have held or suggested, without mentioning Federal Rule 60(b), that section 10(a) of the OSH Act is not an "impenetrable barrier." In *Capital City Excavating. Co. v. Donovan,* 679 F.2d 105 (6th Cir. 1982), the Sixth Circuit rejected the Secretary's argument that the contest period "is jurisdictional in the sense that the time cannot be extended under any circumstances," but declined to apply Rule 60 because no Rule 60 motion had been made before the Commission. In *Atlantic Marine, Inc. v. OSHRC,* 524 F.2d 476 (5th Cir. 1975), the court remanded for fact finding on whether a failure to contest had been caused by OSHA's deception or failure to follow proper procedures; the court wanted the facts clarified before it decided the "important issue" of whether § 10(a) is an "impenetrable barrier." Rule 60(b) was not mentioned.

The Sixth Circuit in *Marshall v. Monroe & Sons, Inc.,* 615 F.2d 1156 (6th Cir. 1980), held that Rule 60 applies to administrative law judges' decisions that became final

orders under § 12(j), 29 U.S.C. § 661(j).[5] (It disagreed in this respect with *Brennan v. OSHRC (S.J. Otinger, Jr., Constr. Co.),* 502 F.2d 30 (5th Cir. 1974).) The Sixth Circuit also admonished the Commission to make a "careful determination" as to whether "mistake, inadvertence, surprise, or excusable neglect" under Federal Rule of Civil Procedure 60 (b)(1) has been shown. 615 F.2d at 1162.

The Commission has followed this admonition, and rarely grants Rule 60 (b) motions. *See* American Bar Association, *Occupational Safety and Health Law*, 1999 *Cumulative Supplement* 168 & n. 12 (R. Rabinowitz, ed.,1999) (lengthy footnote describing facts of many cases in which relief denied). Rule 60(b) motions are made about thirty times a year (out of about 1650 cases per year) and comprise about 1.8 percent of the Commission's case load. *Craig Mechanical,* 16 BNA OSHC at 1765 n. 4. Of these, nearly all are denied. *P&A Construction Co.,* 10 BNA OSHC 1185 (OSHRC 1981) (attorney dictated contest letter and ordered it filed; secretary erroneously assured attorney that letter was filed), and *Northwest Conduit Corp.*, 18 BNA OSHC 1948 (OSHRC 1999), are among the few in which relief has been granted.

Against this background stands *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219 (2d Cir. 2002), the only decision to find that the Commission lacks power to grant relief under Rule 60. The Second Circuit reasoned that Rule 60 does not apply because, in cases in which an employer fails to timely file a notice of contest, there has been no "final judgment, order, or proceeding" of the Commission. *Id.* at 229 (quoting Fed. R.

---

[5] This provision states that, unless directed for review, a judge's decision "become[s] the final order of the Commission within thirty days" after issuance.

Civ. P. 60(b)). The Court focused on the word "deemed" in Section 10(a) of the OSH Act, 29 U.S.C. § 659(a), and stated that citations and assessments not timely contested are merely "deemed" to be final orders of the Commission and do not actually "become" final orders. *Id.* In the court's opinion, Rule 60 only applies to actual final orders, and not to things that are simply deemed or treated as final orders. *Id.*

B. Statement of Facts and Course of Proceedings

Chief Judge Irving Sommer held that Villa Marina Yacht Harbor, Inc., was not entitled to relief under Federal Rule of Civil Procedure 60(b)(1) because its lateness in filing a notice of contest was not due to excusable neglect.

III. ARGUMENT

A. The Commission May Apply Federal Rule of Civil Procedure 60 to "Final Orders of the Commission" under Section 10(a) of the OSH Act.

1. *Principles of Stare Decisis Require an Especially Weighty Showing Before a Commission Precedent Is Overruled. That Showing Cannot Be Made Here.*

The Secretary has argued that this Commission should overrule its long-established precedent that it has the authority to grant relief under Federal Rule 60(b) in cases such as this. The argument, essentially, is that *Branciforte Builders* is wrong.

That is insufficient. Under *stare decisis*, tribunals refrain from reconsidering or overruling a precedent even if the tribunal thinks that the decision is wrong because the "routine reconsideration of the correctness . . . of binding precedents would be enormously destructive." 1B *Moore's Federal Practice* * 0.402[3.-1], p. I-50 (2d ed. 1995). "Special justifications," other than the mere rightness or wrongness of a

precedent, are required to justify its reconsideration or overruling. *Patterson v. McLean Credit Union,* 491 U.S. 164, 173 (1989). For example, courts require that a precedent be so wrong as to be "clearly erroneous." *Schott Optical Glass v. United States*, 750 F.2d 62, 64 (Fed. Cir. 1984). Without such a doctrine, no court or adjudicative tribunal would have a system of precedent worthy of public respect. As the Supreme Court has stated, *stare decisis* ensures that "the law will not merely change erratically" based "on the proclivities of individuals." *Vasquez v. Hillery,* 474 U.S. 254, 265 (1986). While courts do not require administrative agencies to apply *stare decisis*, the Commission and many other agencies, particularly adjudicatory agencies, do so to enhance public respect and confidence, to narrow the range in which the law might depend on personal predilection, and to relieve the public of the burdens of constant relitigation.

This case calls out strongly for the application of *stare decisis. Branciforte Builders* is of long standing, was fully argued and discussed, and rests in part on the decision of a United States Court of Appeals – that of the Third Circuit in *J.I. Hass Co. v. OSHRC,* 648 F.2d 190, 193 (3d Cir. 1981). It is consistent with the view of a state appellate court under a state OSHA law, *Alman Constr. Co. v. Tennessee Department of Labor*, 1992 WL 151434, 1992 CCH OSHD ¶ 29,763 (Tenn. App. 1992), and with the view of a sister federal adjudicatory agency under a similar federal law. *Jim Walter Resources, Inc.,* 15 FMSHRC 782, 786-89, 1993 CCH OSHD ¶ 30,081 (FMSHRC 1993). It has not proven unworkable in practice. *E.g., Solorio v. United States,* 483 U.S. 435 (1987). To the contrary, the many Commission and judges' decisions applying *Branciforte* prove that it is a workable precedent. *Branciforte* also has not been

disapproved by a significant number of tribunals. *Compare Bratton Corp.*, 14 BNA OSHC 1893 (No. 83-132, 1990) (overruling precedent disapproved by four circuits). To overrule a precedent supported by at least one circuit decision in the wake of an adverse decision by another circuit would make Commission precedent unstable and give a distorted view of the matter when other appellate courts consider the issue. And whatever the Secretary might say about *Branciforte Builders*, it has respectable support in the language and legislative history of the standard. Given the above circumstances, the Commission should not, in the aftermath of a single court decision, overrule its precedent unless the Secretary's showing is especially weighty. As we now show, the Secretary's showing is not weighty.

2. *Section 10(a) Does Not Create an Impenetrable Barrier to Re-Opening a Final Order "of the Commission."*

Despite whatever verbal gymnastics the Secretary may resort to, she agrees, and has long agreed, that the Commission has some implied authority to re-open uncontested citations. *See Chao v. Russell P. Le Frois Builder, Inc.*, 291 F. 3d 219, 230 (2d Cir. 2002) (stating that the Secretary urged the court to recognize the Commission's power to apply the equitable tolling doctrine); see also the discussion of *Plessy, Inc.*, 2 BNA OSHC 1302, 1306-07 (OSHRC 1974), on p. 6 above.

The Secretary instead disputes only whether, in exercising that authority, the Commission may apply Federal Rule of Civil Procedure 60 under section 12(g) of the OSH Act, or "equitable tolling." (We show in Part III.A.5 below that the appropriate test for determining whether re-opening is proper is that in Rule 60, not the amorphous and

poorly-fitting doctrine of equitable tolling.) For the moment, it is enough to note that the Secretary has conceded what is obvious to all but one tribunal to have examined the question: It is inconceivable that Congress would have left employers with no recourse whatsoever from uncontested citations. It is inconceivable that Congress would have established the Commission as a "quasi-judicial" tribunal,[6] and even made Federal Rule of Civil Procedure 60 (b) applicable to its proceedings, without permitting it some power to re-open final orders.

Moreover, this position is supported by the language of section 10(a) itself, which makes clear that the Commission has *some* residual authority over uncontested citations. Section 10(a) states that an uncontested citation is deemed not merely a "final order" but "a final order *of the Commission.*" (Emphasis added.) As the Third Circuit observed, the words "of the Commission" make clear that, even if the Commission did not itself adjudicate the citation, the Commission retains some residual jurisdiction over the resulting final order. *Hass,* 648 F.2d at 193.[7] In contrast, the Second Circuit in *Le Frois* ignored the phrase and gave it no meaning.

---

[6] *Leg. Hist.* at 471 (floor remarks of Mr. Javits); *see also id.* at 476 (remarks of Senator Holland).

[7] The Third Circuit stated (648 F.2d at 193):

> The Secretary claims that . . . [because] here there was no [Commission] proceeding, . . . rule 60 does not apply. His attorney contended during oral argument that since the notice of contest was not timely filed, the Commission never had jurisdiction in the first place. We disagree. Section 10(a) . . . states that uncontested citations become final orders of the Commission. Thus, the Commission must have had jurisdiction at some point.

The Commission's authority to re-open final orders is also indicated by section 12(g), 29 U.S.C. § 661(g), which expressly authorizes the Commission to apply the Federal Rules of Civil Procedure, including Rule 60(b), which expressly governs the re-opening of final judgments and orders. Section 12(g) indicates that Congress intended the Commission to act much like a court, which has powers to re-open default judgments. As the Sixth Circuit has pointed out, this is not a case in which an agency is claiming an inherent right to exercise formerly equitable powers of relief from final orders but a right implied from the very words of the Act. "In the [OSH] Act ... Congress specified that the Federal Rules of Civil Procedure could be applied by OSHRC. The power claimed by OSHRC, therefore, has a solid foundation in the language of the statute." *Marshall v. Monroe & Sons, Inc.,* 615 F.2d 1156, 1159 (6th Cir. 1980).

3. *The Second Circuit's* Le Frois *Decision Does Not Warrant a Different View.*

A close examination of the Second Circuit's decision in *Le Frois* reveals nothing that detracts from *Hass* or *Branciforte.* The Second Circuit appeared to reason as follows:

1. Section 12(g) of the Act applies only to Commission "proceedings," and such proceedings never began here because the notice of contest was untimely.

