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PROVING VIOLATIONS OR PROVING AFFIRMATIVE DEFENSES UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT OF NORTH CAROLINA

BY MICHAEL R. SMITH*

INTRODUCTION

Public awareness of the extent of work-derived injuries and illnesses and consequent economic losses¹ led to the Occupational Safety and Health Act of 1970 (OSHA).² The enactment of OSHA led to a separate body of law — OSHA law.

The Occupational Safety and Health Review Commission (Review Commission) was created to resolve contests initiated by employers who were cited by the United States Secretary of labor for violations of OSHA.³ A final Review Commission decision is appealed to the United States court of appeals for the circuit in which the violation was alleged to have occurred.⁴ This review scheme permits a Review Commission precedent decision on a point of law to be at odds with decisions of one or more courts of appeal. Nonetheless, Review Commission decisions are published.⁵ Therefore, respondents who have appeared before the Review Commission have had access to all federal-OSHA case law.

States are allowed the option of being subject to federal-OSHA or ad-

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1. In 1969, 2.25 million American employees were *disabled* by accidents at work. The best statistics then available permitted the estimate of 336,000 cases of work-related diseases for 1969. Over \$1.5 billion in lost wages resulted from the injuries and illnesses. The loss to the national economy was estimated to have exceeded \$8 billion. *Employment Safety and Health Guide*, CCH, 501, at 305 (1986).

2. 29 U.S.C. §§ 651-78 (1985). The legislation was originally signed into law on December 29, 1970.

3. 29 U.S.C. § 661(a) (1985).

4. 29 U.S.C. § 660(a) 1985.

5. Occupational Safety and Health Cases are published by the Bureau of National Affairs (OSHC or BNA); Occupational Safety and Health Decisions are published by Commerce Clearinghouse (OSHD) CCH publishes synopses of administrative law judge decisions and the full text of Review Commission decisions.

ministering their own occupational safety and health plan.⁶ The Occupational Safety and Health Act of North Carolina (OSHANC or Act) became law in 1973.⁷

The Safety and Health Review Board of North Carolina (Review Board) was created to resolve contests initiated by employers who were cited by the North Carolina Commissioner of Labor for violations of the Act.⁸ The Review Board is composed of hearing examiners, for adjudication at the trial level, and an appellate body.⁹ Appeal of final Review Board decisions begins in the superior court.¹⁰

The structure for administrative and judicial review of OSHANC decisions in North Carolina avoids the appearance of case law disparateness found within the federal-OSHA arena. However, unlike federal-OSHA, OSHANC decisions have not previously been published.¹¹

Parties and the judiciary have been disadvantaged by lack of access to North Carolina OSHA case law. The absence of published case law has also hindered attempts to write about North Carolina OSHA law as it has developed. Now, however, North Carolina OSHA case law is being published. This article predominantly cites to that newly-published case law.¹²

The scope of this article is developed below. However, in summary, it sets forth the Commissioner of Labor's burden of proof (as developed by case law in this state) *vis-à-vis* citations for violations variously denominated. Also included are selected defenses.

I. PROVING VIOLATIONS

The General Assembly of North Carolina elected the North Carolina Department of Labor to administer the Occupational Safety and Health Act of North Carolina. The Commissioner of Labor (Commissioner) or

6. 29 U.S.C. § 667(b) (1985).

7. N.C. GEN. STAT. §§ 95-126 to 160 (1985 and Supp. 1988).

8. N.C. GEN. STAT. § 95-135(a) (1985).

9. It should be noted that in 1988 OSHANC was amended to direct notices of contest from agricultural employers to the Office of Administrative Hearings. An administrative law judge issues a "recommended decision." The Review Board reviews the recommended decision for error and makes the "final agency" decision. Appeal is to the superior court. See N.C. Gen. Stat. §§ 95-135(j), 95-137(b)(5) (1988).

10. N.C. GEN. STAT. § 95-141 (1988).

11. Except, of course, for state court of appeals and supreme court decisions.

12. *North Carolina Occupational Safety and Health Decisions* (compiled and indexed by M. Smith), Volumes 1 and 2, contain all decisions of both levels of the Review Board and all OSHA-related decisions of the state courts, superior through supreme court. The two initial volumes report decisions through February 11, 1988. The first advance sheets for Volume 3 are being prepared for publication. Cases decided after February 11, 1988 which have not yet been published can be found in law libraries or public libraries in Asheville, Chapel Hill, Charlotte, Fayetteville, Greensboro, Raleigh and Wilmington, North Carolina. Unpublished decisions are identifiable by docket (OSHANC) number.