2. Rule 60(b) applies only after a "final judgment, order, or proceeding" occurs, and "[n]one of these predicates are present here."

3. The Commission lacks residual authority over "final orders of the Commission" under section 10(a) because an uncontested citation is only

> "deemed" or treated as a final order of the Commission and does not actually "become" one.

Each of these premises is demonstrably in error.

The first premise is wrong and tautological. *This* proceeding is a proceeding of the Commission because it was brought to the Commission for resolution. In bringing it to resolution, section 12(g) states, the Federal Rules apply. Section 12(g) uses the term in this same neutral way as the Administrative Procedure Act does. There, an "agency proceeding" is defined as "an agency process as defined by paragraph[] . . . (7) . . . of this section;" *i.e.*, an "adjudication," which in turn "means agency process for the formulation of an order[.]" 5 U.S.C. §§ 551(12) and (7), respectively. The court's suggestion that a timely notice of contest is necessarily required is a tautology, for it assumes the answer to the question to be resolved. Whether the Commission has authority to grant the relief in the proceeding is a different question than whether a "proceeding" is underway.

The Second Circuit's second premise is wrong as a matter of fact. There is certainly here a "final judgment, order, or proceeding" within the meaning of Rule 60(b) and to which it may be applied. It is the "final ... order" that results when a citation is not timely contested.

The heart of the *Le Frois* decision is its third assertion – that the Third Circuit in *Hass* "fails to recognize the import of the word 'deemed' in the statute." 291 F.3d at 229. Under section 10(a), we are told, a citation is only "deemed" or "treat[ed]" as a final order of the Commission and does not actually "become" one. *Id.* The import of this observation is difficult to grasp. Even if an uncontested citation were only "deemed" or

"treated" as a final order of the Commission, the *Le Frois* court did not explain why it is to be deemed or treated as a final order *of the Commission*. The *Le Frois* court did not explain why an uncontested citation is treated as a final order of the Commission for some purposes (for example, a failure-to-abate proceeding) but not for this purpose, as to which it is to be considered merely a "final order." No reason for the distinction seems apparent.

In fact, the panel drew a distinction without a difference. Whether a citation "becomes" a final order or is merely "deemed" to be a final order is irrelevant because the plain words of the statute require that the citation be treated as a final order of the Commission – period. When the word "deem" instructs that something be treated as if it were something else, the commonsense interpretation is that the thing is treated as the something else for all purposes unless a more limited purpose is specified. Congress well knew how to limit the purposes for which something is to be deemed to be something else. Section 17(k), 29 U.S.C. § 666(k), states: "*For purposes of this section* [concerning penalties], a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists ..." (Emphasis added.) That the Act uses this explicit limiting language in section 17(k) and not in section 10(a) indicates that section 10(a) requires uncontested citations to be treated as final orders for all purposes, including Rule 60.

The Second Circuit overlooked that Congress used the word "deemed" in section 10(a) for a narrow and modest reason: If the employer failed to timely contest, there was no reason to bother issuing a default judgment paper entitled "final order." To eliminate

paperwork and save time, an uncontested citation would be treated as a final order. But even though the Commission had no hand in the evolution of a citation to a final order, Congress still decreed that the uncontested citation be treated as a final order *of the Commission* – a phrase that the Second Circuit gave no meaning. As stated in the dissenting opinion in *Le Frois*, "whether deemed or actual – an order of the Commission must be one that is within its jurisdiction and thus subject to reopening or reconsideration." 291 F.3d at 231. In sum, the word "deemed" does not undermine the Third Circuit's view that the phrase "of the Commission" signifies that the Commission has residual authority over section 10(a) final orders.

4. *The Phrase "Not Subject to Review by Any Court or Agency" Does Not Bar Re-Opening; It Bars Only Direct Appeal.*

The Secretary may lay emphasis on section 10(a)'s phrase "not subject to review by any court or agency." The argument ignores the reason why Congress inserted the phrase. A merely final order of the Commission is, by reason of the final-order rule, facially an appealable one. The phrase "not subject to review by any court or agency" was added to make clear that the failure to timely contest a citation means that it is not appealable to the Commission or a court. This has nothing to do with whether the final order itself is re-openable,[8] such as those in Rule 60(b), for appealability and reconsideration are two entirely different things. As Judge Pooler stated in dissent:

---

[8] The Secretary may claim that *Branciforte* permits the Commission to adopt a rule, different from Rule 60(b), that would permit re-opening in broader circumstances. Aside from the fact that this is unfounded speculation (the Commission has not even proposed such a rule in its nearly thirty-two year history), any such rule would have to respect the congressional interest in repose evident in the 15 working day period in section 10(a) and

> "Review" used by itself suggests an examination of the determination of an inferior tribunal. . . . "Reconsider" and "reopen," on the other hand ordinarily refer to a reexamination of a tribunal's own decision or order. Section 659(a) prohibits review but does not prohibit reconsideration or re-opening.

291 F.3d at 230.

5. *Federal Rule of Civil Procedure 60 Rather Than "Equitable Tolling" Is the Appropriate Rule to Apply Here.*

The Secretary has taken the position that, in exercising its conceded authority to re-open final orders, the Commission may not apply section 12(g) and Federal Rule of Civil Procedure 60, but must instead apply the amorphous concept of "equitable tolling," which courts read into otherwise silent statutes. *E.g., Irwin v. Department of Veterans Affairs,* 498 U.S. 89 (1990). This argument has no merit.

First, while the Commission's application of Federal Rule 60 is firmly grounded in the language of the OSH Act, equitable tolling is not. An approach with support in the statutory language is preferred over a one that is at best implicit. Moreover, Rule 60's terms perfectly fit those of section 10(a). Rule 60(b) governs relief from a "final judgment, order, or proceeding" while section 10(a) speaks of "a final order."

Second, equitable tolling fits this situation awkwardly, if at all. While Federal Rule 60 was specifically written to govern "final orders," equitable tolling has a different function – to extend statutes of limitation so that claims may be filed and evolve into final

---

the narrow criteria of Rule 60(b). Whatever the limits of the Commission's freedom, *amicus* would agree with the Secretary that the Commission could not stray much from Rule 60(b) and still be true to congressional intent.

judgments or orders after litigation. *E.g., Polanco v. Drug Enforcement Administration,* 158 F.3d 647, 655 (2d Cir. 1998). But section 10(a) is not a statute of limitations; it does not set a deadline for the filing of a claim, but for opposing one. It is thus akin to Federal Rule of Civil Procedure 12(a)(1), which imposes a twenty-day deadline for filing an answer to a complaint, which sets no limitation period. (It is undoubtedly no coincidence that the fifteen working day period in section 10(a) for contesting a citation nearly always equals the twenty calendar day period in Rule 12(a)(1) for answering a complaint.) The actual statute of limitations in the OSH Act is that in section 9(c), 29 U.S.C. § 658(c), which requires that citations be issued within six months.

Equitable tolling is a poor fit for other reasons. It presupposes that no claim has yet been filed, and that there is no final judgment or order to re-open or to relieve a party from. That is undoubtedly why the leading equitable tolling case of *Irwin v. Department of Veterans Affairs,* 498 U.S. 89 (1990), did not discuss Federal Rule 60 – for there was no "final judgment" to apply it to. That is not the problem here. Unlike Rule 60(b), which sets out criteria to determine whether to relieve a default judgment, equitable tolling asks instead whether a lawsuit may proceed. These different functions give the two doctrines widely differing contours and criteria.

Third, equitable tolling would grant employers an avenue of relief so narrow as to be illusory. Generally, equitable tolling is only available in cases where OSHA's behavior was improper or misled the employer with respect to the requirements for contesting a citation and the employer has been diligent in preserving its rights. *See e.g., Irwin*, 498 U.S. at 96; *Secretary of Labor v. Barretto Granite Corp.*, 830 F.2d 396, 399

(1st Cir. 1987); *Craig Mechanical, Inc.*, 16 BNA OSHC 1763, 1766 (OSHRC 1994). Such a narrow avenue of relief would not only deny employers, for no reason apparent from the face or legislative history of the statute, the same narrow right to re-opening as any other federal litigant but would perpetuate the indefensible.

For example, in *Losli, Inc.*, 1 BNA OSHC 1734 (OSHRC 1974), summarized on p. 5, a failure to contest a citation made the company "unique among employers" – it alone had to modify its metal shear to meet specifications in a standard that regulates mechanical power presses, a nonsensical result. 1 BNA OSHC at 1735 (dissenting opinion). An employer in such a position should be permitted, even if he were not excusably neglectful, to affirmatively shoulder the heavy burden imposed by Rule 60(b)(5) and show that it is "no longer equitable that the judgment should have prospective application." But under the Secretary's view, this employer could get no relief and would forever be in jeopardy of being driven out of business by failure-to-abate penalties of up to $7000 per day. That is absurd. Similarly, there is no reason why the Commission should not be able to correct severely adverse clerical errors under Federal Rule 60(a). Equitable tolling would not reach these cases at all.

Applying Federal Rule 60 to cases in which employers untimely contest citations does not undermine section 10(a)'s interest in finality, for Rule 60 itself expresses a strong interest in finality. Nor will Rule 60(b) motions hinder abatement of violations. First, Rule 60 states that the mere filing of a motion does not suspend the operation of a final order; an employer would have to file and justify a separate motion to that effect. *See Monroe*, 615 F.2d at 1160; *see also* Fed. R. Civ. P. 62(b). Second, Rule 60(b)

motions are made about thirty times a year (out of about 1650 cases per year), comprise no more than about 1.8 percent of the Commission's case load, and are nearly all denied. See p. 8 above. Third, a very large percentage of violations are abated before the inspector leaves the worksite. The number of times that a condition is still unabated, and the employer will find it worthwhile to even try to obtain Rule 60(b) relief, is insignificantly small. Fourth, the Secretary would almost never suffer procedural prejudice from the filing of such motions.[9] There is, in sum, no practical reason why Rule 60 should not apply.

B. On Issues of Statutory Interpretation, the Commission Should State Firmly That It Owes the Secretary No Deference under *CF&I Steel*.

Commission precedent holds that the Commission does not defer to the Secretary on issues of statutory construction. *Arcadian Corp.*, 17 BNA OSHC 1345, 1352 (OSHRC 1995), *aff'd*, 110 F.3d 1192 (5th Cir. 1997). *Amicus* urges the Commission to adhere to this precedent, and to explain clearly to the various courts of appeals why it

---

[9] *See Montgomery Security Doors & Ornamental Iron, Inc.*, 18 BNA OSHC 2145, 2147-48 n.7 (OSHRC 2000) (sep. opinion of Comm. Weisberg):

> [I]n cases involving requests for relief under Rule 60(b) from a final order based on a failure to file a timely notice of contest, it would be extremely rare to find that the Secretary suffered prejudice (was deprived of a fair opportunity to present her case) as a result of a late filing. Similarly, it is unlikely that a late filing in an individual case would have an adverse impact on or disrupt Commission judicial proceedings. Also, it would be hard to imagine a late filing case where an employer willfully acts in bad faith, such as where a company delays filing a notice of contest in order to somehow gain an advantage. Thus, in almost all 60(b) late filing cases before the Commission, it is a given that there is a lack of prejudice to the Secretary or to the interests of efficient judicial administration, combined with a lack of bad faith by the employer.

does not defer to the Secretary on such questions. Without a clear, forceful statement from the Commission, it is likely that the courts of appeals will continue to fail to closely analyze whether *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144 (1991), is even apposite to questions of statutory construction. They will, by applying *CF&I Steel* to such questions, implicitly force the Commission to defer to the Secretary on questions of statutory construction.

The core reason why *CF&I Steel* should not be extended to this question is indisputable congressional intent. Applying *CF&I Steel* (or otherwise deferring to the Secretary) on questions of statutory construction would have the ironic effect of making the Commission even more subservient than the bodies that Congress in 1970 rejected as insufficiently independent. These bodies were departmental or agency appeals boards, *i.e.,* boards established by Cabinet agencies or independent agencies (such as the Federal Trade Commission) to adjudicate cases brought by their enforcement bureaus. For example, the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 801 *et seq.* (1976), gave all administrative functions to the Department of the Interior. That department established an enforcement arm, the Mining Enforcement Safety Administration (MESA), and an adjudication arm, the Interior Board of Mine Operation Appeals (IBMA). The IBMA reviewed questions of law *de novo,* without deference to MESA,[10] and its views were given deference by courts.[11] Such departmental appeals boards were then the rule.

---

[10] *See, e.g., Eastern Associated Coal Corp.*, 7 IBMA 133, 1976-77 CCH OSHD ¶ 21,373 (1976) *(en banc);* 1 *Coal Law & Regulation,* ¶ 1.04[9][b][iii], p. 1-49 (T. Biddle ed.

But Congress rejected this scheme for the OSH Act. It established the Commission precisely because it was dissatisfied with and suspicious of the independence of such internal appeals boards. The passage of the Act was endangered by a dispute in Congress over precisely this point.[12] The President likewise threatened to veto any bill that placed all administrative powers in one agency. American Bar Association, *Occupational Safety and Health Law* at 42. To save the Act, Senator Javits proposed a compromise – the establishment of an independent adjudicator. In urging that compromise, he assured the Senate that it would establish "an autonomous, independent commission which, ***without regard to the Secretary,*** can find for or against him on the basis of individual complaints."[13] This remark appears to be the only piece of legislative history that directly addresses the deference issue.

1990) ("Of course, the Board could independently decide questions of law."). MESA was later transferred to the Labor Department and became MSHA after the Federal Mine Safety and Health Act of 1977 was passed; the IBMA's functions were transferred to the newly-created Federal Mine Safety and Health Review Commission.

[11] *Zeigler Coal Co. v. Kleppe,* 536 F.2d 398, 409 (D.C. Cir. 1976) (IBMA's view "must be given some significant weight").

[12] S. Rep. No. 1282, 91st Cong., 2d Sess. 55 (1970), *reprinted in Leg. Hist.* at 141, 194 (debate "so bitter as to jeopardize seriously the prospects for enactment. . . ."). *See also* the pointed remarks by Senators Dominick and Smith appended to the Senate Report at 61-64, *Leg. Hist.* at 200-03.

[13] *Leg. Hist.* at 463 (emphasis added). On the strength of that assurance, Senator Holland immediately declared his support, stating that "that kind of independent enforcement is required ...." *Id.* at 463; *see also id.* at 193-94, 200-03, 380-94, 479; and Judson MacLaury, *The Job Safety Law of 1970: Its Passage Was Perilous*, Monthly Lab. Rev. 22-23 (March 1981).

The Secretary's position on deference is flatly inconsistent with Senator Javits's statement. The Commission cannot both decide cases "without regard" for the position of the Secretary and give the Secretary's reasonable interpretation controlling regard. Counsel for the *amicus* is not aware of any case in which the Secretary has denied that this statement by Senator Javits is inconsistent with her position.[14]

Although Senator Javits's statement was noted in one *amicus* brief to the Supreme Court,[15] the employer's brief in *CF&I Steel* failed to quote or cite it.[16] Apparently as a result, the Court did not discuss it or note it. Respect for undisputed congressional intent would require that it be given as much effect as possible. Thus, unless the Secretary can in a brief or oral argument reconcile Senator Javits's statement with her position on deference, or unless there are compelling indications in *CF&I Steel* that it necessarily applies to statutory questions, *CF&I Steel* should not be extended any further than its precise holding.

The *CF&I Steel* opinion has no such compelling indications. First, the Court's actual holding is confined to interpretation of the Secretary's own standards; the Court did not address deference to the Secretary's statutory constructions. Second, the essential premises underlying the reasoning of *CF&I Steel* — that the Secretary's power to

---

[14] *Amicus* respectfully suggests that questions insistently posed to the Secretary during any oral argument about the consistency of her position with this statement by Senator Javits would likely yield an illuminating response.

[15] Brief of Am. Iron and Steel Institute at 4, available on Lexis at 1989 U.S. Briefs 1541.

[16] The Commission should take official notice that CF&I Steel was then in bankruptcy, and was represented by a sole practitioner that had not previously litigated cases before the Commission.

construe standards is derivative of her power to adopt them, and that the Secretary is in a superior position to construe standards she authored — are inapplicable to construction of the Act. The statement that the Commission has "the type of nonpolicymaking adjudicatory powers typically exercised by a court in the agency-review context," 499 U.S. at 154, is not a compelling contrary indication, for the case law in 1970 did not make clear whether a court was required to give an enforcement agency's view *Chevron*-style[17] deference or mere *Skidmore*-style[18] "weight."[19] Thus, *CF&I Steel* should not be

---

[17] *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

[18] *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

[19] K. Davis, Administrative Law Treatise § 29.16 (2d ed. 1984); *see also, e.g., Pittston Stevedoring Corp. v. Dellaventura,* 544 F.2d 35, 49 (2d Cir. 1976) (per Friendly, J.) ("there are two lines of Supreme Court decisions on this subject which are analytically in conflict"), *aff'd sub nom. Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249 (1977); Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes,* 73 Tex. L. Rev. 83, 93 (1994) (pre-*Chevron* doctrine "schizophrenic").

One line of cases required a court to adopt the interpretation it thought correct after giving the agency's interpretation "weight," the degree of which would vary with the technical complexity of the issue, the agency's expertise, etc. For example, in *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944), the Court stated that while the agency's interpretations are "not controlling," they "do constitute a body of experience and informed judgment to which courts ... may properly resort for guidance." "The weight" given to the agency's interpretation, the Court stated "will depend upon the thoroughness evident in its consideration, ... [and] its consistency with earlier and later pronouncements...." *See generally* K. Davis, *Administrative Law Treatise* § 3.1, p. 108 (3d ed. 1994).

The other line of cases held that "the reviewing court's function is limited" and that it must accept an agency interpretation with "a reasonable basis in law" (*e.g., NLRB v. Hearst Publications, Inc.,* 322 U.S. 111, 130-31 (1944)) or "unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969). Inasmuch as the criterion for interpretation under this second line of cases is the reasonableness of the agency's interpretation, not its correctness in a court's eyes, this line of cases appeared to bar courts from interpreting statutes *de novo.*

extended beyond the precise rule it established – that the Secretary receives deference with respect to her interpretation of her own standards.

Indeed, this is precisely the kind of case in which the Commission should insist on its independence; the question here is a purely statutory one involving procedural fairness and the Commission's adjudicatory authority to grant procedural relief, and it requires only legal construction. *See Donovan v. OCAW,* 718 F.2d 1341, 1347, 1349 (5th Cir. 1983) ("the administration of [adjudication] … falls within the Commission's bailiwick"); *Smith Steel Casting Co. v. Donovan,* 725 F.2d 1032, 1035-36 (5th Cir. 1984) (deferring to OSHRC's policy determination to adopt exclusionary rule); *Reich v. Arcadian Corp.,* 110 F.3d 1192, 1199 (5th Cir. 1997) (Commission has primacy over penalty questions). Construction of section 10 and related provisions is so intimately tied up with the Commission's power to adjudicate fairly that the Commission could not independently adjudicate unless it were able to independently construe those provisions. To defer to the Secretary on how to construe statutory provisions bearing solely on the Commission's adjudicatory authority would as a practical matter defeat Congress's purpose of establishing an impartial adjudicator not influenced by the zeal of a prosecutor.

This is not to say that, even on matters of statutory construction, the Commission would be warranted in wholly ignoring the Secretary's view. If the Secretary presents evidence of, or the Commission takes official notice of, experience by OSHA or technical considerations that support its interpretation, it would be consistent with Senator Javits's

statement to, on *de novo* examination, give that showing as much weight as the showing intrinsically deserves.

That is precisely what is required here for another reason. Inasmuch as the Secretary's view has been expressed only as a position in litigation, it does not deserve deference under *CF&I Steel* or *Chevron* but is entitled only to as much as weight as it intrinsically deserves. *United States v. Mead Corp.*, 533 U.S. 218 (2001). The Secretary's position here rests not on enforcement experiences or technical considerations, but on legal argument, to which the Commission need not intrinsically assign more weight than it might assign to the employer's or the *amicus*'s argument.

IV. CONCLUSION

The Commission should adhere to its view that it has the authority to grant relief under Federal Rule 60(b) from section 10(a) final orders.

Of counsel:
Karen Harned, Esq.
Executive Director
NFIB Legal Foundation
Suite 200, 1201 F Street, N.W.
Washington, D.C. 20004
202-314-2061

Respectfully submitted,

Arthur G. Sapper, Esq.
McDERMOTT, WILL & EMERY
600 13th Street, N.W.
Washington, DC 20005-3096
202-756-8246

COUNSEL FOR *AMICUS CURIAE*

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____, 2002, the foregoing was served by first class mail upon the following:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
U.S. Department of Labor
Room S4004
200 Constitution Avenue, NW
Washington, DC 20210

Eduardo Ferrer Ramirez, Esq.
PO Box 9020485
San Juan, PR 00902-0485

_____
Lauren H. Abrams

APPENDIX O – SUBMITTED FOR THE RECORD, BRIEF OF THE AMICUS CURIAE, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS AND THE KITCHEN CABINET MANUFACTURERS ASSOCIATION, IN SUPPORT OF RUSSELL P. LE FROIS BUILDERS, INC., FOR AFFIRMANCE, 00-4057, IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, JULY 21, 2000

00-4057

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALEXIS M. HERMAN, SECRETARY OF LABOR,

Petitioner,

v.

RUSSELL P. LE FROIS BUILDERS, INC.
and
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
Respondents.

ON PETITION FOR REVIEW OF A FINAL ORDER OF THE
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

BRIEF OF THE *AMICI CURIAE*, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS and THE KITCHEN CABINET MANUFACTURERS ASSOCIATION, IN SUPPORT OF RUSSELL P. LE FROIS BUILDERS, INC., FOR AFFIRMANCE

Of counsel:
Thomas Sullivan, Esq.
Executive Director
NFIB Legal Foundation
Suite 200, 1201 F Street, N.W.
Washington, D.C.

C. Richard Titus
Executive Vice President
Kitchen Cabinet Manufacturers Association
1899 Preston White Drive
Reston, VA 20191

Arthur G. Sapper, Esq.
McDERMOTT, WILL & EMERY
600 13th Street, N.W.
Washington, D.C. 20005-3096
202-756-8246

COUNSEL FOR *AMICI CURIAE*

Dated: July 21, 2000

CORPORATE DISCLOSURE STATEMENT

The *amicus curiae*, the National Federation of Independent Business, is a non-profit corporation, has no parent corporation or subsidiaries, and has not issued stock to the public.

The *amicus curiae*, the Kitchen Cabinet Manufacturers Association (KCMA), is a non-profit corporation, has no parent corporation or subsidiaries, and has not issued stock to the public.

_____

Arthur G. Sapper DATE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules & Regulations

Miscellaneous

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 00-4057

ALEXIS M. HERMAN, SECRETARY OF LABOR,
Petitioner,
v.
RUSSELL P. LE FROIS BUILDERS, INC.
and
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
Respondents.

**BRIEF OF THE *AMICI CURIAE*,
THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS and
THE KITCHEN CABINET MANUFACTURERS ASSOCIATION**

I. IDENTITY AND INTEREST OF THE *AMICI CURIAE*

A. Identity of The *Amici Curiae.*

The *amicus curiae*, National Federation of Independent Business ("NFIB"), a nonprofit corporation, is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all 50 states. The approximately 600,000 members of NFIB own a wide variety of America's independent businesses, from mom-and-pop grocery stores to bowling alleys to construction firms. In 2000, NFIB established a Legal Foundation to protect the rights of America's small business owners by, among other things, filing in precedent-setting cases *amicus* briefs stating the views of the small business

community.

The *amicus curiae*, the Kitchen Cabinet Manufacturers Association (KCMA), represents over 350 companies who manufacture kitchen cabinets, bath vanities, countertops and other decorative laminate products, or supply goods and services to the industry. Typically, companies in the industry are small. Forty-four percent of KCMA's 162 manufacturing members report sales under $5 million and 63 percent report sales under $10 million. In addition, there are thousands of cabinet and woodworking operations with fewer than 20 workers who are not members of KCMA.

B. Interest of The *Amici Curiae* In This Case.

The *amici* are interested in this case because an adverse decision will as a practical matter close the door to relief from OSHA citations that were not timely contested. Closing that door would be particularly harmful to small businesses, whose lack of resources and unfamiliarity with OSHA often lead them to make procedural missteps in dealing with OSHA. Small employers have the greatest difficulty shouldering the monetary penalties, abatement requirements, and the other collateral consequences of citations that were not timely contested. As this case shows, even the cost of litigation is a great burden to them.

The very great majority of small employers who fail to timely or properly contest citations will not qualify for relief under FED.R.CIV.P. 60. Nevertheless, a

few will. A few will be able to show a legally excusable mistake or inadvertence under Rule 60(b)(1), as happened here. A few will be able to point to final orders in which are embedded prospective requirements so clearly inequitable as to warrant relief under Rule 60(b)(5). A few will be able to point to important clerical errors in citations that must be corrected under Rule 60(a). It is to preserve the rights of those employers that this brief is filed.

C. Source of the *Amici Curiae*'s Authority To File This Brief

This brief is filed under the consent clause of FED.R.APP.P. 29(a). The parties' consent letters are set out in Attachment A, after the statutory appendix.

II. STATEMENT OF JURISDICTION

Pursuant to FED.R.APP.P. 28(b), the *amici curiae* agrees with OSHA's statement of jurisdiction, except that (1) This Court has jurisdiction under 29 U.S.C. § 660(b), not § 660(a); and (2) The Commission had subject matter jurisdiction under 29 U.S.C. § 659(c), § 10(c) of the Occupational Safety and Health Act, 29 U.S.C. § 651-678, because a notice of contest of a citation was forwarded to the Commission for adjudication.

III. COUNTER-STATEMENT OF THE ISSUE

Whether the Commission may grant relief under FED.R.CIV.P. 60 from a "final order of the Commission" resulting from an employer's failure to contest an OSHA citation within the fifteen working day statutory contest period.

IV. COUNTER-STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. *General Statutory Provisions and Background*

The Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the OSH Act") authorizes OSHA to issue citations and propose penalties against employers. § 9(a) of the OSH Act, 29 U.S.C. § 658(a).

The OSH Act also established the Occupational Safety and Health Review Commission ("OSHRC" or "Commission") "for carrying out adjudicatory functions under the Act." § 2(b)(3), § 651(b)(3). The Commission was to be "an autonomous, independent" body that would decide cases "without regard to the Secretary."[1] The Commission was to act as a "quasi-judicial body,"[2] and was to exercise "adjudicatory powers typically exercised by a court in the agency-review context." *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144, 145 (1991). Thus, § 12(g), § 661(g), states: "Unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure."[3]

---

[1] SENATE SUBCOMMITTEE ON LABOR, LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, 92D CONG., 1ST SESS. 463 (Comm. Print. 1971) (remarks of Senator Javits, author of compromise that created the Commission).

[2] *Id.* at 471 (floor remarks of Mr. Javits); *see also id.* at 476 (remarks of Senator Holland).

[3] *See also* 29 C.F.R. § 2200.2(b) (Federal Rules apply unless Commission rule governs a point). The Commission has not adopted a different rule governing any issue in this case.

If an employer contests a citation, it is entitled to a hearing before the Commission. § 10(c), § 659(c). The Commission may "affirm..., modify.., or vacat[e] the Secretary's citation or proposed penalty, or direct... other appropriate relief." *Id.*

If the employer does not contest the citation, then it "shall be deemed a final order of the Commission and not subject to review by any court or agency." § 10(a), § 659(a). The consequences of a failure to contest include:

- An implied order to abate the cited condition by the abatement date. Failure to timely abate exposes the employer to penalties of up to $7,000 a day. §§ 10(b) and 17(d), §§ 659(b) and 666(d). The Commission[4] may later extend that time in limited circumstances. § 10(c), § 659(c). See p.8 below.

- Characterization of the violation as "repeated," "willful," "serious" or "other than serious."

- An obligation to pay the proposed penalty. Penalties can range from $0 to $7000 for each "other than serious" violation, $1 to $7000 for each "serious" violation), from $0 to $70,000 for each "repeated" violation, and $5000 to $70,000 for each "willful" violation. § 17(a)-(c), § 666(a)-(c). There is no cap on the penalties that can result from an inspection, and total penalties of $100,000 are not uncommon. See the OSHA press releases at <http://www.osha.gov/media/oshnews/apr00/index.html>.

---

[4] The reference to "the Secretary" instead of "the Commission" in this provision is a typographical error. *H.K. Porter Co.,* 1 BNA OSHC 1600 (OSHRC 1974).

- Inclusion of the citation on the employer's "history of previous violations," which raises all subsequent penalties. § 17(j), § 666(j). OSHA maintains that history on an Internet database at <http://www.osha.gov/cgi-bin/est/est1>.

- Exposure to subsequent "repeated" or "willful" violations under § 17(a), § 666(a), even if the subsequent violation occurred at a different workplace or years later. *See Potlatch Corp.*, 7 BNA OSHC 1061, 1064 (OSHRC 1979) (no time or location limit on "repeated" violations).

- Upon request to a court clerk, the issuance "forthwith" of a court order, enforceable by contempt and other penalties, to comply with the Commission's final order. § 11(b), § 660(b).

- Disqualification in some jurisdictions from bidding on public construction contracts. *E.g.*, CAL. GOV'T CODE § 14661(d)(2)(B)(vi)(II). See also proposed federal blacklisting regulations at 65 Fed. Reg. 40830 (2000).

- Collateral use of the final order against the employer in civil litigation. *E.g.*, *Felden v. Ashland Chemical Co.*, 631 N.E.2d 689 (Ohio App. 1993) (admitting OSHA citation); *Industrial Tile v. Stewart,* 388 So.2d 171 (Al. 1980) (same).

The ramifications of a citation are often not obvious. An employer unfamiliar with OSHA's complex standards might easily fail to realize that a citation's implied abatement order requires that parts of a factory be rebuilt or a construction method be abandoned. An employer might not realize that a citation requires that a machine be modified to meet specifications in an inapplicable standard. *See, e.g.,*

Losli, Inc., 1 BNA OSHC 1734 (OSHRC 1974) (uncontested citation required metal shear to be modified to meet inapplicable specifications for power presses), discussed on page 20 below.

There are various ways that employers can fail to timely contest an OSHA citation, aside from making a clerical error. An employer whose notice of contest mentions only the "penalty" rather than the "citation" has contested only the penalty amount – and not the citation – unless the employer shows that he intended during the contest period to contest both; afterthoughts will not suffice.[5] A letter that contests only an "abatement period" is not considered a notice of contest at all, but as a petition for modification of the abatement period under § 10(c), which shifts the burden of proof to the employer.[6] A notice of contest sent to the wrong

---

[5] *Marshall v. Haugen,* 586 F.2d 1263, 1266 (8th Cir. 1978); *see Monarch Water Systems, Inc.*, 12 BNA OSHC 1897, 1900 (OSHRC 1986); and *A.R. Butler Constr. Co.*, 14 BNA OSHC 2140 (OSHRC J. 1991). OSHA has consistently refused to adopt the suggestion of the Fifth and Eight Circuits and the Commission that this problem be solved by including a contest check sheet with a citation, as its sister agency, the Mine Safety and Health Administration has done. *Brennan v. OSHRC (Bill Echols Trucking Co.)*, 487 F.2d 230, 234 n.7 (5th Cir. 1973); *Haugan,* 586 F.2d at 1266 n.2.

[6] *Gilbert Manufacturing Co.*, 7 BNA OSHC 1611 (OSHRC 1979). *Compare* § 10(c), § 659(c), *and* 29 C.F.R. § 2200.37(d)(3) (employer has burden of proof) *with* 5 U.S.C. § 556(d) (proponent of order has burden of proof).

agency – to OSHRC rather than OSHA – is ineffective.[7] An oral contest is ineffective.[8]

2. *Case Law.*

The Commission in one of its earliest cases held that it could not apply Rule 60 because it lacked "subject matter jurisdiction" if a notice of contest were not timely filed. *Plessy, Inc.,* 2 BNA OSHC 1302, 1306-07 (OSHRC 1974). (There, OSHA had moved to vacate an uncontested citation item because "further investigation" indicated that "there was, in fact, no violation ....")

In *J.I. Haas Co. v. OSHRC,* 648 F.2d 190, 193 (3d Cir. 1981), the Third Circuit disagreed, and held that Rule 60 may be applied. This caused the Commission to re-examine the issue, and in *Branciforte Builders Inc.,* 9 BNA OSHC 2113 (OSHRC 1981), it agreed with *Haas.* Other tribunals have also followed *Haas. McLaughlin v. Keefe Earth Boring Co.,* 702 F. Supp. 705 (N.D. Ill. 1989) (penalty collection stayed until Commission acts on Rule 60 motion); *Alman Constr. Co. v. Tennessee Department of Labor*, 1992 WL 151434, 1992 CCH OSHD ¶ 29,763 (Tenn. App. 1992) (applying TENN.R.CIV.P. 60(b) to final orders under Tennessee Occupational Safety and Health Act of 1972, TENN.

---

[7] *See Fitchburg Foundry,* 7 BNA OSHC 1516 (OSHRC 1979) (alternative holding; § 10(a) requires notice of contest to be sent to "the Secretary").

[8] *E.g., Craig Mechanical Inc.,* 16 BNA OSHC 1763 (OSHRC 1994), *aff'd without opinion,* 55 F.3d 633 (5th Cir. 1995).

CODE ANN. §§ 50-3-101 *et seq.);* and *Jim Walter Resources, Inc.,* 15 FMSHRC 782, 786-89, 1993 CCH OSHD ¶ 30,081 (FMSHRC 1993) (Federal Mine Safety and Health Review Commission, applying FED.R.CIV.P. 60(b) under Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.,* to "final order of the Commission . . . not subject to review by any court or agency"). No court has disagreed with these decisions.

In addition, two other courts have held or suggested, without mentioning FED.R.CIV.P. 60(b), that § 10(a) of the OSH Act is not an "impenetrable barrier." In *Capital City Excavating. Co. v. Donovan,* 679 F.2d 105 (6th Cir. 1982), the Sixth Circuit rejected OSHA's argument that the contest period "is jurisdictional in the sense that the time cannot be extended under any circumstances," but declined to apply Rule 60 because no Rule 60 motion had been made before the Commission. In *Atlantic Marine, Inc. v. OSHRC,* 524 F.2d 476 (5th Cir. 1975), the court remanded for fact finding on whether a failure to contest had been caused by OSHA's deception or failure to follow proper procedures; the court wanted the facts clarified before it decided the "important issue" of whether § 10(a) is an "impenetrable barrier." Rule 60(b) was not mentioned.

The Sixth Circuit in *Marshall v. Monroe & Sons, Inc.,* 615 F.2d 1156 (6th Cir. 1980), held that Rule 60 applies to administrative law judges' decisions that

became final orders under § 12(j), § 661(j).[9] (It disagreed in this respect with *Brennan v. OSHRC (S.J. Otinger, Jr., Constr. Co.),* 502 F.2d 30 (5th Cir. 1974).) The Sixth Circuit also admonished the Commission to make a "careful determination" as to whether "mistake, inadvertence, surprise, or excusable neglect" under FED.R.CIV.P. 60(b)(1) has been shown. 615 F.2d at 1162.

The Commission has followed this admonition, and rarely grants Rule 60(b) motions. See AMERICAN BAR ASSOCIATION, OCCUPATIONAL SAFETY AND HEALTH LAW, 1999 CUMULATIVE SUPPLEMENT 168 & n. 12 (R. Rabinowitz, ed.,1999) (lengthy footnote describing facts of many cases in which relief denied). Rule 60(b) motions are made about thirty times a year (out of about 1650 cases per year) and comprise about 1.8 percent of the Commission's case load.[10] Of these, nearly all are denied. This case, *P&A Constr. Co.,* 10 BNA OSHC 1185 (OSHRC 1981) (attorney dictated contest letter and ordered it filed; secretary erroneously assured attorney that letter filed), and *Northwest Conduit Corp.*, 18 BNA OSHC 1948 (OSHRC 1999), are among the few in which relief has been granted.

B. Nature of Case and Course of Proceedings

Unless otherwise stated, the following statement is taken entirely from the decisions of the Commission and its judge.

---

[9] This provision states that, unless directed for review, a judge's decision "become[s] the final order of the Commission within thirty days" after issuance.

On or about May 14, 1998, the Occupational Safety and Health Administration ("OSHA") of the U.S. Department of Labor mailed an envelope containing a citation to Russell P. Le Frois Builders, Inc. ("Le Frois"). The citation alleged that Le Frois had committed five "serious" violations of the construction standards in 29 C.F.R. Part 1926. Penalties totaling $11,265 were proposed. The citation also stated that LeFrois had abated each alleged violation immediately[11] or while the inspection was still underway.[12] Record Vol. 3, No. 1.

The citation was mailed to the company's post office box by certified mail. A secretary for Le Frois received and signed for it on May 15, 1998. She put it among the day's mail and placed it in her car before returning to the office. The envelope evidently fell beneath the passenger seat of her car when she deposited the day's mail there or when she picked it up the day's mail to bring it to the office.

On the weekend of July 4th, the secretary or her husband discovered the certified mail envelope under the front seat of the secretary's car. On Monday, July 6, the secretary gave the certified mail envelope to company president Richard

---

[10] *Craig Mechanical,* 16 BNA OSHC at 1765 n. 4.

[11] Citation Item 1 uses the term "quick fix," which signifies that abatement was "immediate." OSHA Instruction CPL 2.112, *Nationwide Quick-Fix Program* (August 2, 1996), *available at* <http://www.osha-slc.gov/OshDoc/Directive_data/CPL_2_112.html>.

[12] Citation Items 2-5 use the term "corrected during inspection," which also indicates immediate abatement. See "Abatement Verification," 62 Fed. Reg. 15324, 15326 col. 3 (1997).

Le Frois, who promptly contacted OSHA. Although the fifteen working-day contest period had expired after June 8, the director of OSHA's area office advised the company to file a notice of contest, and the company did so on July 8.

The company had used the same mail pickup system for 18 years and had not previously had a problem with it. After this incident, however, the company instituted a new procedure (a mail bag) to prevent a recurrence.

The late notice of contest was forwarded to the Commission. OSHA moved before an administrative law judge of the Commission to dismiss the notice of contest as untimely. Le Frois asked the Judge for "a chance to tell our side and to defend ourselves." The Judge applied FED.R.CIV.P. 60(b) but denied relief on the ground that the company had failed to show "inadvertence ... or excusable neglect" within the meaning of Clause (1) of that rule.

The Commission reversed. First, it stated that, in accordance with its precedent,[13] it would apply FED.R.CIV.P. 60. Second, it found that the facts establish "inadvertence or excusable neglect" within the meaning of FED.R.CIV.P. 60(b)(1), and it remanded for further proceedings. (OSHA seeks judicial review of only the first of these holdings. OSHA does not dispute that relief is otherwise proper under FED.R.CIV.P. 60. OSHA.Br. 14 n.5.)

---

[13] *Northwest Conduit Corp.*, 18 BNA OSHC 1948 (OSHRC 1999); *Jackson Assoc. of Nassau,* 16 BNA OSHC 1261 (OSHRC 1993).

On remand, OSHA declined to file a complaint and the Judge vacated the citation. OSHA sought review, no Commissioner granted it, and this appeal followed.

V. ARGUMENT

A. Standard of Review

1. This court may not set aside a Commission order unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *New York State Electric & Gas Corp. v. Secretary of Labor,* 88 F.3d 98 (2d Cir. 1996) (*"NYSE&G"*).

2. On issues pertaining to the Commission's construction of the OSH Act – as opposed to OSHA's interpretation of its own standards – this Court defers to the Commission. *D.A. Collins Constr. Co. v. Secretary of Labor,* 117 F.3d 691, 694 (2d Cir. 1997) (looking to correctness of Commission's view on statutory construction issue); *NYSE&G,* 88 F.3d at 104, 108 ("Commission might select some other rule [because] ... its experience and expertise in the occupational safety field place it in the best position to formulate a workable rule ..."); *Donovan v. Red Star Marine Services, Inc.,* 739 F.2d 774, 776 (2d Cir. 1984) (according deference on statutory issue to Commission), *cert. denied,* 470 U.S. 1003 (1985). Thus, as we show in detail in Part C below (beginning on p. 25), OSHA's statement of the standard of review is incorrect and contrary to the precedent of

this Court. Deference on this issue, which goes to procedural fairness in adjudication, is due to the impartial Commission, not to OSHA, which is here proceeding as a prosecutor.

3. When deferring to the Commission, the appropriate degree of deference is that stated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), *i.e.*, a Commission interpretation must be upheld unless it is contrary to clear statutory language or is unreasonable. The *Chevron* rule applies to the Commission because it states its interpretations in formal adjudications. *Christensen v. Harris County,* 120 S.Ct. 1655, 1663 (2000).

B. The Commission May Apply Fed.R.Civ.P. 60 To "Final Orders of the Commission" Under § 10(a) of the OSH Act.

The Commission correctly held that it may, in the limited circumstances permitted by FED.R.CIV.P. 60, grant relief from an uncontested citation that is deemed a "final order of the Commission" by § 10(a) of the OSH Act, 29 U.S.C. 659(a). It did not err in following the holding to that effect of the Third Circuit in *J.I. Haas Co. v. OSHRC,* 648 F.2d 190, 193 (3d Cir. 1981).

OSHA does not dispute that the Commission has some implied authority to re-open uncontested citations. OSHA.Br. 16. As we show immediately below, this concession is correct. OSHA instead disputes only whether, in exercising that authority, the Commission may apply FED.R.CIV.P. 60 under § 12(g) of the OSH Act, or "equitable tolling." We show in Part V.B.2 below that the appropriate test

for determining whether re-opening is proper is that in FED.R.CIV.P. 60, not the amorphous and poorly-fitting doctrine of equitable tolling.

1. *Section 10(a) Does Not Create An Impenetrable Barrier To Re-Opening A Final Order "of the Commission."*

OSHA concedes that, despite § 10(a)'s phrase "not subject to review by any court or agency," the Commission has some implied authority to re-open uncontested citations. See OSHA.Br. 16. OSHA thus concedes what is obvious to every tribunal to have examined the question: It is inconceivable and absurd that Congress would have left employers with no recourse whatsoever from uncontested citations. It is inconceivable and absurd that Congress would have established the Commission as a "quasi-judicial" tribunal (p.4 & n.2 above), and even made FED.R.CIV.P. 60(b) applicable to its proceedings (§ 12(g), § 661(g)), without permitting it some power to re-open final orders.

The matter should have been clear without any such concession, for § 10(a) itself makes clear that the Commission has some residual authority over uncontested citations. Section 10(a) states that an uncontested citation is deemed not just a "final order" but "a final order *of the Commission.*" (Emphasis added.) As the Third Circuit observed, the words "of the Commission" make clear that, even if the Commission did not itself adjudicate the citation, the Commission retains some residual jurisdiction over the resulting final order. *Haas*, 648 F.2d at

193.[14] OSHA's argument, by contrast, ignores the phrase and gives it no meaning. See OSHA.Br. 24-26 (denies "residual jurisdiction" but never discusses phrase).

The Commission's authority to re-open final orders is also indicated by § 12(g), § 661(g), which expressly authorizes the Commission to apply the Federal Rules of Civil Procedure, including its Rule 60(b). As the Sixth Circuit has pointed out, this is therefore not a case in which an agency is claiming an inherent right to exercise formerly equitable powers of relief from final orders. "In the [OSH] Act ... Congress specified that the Federal Rules of Civil Procedure could be applied by OSHRC. The power claimed by OSHRC, therefore, has a solid foundation in the language of the statute." *Marshall v. Monroe & Sons, Inc.*, 615 F.2d 1156, 1159 (6th Cir. 1980).

OSHA argues (Br. 22-23) that reliance on the Federal Rules proves too much for, even though Rules 69 and 70 speak of "execution" of money judgments, contempt and abatement enforcement orders, the Commission could not issue such writs and orders. The argument compares apples and oranges. The Commission

---

[14] The Third Circuit stated (648 F.2d at 193):

> The Secretary claims that ... [because] here there was no [Commission] proceeding, ... rule 60 does not apply. His attorney contended during oral argument that since the notice of contest was not timely filed, the Commission never had jurisdiction in the first place. We disagree. Section 10(a) ... states that uncontested citations become final orders of the Commission. Thus, the Commission must have had jurisdiction at some point.

cannot issue such writs and orders for other reasons. Section 17(l), § 666(l), affirmatively places venue for orders of execution of penalty judgments in the U.S. district courts. Sections 11(b) and 13, §§ 660(b) and 662, place the authority to issue writs in aid of abatement in the federal district and appellate courts respectively. OSHA's argument thus establishes only the inapposite proposition that the Commission may not employ the Federal Rules so as to usurp specific venue allocations elsewhere in the Act.

2. *Fed.R.Civ.P. 60 Rather Than "Equitable Tolling" Is The Appropriate Rule To Apply Here.*

OSHA argues, however, that, in exercising its conceded authority to re-open final orders, the Commission may not apply § 12(g) and FED.R.CIV.P. 60, but must instead apply the amorphous concept of "equitable tolling," which courts read into otherwise silent statutes.[15] This argument has no merit.

First, while the Commission's application of FED.R.CIV.P. 60 is firmly grounded in the language of the OSH Act, equitable tolling is not. An approach with support in the statutory language is preferred over a one that is at best implicit.[16] Moreover, Rule 60's terms fit those of § 10(a). Rule 60(b) governs relief from a "final judgment, order, or proceeding" while § 10(a) speaks of "a

---

[15] *E.g., Irwin v. Department of Veterans Affairs,* 498 U.S. 89 (1990).

[16] *See Greene v. United States,* 79 F.3d 1348, 1355 (2d Cir. 1996) (more specific statute controls over more general statute).

final order." Rule 60(b) applies to a "final judgment, order *or proceeding*" (emphasis added), thus indicating that the rule applies even when a "final judgment [or] order" has not resulted from a "proceeding" – which is precisely what happens under § 10(a). The rule itself thus refutes OSHA's argument (Br. 23) that Rule 60 is inapt because "an uncontested citation is not a judgment rendered by the Commission in any action before it."

Second, equitable tolling fits this situation awkwardly, if at all. While FED.R.CIV.P. 60 was specifically written to govern "final orders," equitable tolling has a different function – to extend statutes of limitation so that claims may be filed and evolve into final judgments or orders after litigation. *E.g., Polanco v. Drug Enforcement Administration,* 158 F.3d 647, 655 (2d Cir. 1998). But § 10(a) is not a statute of limitations; it does not set a deadline for the filing of a claim, but for opposing one. It is thus akin to FED.R.CIV.P. 12(a)(1), which imposes a twenty-day deadline for filing an answer to a complaint, which sets no limitation period. (It is undoubtedly no coincidence that the fifteen working day period in § 10(a) for contesting a citation nearly always equals the twenty calendar day period in Rule 12(a)(1) for answering a complaint.) The actual statute of limitations in the OSH Act is that in § 9(c), § 658(c), which requires that citations be issued within six months.

OSHA nevertheless tries to shoe-horn § 10(a) into a statute of limitations by representing that the Commission in *Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1949 (OSHRC 1999), held that § 10(a) contest period is "appropriately viewed as being 'in the nature of a statute of limitations.'" OSHA.Br. 18. The Commission said no such thing. It merely summarized OSHA's *argument* to that effect.

Equitable tolling is a poor fit for other reasons. It presupposes that no claim has yet been filed, and that there is no final judgment or order to re-open or to relieve a party from. That is undoubtedly why *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), did not discuss FED.R.CIV.P. 60 – for there was no "final judgment" to apply it to. That is not the problem here. Unlike Rule 60(b), which sets out criteria to determine whether to relieve a default judgment, equitable tolling asks instead whether a lawsuit may proceed. These different functions give the two doctrines widely differing contours and criteria.

Third, equitable tolling would grant employers an avenue of relief so narrow as to be illusory, and would deny relief even when there is no legitimate reason for denying it. OSHA (Br. 16) states that equitable tolling is not available unless the "claimant" has –

- "Actively pursued" his remedies by "filing a defective pleading during the statutory period," or

- "[B]een induced or tricked by his adversary's misconduct into allowing the filing deadline to pass," or
- Has been "prevented in some extraordinary way from exercising his rights."

Applying this doctrine to notices of contest would lead to irrational results. It would deprive of a hearing employers, such as Le Frois, who for perfectly excusable reasons failed to timely contest citations. It is telling that OSHA has stated no reason why *this* employer in *this* case should not get a hearing. OSHA's position would also perpetuate the indefensible. For example, in *Losli, Inc.*, 1 BNA OSHC 1734 (OSHRC 1974), a failure to contest a citation made the company "unique among employers"[17] – it alone had to modify its metal shear to meet specifications in a standard that regulates mechanical power presses, a nonsensical result. An employer in such a position should be permitted, even if he were not excusably neglectful, to affirmatively shoulder the heavy burden imposed by Rule 60(b)(5) and show that it is "no longer equitable that the judgment should have prospective application." But under OSHA's view, this employer could get no relief and would forever be in jeopardy of being driven out of business by failure-to-abate penalties of up to $7000 per day. That is absurd. Similarly, there

[17] 1 BNA OSHC at 1735 (dissenting opinion).

is no reason why the Commission should not be able to correct severely adverse clerical errors under FED.R.CIV.P. 60(a).

OSHA also argues (Br. 28) that § 10(a) "expresses a greater interest in finality than is expressed in the Federal Rules of Civil and Appellate Procedure," citing FED.R.CIV.P. 55 and 59, and FED.R.APP.P. 4. The argument is inapposite. It does not mention FED.R.CIV.P. 60, which is the apt rule and which does indeed express a strong interest in finality. The rules OSHA mentions do not govern final judgments or orders.

OSHA also argues (Br. 28-29) that greater finality should be assigned to its citations because a citation is "an official OSHA determination that a violation has occurred" and is disinterestedly issued, while a civil complaint necessarily reflects a private party's personal bias. This argument flies in the face of the OSH Act, its legislative history, and reality. First, § 9(a), § 658(a), permits OSHA to issue a citation if it merely "believes" that a violation has occurred; it need not make anything so formal as a "determination." Second, Congress so distrusted OSHA's objectivity that it established the impartial Commission to review citations.[18] Third, OSHA citations are notorious for their inaccuracy. Even when important

---

[18] *E.g.*, AMERICAN BAR ASSOCIATION, OCCUPATIONAL SAFETY AND HEALTH LAW 445 (S. Bokat & H. Thompson eds., 1988) (OSHA not thought "impartial" or "objective") ("ABA Treatise"), *citing* Leg. Hist. at 476 (statement of Senator Holland).

citations are intensively reviewed by high Labor Department officials before their issuance,[19] only six percent of litigated "willful" citations are affirmed by the Commission as such, and only four percent of the proposed penalties are assessed.[20] And even in the 1970's, when the Commission was less critical of OSHA citations than now, 27 percent of all citations were vacated, and 42 percent of all proposed penalties were reduced.[21]

OSHA also implies that Rule 60(b) motions will hinder abatement of violations. That is implausible. First, Rule 60(b) motions are made about thirty times a year (out of about 1650 cases per year), comprise no more than about 1.8 percent of the Commission's case load, and are nearly all denied. See p.10 above. Second, Rule 60 states that the mere filing of a motion does not suspend the operation of a final order; an employer would have to file and justify a separate

---

[19] As required in certain cases by OSHA Instruction CPL 2.80, *Handling of Cases To Be Proposed By Violation-By-Violation Penalties* (October 1, 1990), *available at* <http://www.osha-slc.gov/OshDoc/Directive_data/CPL_2_80.html>.

[20] Office of the Inspector General, U.S. DOL, Final Report: *How OSHA Settled and Followed Up On Its Egregious Policy*, pp. 14-15 (March 31, 1992) (Report No. 05-92-0008-10-001).

[21] M. Rothstein, *Judicial Review of Decisions of the Occupational Safety and Health Review Commission – 1973-1978: An Empirical Study,* 56 CHICAGO-KENT L.REV. 607, 613 n.31 (1980). OSHA may respond that a very large percentage of its citations are voluntarily not contested. That is beside the point, for this issue concerns citations that employers *do* wish to contest.

motion to that effect.[22] Third, OSHA will not deny that that, as this case exemplifies (p.11 above), the vast majority of construction violations (and the great majority of all violations) are abated before the inspector leaves the worksite. The number of times that a condition is still unabated, and the employer will find it worthwhile to even try to obtain Rule 60(b) relief, is insignificantly small. Fourth, OSHA would almost never suffer procedural prejudice from the filing of such motions.[23] There is, in sum, no practical reason why Rule 60 should not apply.

---

[22] *See Monroe*, 615 F.2d at 1160; *see also* FED.R.CIV.P. 62(b). OSHA.Br. 19 n.7 states that the Commission in *Jackson,* 16 BNA OSHC at 1263 n.6, stated the opposite. That is flatly untrue; nothing in that footnote even hints at such a view.

[23] *See also Montgomery Security Doors & Ornamental Iron, Inc.,* 18 BNA OSHC 2145, 2147-48 n.7 (OSHRC 2000) (sep. opinion of Comm. Weisberg):

> [I]n cases involving requests for relief under Rule 60(b) from a final order based on a failure to file a timely notice of contest, it would be extremely rare to find that the Secretary suffered prejudice (was deprived of a fair opportunity to present her case) as a result of a late filing. Similarly, it is unlikely that a late filing in an individual case would have an adverse impact on or disrupt Commission judicial proceedings. Also, it would be hard to imagine a late filing case where an employer willfully acts in bad faith, such as where a company delays filing a notice of contest in order to somehow gain an advantage. Thus, in almost all 60(b) late filing cases before the Commission, it is a given that there is a lack of prejudice to the Secretary or to the interests of efficient judicial administration, combined with a lack of bad faith by the employer.

3. *OSHA's Other Arguments Have No Merit.*

Scattered throughout OSHA's brief are various other meritless arguments.

a. OSHA alludes occasionally (OSHA.Br. 5 (statement of case), 26, 30-31) but never flatly relies upon, the provision in § 10(c) of a procedure by which an employer can obtain an extension of an abatement date. The veiled suggestion is that the provision indicates a congressional intent to foreclose other relief. But as the Sixth Circuit stated in *Monroe,* 615 F.2d at 1159, the provision "deals with a very specific problem" – the need for more time to abate – and not the validity of the citation.[24] It "does not deal with the circumstances enumerated under FED.R.CIV.P. 60(b) and does not therefore preclude its application." 615 F.2d at 1159.

b. OSHA also states briefly (Br. 24) that "no res judicata or collateral estoppel effect attaches to uncontested citations," citing *Kit Mfg. Co.,* 2 BNA OSHC 1672, 1673 (OSHRC 1975). That statement is misleading. All that *Kit* and the principal such case, *York Metal Finishing Co.,* 1 BNA OSHC 1655 (OSHRC 1974), held is that an employer may avoid additional failure-to-abate penalties by shouldering the burden of proving that the cited condition is not violative.[25] Unless

---

[24] *See Kimball Office Furniture, Inc.,* 4 BNA OSHC 1276 n. 1 (OSHRC 1976).

[25] *Scullin Steel Co.,* 6 BNA OSHC 1764, 1768 (OSHRC 1978) (burden on employer to "prov[e] that no violation occurred at the time of the initial inspection").

the employer so proves, the citation is given full effect and additional penalties are assessed. And even if the employer *does* so prove, he obtains no relief from the original penalties or the original characterizations, nor is the final order removed from his record. This line of cases also does nothing for the employer who wishes to avoid exposure to daily penalties of $7000 by affirmatively seeking Rule 60 relief. (It is also disappointing that OSHA's brief does not inform the Court that OSHA is now challenging even these modest cases before the Commission in *Hercules, Inc.*, OSHRC Docket No. 95-1483.)

C. On Issues of Statutory Interpretation – And Especially Those Involving Procedural Fairness or Commission Authority – This Court Should Defer To The Commission Rather Than OSHA.

We show now that the proper body to which this Court should look for an administrative interpretation is the impartial Commission rather than OSHA, which is here proceeding as merely a prosecutor.

It is, however, unnecessary for the Court to reach this issue. As OSHA implicitly concedes (Br.15 n.6), the recent decision in *Christensen,* 120 S.Ct. at 1663-64, means that its views would, at most, be entitled to only "respect," rather than *Chevron* deference. Such "respect" is not sufficient to justify reversal here, for OSHA's position ignores the language of the OSH Act and of Rule 60, and seeks to displace them with the ill-fitting doctrine of equitable tolling. This Court can and should decline to uphold OSHA's position on that narrow ground.

1. As we showed on page 14 above, OSHA's statement of this Court's scope of review is incorrect and contrary to the precedent of this Court. We there showed that, on issues of construction of the OSH Act – as opposed to standards written by OSHA – this Court defers to the Commission, rather than the Secretary. This Court has, for example, noted that the Commission's "experience and expertise in the occupational safety field place it in the best position to formulate a workable rule ...." *NYSE&G,* 88 F.3d at 108. OSHA is, of course, entitled to deference when the meaning of OSHA's own standard is in question. *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144 (1991).[26] But inasmuch as this case involves construction of only the OSH Act, and not any OSHA standards, any deference is to be afforded to the views of the impartial Commission.

2. In a footnote (OSHA.Br. at 15 n. 6), OSHA implies that it alone is entitled to deference even on statutory construction issues because it alone "is responsible for administration of the OSH Act." That is incorrect. OSHA is responsible under the OSH Act for administration of rulemaking, inspection and prosecution, but not adjudication, which has been committed to the impartial Commission. This Court should thus continue to defer to the Commission, where,

---

[26] *E.g., Sparrow Constr. Corp. v. Secretary of Labor,* 22 F.3d 402 (2d Cir. 1994) (*per curiam*). While that case speaks of deference to OSHA's view of "OSHA," the case concerned only the interpretation of OSHA's own standard, not the OSH Act.

as here, the question is a statutory one involving procedural fairness and the Commission's adjudicatory authority to grant procedural relief. See *Donovan v. OCAW,* 718 F.2d 1341, 1347, 1349 (5th Cir. 1983) ("the administration of [adjudication] ... falls within the Commission's bailiwick"); *Smith Steel Casting Co. v. Donovan,* 725 F.2d 1032, 1035-36 (5th Cir. 1984) (deferring to OSHRC's policy determination to adopt exclusionary rule); *Reich v. Arcadian Corp.,* 110 F.3d 1192, 1199 (5th Cir. 1997) (Commission has primacy over penalty questions). Construction of § 10 and related provisions is so intimately tied up with the Commission's power to adjudicate fairly that the Commission could not independently adjudicate unless it were able to independently construe those provisions. To defer to OSHA on how to construe statutory provisions bearing solely on the Commission's adjudicatory authority would as a practical matter defeat Congress's purpose of establishing an impartial adjudicator not influenced by the zeal of a prosecutor. That is why the Commission does not defer to OSHA on issues of statutory construction. *Arcadian Corp.*, 17 BNA OSHC 1345, 1352 (OSHRC 1995), *aff'd*, 110 F.3d 1192 (5th Cir. 1997).

3. Nothing in *CF&I Steel* requires a contrary result. First, the Court's actual holding is confined to interpretation of OSHA's own standards; the Court did not address deference to OSHA's statutory constructions. Second, the essential premises underlying the reasoning of *CF&I Steel* — that OSHA's power to

construe standards is derivative of its power to adopt them, and that OSHA is in a superior position to construe standards it authored — are inapplicable to construction of the Act. Third, the decision should, for the reasons that follow, not be extended beyond the precise rule it established – that OSHA receives deference with respect to OSHA's interpretation of its own standards.

In 1970, passage of the Act was threatened in Congress by a dispute over whether all administrative powers should be placed in OSHA's hands.[27] The president had threatened to veto any bill that did so.[28] To save the statute, Senator Javits proposed a compromise – the establishment of an independent adjudicator. In urging that compromise, he assured the Senate that it would establish "an autonomous, independent commission which, *without regard to the Secretary,* can find for or against him on the basis of individual complaints."[29]

Although this remark is the only piece of legislative history that directly addresses the deference issue, the employer's brief in *CF&I Steel* did not quote or

---

[27] S. Rep. No. 1282, 91st Cong., 2d Sess. 55 (1970), *reprinted in* Leg. Hist. at 141, 194 (debate "so bitter as to jeopardize seriously the prospects for enactment. . . ."). See also the pointed remarks by Senators Dominick and Smith appended to the Senate Report at 61-64, Leg. Hist. at 200-03.

[28] ABA Treatise at 42.

[29] Leg. Hist. at 463 (emphasis added). On the strength of that assurance, Senator Holland immediately declared his support, stating that "that kind of independent enforcement is required ...." *Id.* at 463; *see also id.* at 193-94, 200-03, 380-94, 479; and Judson MacLaury, *The Job Safety Law of 1970: Its Passage Was Perilous*, Monthly Lab. Rev. 22-23 (March 1981).

cite it[30] and, apparently as a result, the Court did not discuss it. For this reason, *CF&I Steel* should not be extended any further than its precise holding.

4. In any event, OSHA's interpretation would not be entitled to "deference" in the *Chevron* sense, for it has not stated its view in a formal adjudication or regulation adopted after notice-and-comment rulemaking. *Christensen,* 120 S.Ct. at 1663. Its views would at most be entitled to "respect" and then "only to the extent that [it has] the 'power to persuade.'" *Id.* at 1664 (quoting *EEOC v. Arabian American Oil Co.,* 499 U.S. 244, 256-58 (1991)). For the reasons stated in Part B above, those views do not warrant the concurrence of this Court.

VI. CONCLUSION

The petition for judicial review should be denied.

Of counsel:
Thomas Sullivan, Esq.
Executive Director
NFIB Legal Foundation
Suite 200, 1201 F Street, N.W.
Washington, D.C.

C. Richard Titus, Executive Vice President
Kitchen Cabinet Manufacturers Association
1899 Preston White Drive
Reston, VA 20191

Arthur G. Sapper, Esq.
McDERMOTT, WILL & EMERY
600 13th Street, N.W.
Washington, DC 20005-3096
202-756-8246

COUNSEL FOR *AMICI CURIAE*

[30] The employer was then in bankruptcy, and used a sole practitioner with almost no OSHA experience.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 29(d) and 32(a)(7)(C), the undersigned certifies that:

1. Exclusive of exempted portions, the brief contains _____ words (fewer than the 7000 words permitted), as counted by Word97, the word processing program on which the brief was created; and

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word97 in Times New Roman 14.

_____
Arthur G. Sapper

CERTIFICATE OF SERVICE

I hereby certify that on this ___th day of July 2000, I caused to be sent a copy of the following documents:

- Brief for the *amici curiae*; and
- One computer-readable disk copy of the brief (in Word97);

by first class mail to:

Ronald J. Gottlieb, Esq. (two copies)
United States Department of Labor
Office of the Solicitor
200 Constitution Avenue, N.W.
Room N-2700
Washington, D.C. 20210

Thomas Smith, Esq. (one copy)
Harter, Secrest & Emery
700 Midtown Tower
Rochester, New York 14604
Attorney for Russell P. Le Frois Builders, Inc.

The Honorable Ray H. Darling, Jr. (two copies)
Executive Secretary
Occupational Safety and Health Review Commission
One Lafayette Centre
1120 20th Street, NW, 9th Floor
Washington, DC 20036-3419

Russell P. Le Frois Builders, Inc. (one copy)
P.O. Box 230
1020 Lehigh Station Road
Henrietta, N.Y. 14467-9369

_____
Arthur G. Sapper

STATUTORY AND REGULATORY APPENDIX

The Occupational Safety and Health Act

Sec. 10 Procedure for Enforcement [29 U.S.C. § 659]

(a) If, after an inspection or investigation, the Secretary issues a citation under section 9(a), he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed under section 17 and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employees or representative of employees under subsection (c) within such time, the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

(b) If the Secretary has reason to believe that an employer has failed to correct a violation for which a citation has been issued within the period permitted for its correction (which period shall not begin to run until the entry of a final order by the Commission in the case of any review proceedings under this section initiated by the employer in good faith and not solely for delay or avoidance of penalties), the Secretary shall notify the employer by certified mail of such failure and of the penalty proposed to be assessed under section 17 by reason of such failure, and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the Secretary's notification or the proposed assessment of penalty. If, within fifteen working days from the receipt of notification issued by the Secretary, the employer fails to notify the Secretary that he intends to contest the notification or proposed assessment of penalty, the notification and assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

(c) If an employer notifies the Secretary that he intends to contest a citation issued under section 9(a) or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section 9(a), any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity

for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

Sec. 12 The Occupational Safety and Health Review Commission
[29 U.S.C. § 661; 5 U.S.C. §§ 5314 & 5315]

(a) The Occupational Safety and Health Review Commission is hereby established. The Commission shall be composed of three members who shall be appointed by the President, by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this Act. The President shall designate one of the members of the Commission to serve as Chairman.

(b) The terms of members of the Commission shall be six years except that (1) the members of the Commission first taking office shall serve, as designated by the President at the time of appointment, one for a term of two years, one for a term of four years, and one for a term of six years, and (2) a vacancy caused by the death, resignation, or removal of a member prior to the expiration of the term for which he was appointed shall be filled only for the remainder of such unexpired term. A member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

(c)(1)Section 5314 of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:

"(57)Chairman, Occupational Safety and Health Review Commission."

(2) Section 5315 of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:

"(94)Members, Occupational Safety and Health Review Commission."

(d) The principal office of the Commission shall be in the District of Columbia. Whenever the Commission deems that the convenience of the public or of the parties may be promoted, or delay or expense may be minimized, it may hold hearings or conduct other proceedings at any other place.

(e) The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission and shall appoint such administrative law judges and other employees as he deems necessary to assist in the performance of the Commission's functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification and General Schedule pay rates: Provided, That assignment, removal and compensation of administrative law judges shall be in accordance with sections 3105, 3344, 5362, and 7521 of title 5, United States Code.

(f) For the purpose of carrying out its functions under this Act, two members of the Commission shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members.

(g) Every official act of the Commission shall be entered of record, and its hearings and records shall be open to the public. The Commission is authorized to make such rules as are necessary for the orderly transaction of its proceedings. Unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure.

(h) The Commission may order testimony to be taken by deposition in any proceedings pending before it at any state of such proceeding. Any person may be compelled to appear and depose, and to produce books, papers, or documents, in the same manner as witnesses may be compelled to appear and testify and produce like documentary evidence before the Commission. Witnesses whose depositions are taken under this subsection, and the persons taking such depositions, shall be entitled to the same fees as are paid for like services in the courts of the United States.

(i) For the purpose of any proceeding before the Commission, the provisions of section 11 of the National Labor Relations Act (29 U.S.C. 161) are hereby made applicable to the jurisdiction and powers of the Commission.

(j) A administrative law judge appointed by the Commission shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such administrative law judge by the Chairman of the Commission, and shall make a report of any such determination which constitutes his final disposition of the proceedings. The report of the administrative law judge shall become the final order of the Commission within thirty days after such report by the administrative law judge,

unless within such period any Commission member has directed that such report shall be reviewed by the Commission.

(k) Except as otherwise provided in this Act, the administrative law judges shall be subject to the laws governing employees in the classified civil service, except that appointments shall be made without regard to section 5108 of title 5, United States Code. Each administrative law judge shall receive compensation at a rate not less than that prescribed for GS-16 under section 5332 of title 5, United States Code.

Federal Rules of Civil Procedure

Rule 60. Relief from Judgment or Order

(a) Clerical Mistakes.

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655,

or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

LETTERS OF CONSENT UNDER FRAP 29(a)

BEFORE THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ELAINE M. CHAO, SECRETARY OF LABOR,
Complainant,
v.
VILLA MARINA YACHT HARBOR, INC.,
Respondent.

DOCKET NO. 01-0830

BRIEF OF THE *AMICUS CURIAE,* THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION IN SUPPORT OF VILLA MARINA YACHT HARBOR, INC.

Of counsel:
Karen Harned, Esq.
Executive Director
NFIB Legal Foundation
Suite 200
1201 F Street, N.W.
Washington, D.C. 20004
202-314-2061

Arthur G. Sapper, Esq.
McDERMOTT, WILL & EMERY
600 13th Street, N.W.
Washington, D.C. 20005-3096
202-756-8246
COUNSEL FOR *AMICUS CURIAE*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

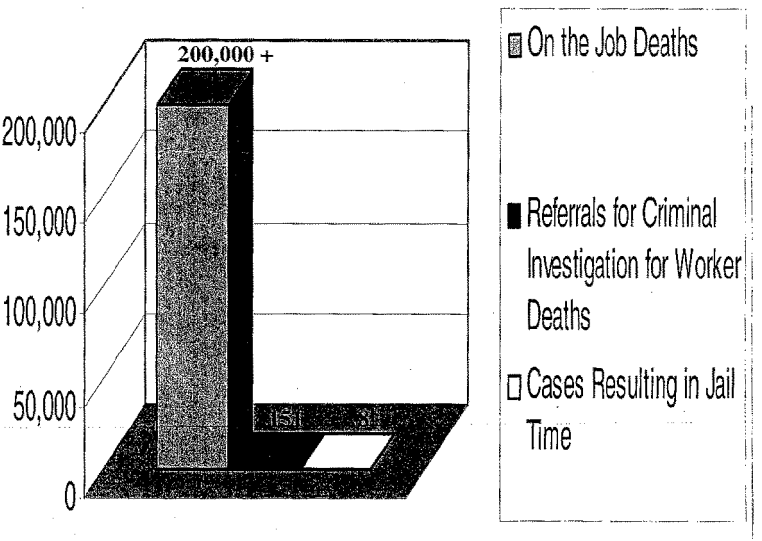
Regulations

Other Authorities

APPENDIX P – SUBMITTED FOR THE RECORD, "MOURN FOR THE DEAD - FIGHT FOR THE LIVING", THE NEW YORK TIMES

Mourn for the Dead - Fight for the Living

Only 8 OSHA Cases Resulted in Jail Time of More Than 200,000 Worker Deaths (1972-2001)



Source: New York Times

Table of Indexes

□