his designee is empowered to enforce the Act.¹³

The Act's Enforcement Provisions

The Act is *prevention*-oriented. It seeks to prevent job-related injuries and illnesses.¹⁴ There is reliance upon voluntary cooperative efforts of employers and employees to accomplish the objective of the Act.¹⁵

Voluntary compliance with OSHANC standards is also critically important. The ratio of businesses to OSHANC enforcement personnel will always guarantee the importance of voluntary compliance.¹⁶ Nonetheless, the Commissioner is charged with ensuring that the purpose of the Act is effected. The Commissioner may promulgate safety and health standards,¹⁷ inspect workplaces to determine compliance with OSHANC standards,¹⁸ issue citations,¹⁹ and assess penalties²⁰ for alleged violations of the standards.

Employers and Employees Covered by the Act

The Act protects employees, as opposed to the general public. OSHANC extends to most employers and employees in North Carolina. Migrant workers,²¹ contractors on federal work projects,²² salaried management employees,²³ and employees of public agencies²⁴ have been determined to be protected by OSHANC.

Not covered by OSHANC are employers and employees who are: employed by the federal government; protected by particular federal acts; engaged in maritime operations;²⁵ and, domestic workers employed in their employer's home.²⁶ Additionally, particular businesses with fewer than eleven employees with lost workday injury rates below the national average are exempted from programmed safety inspections. Similar exemption is extended to farms with fewer than eleven employees which do not maintain a temporary labor camp.²⁷

13. N.C. GEN. STAT. §§ 95-126(b)(2)(m), 95-136 - 95-139 (1985).

14. *Id.* at § 95-126(b)(1) (1985).

15. *Id.* at § 95-126(b)(2)(a)-(b) (1985).

16. M. Smith, OSHA Law in North Carolina § 6.2 (1985).

17. N.C. GEN. STAT. § 95-131 (1985).

18. *Id.* at § 95-136.

19. *Id.* at § 95-137.

20. *Id.* at § 95-138.

21. Brooks v. Frank David Zimmerman, Grower, 3 NCOSHD —, OSHANC 88-1460 (1988).

22. Nye v. Cieszko Construction Co., 1 NCOSHD 172 (1977).

23. Brooks v. Cumulus Fibers, Inc., 1 NCOSHD 989 (1983).

24. Brooks v. Onslow County Economic Development Comm'n., 2 NCOSHD 522 (RB 1984).

The Commissioner may not impose monetary penalties upon public agencies. See N.C. Gen. Stat. § 95-148 (1985).

25. N.C. GEN. STAT. § 95-128 (1985).

26. *Id.* at § 95-127(10).

27. Employment Safety & Health Guide (CCH) 518. The federal government does not provide

Employers must obey OSHANC standards, and the so-called "General Duty Clause." Employers are only cited for alleged violations of the General Duty Clause when their own employees are exposed to hazards.²⁸ When OSHANC standards are cited, an employer in control of a condition may be liable for employees of other contractors and for independent contractors.²⁹

Applicable Standards

OSHANC standards may be promulgated by the Commissioner. They must be as effective as comparable federal-OSHA standards promulgated by the United States Secretary of Labor, or the Commissioner may adopt the federal-OSHA standards.³⁰ Employers must comply with OSHANC standards and with the General Duty Clause requirement to provide workplaces and work conditions free from recognized hazards.³¹

The Act provides for employer and employee participation in the standard-promulgation process. Notice of proposals for new or changed standards is published by the United States Secretary of Labor in the Federal Register.³² The Secretary of Labor provides opportunities for comment by interested persons. In similar fashion, the Commissioner of Labor notifies the public by publishing his intentions regarding OSHANC standards in newspapers throughout the State. Public hearings are held, and comments are solicited.³³

The Review Board has held that employers cited for alleged violations of OSHANC standards may challenge them as unconstitutional. The right is irrespective of the length of time since the standard was promulgated or whether the employer had previously challenged it.³⁴

Comments regarding the feasibility of standards may be lodged during the standard promulgation process. Nonetheless, in certain instances, the Commissioner is required to prove that the correction of a condition in accordance with the cited standard is feasible.³⁵

Any employer may petition for a variance from a standard,³⁶ or for the

appropriations for such inspections. OSHANC (N.C. Gen. Stat. § 95-128(6) (1985)) exempts employers and employees in classes of employment for which matching federal funding is not provided to these state for enforcement purposes.

28. See *infra* text accompanying notes 126-51.

29. *Nye v. Wadsworth Wrecking Co.*, 2 NCOSHD 50 (RB 1977), *aff'd*, 2 NCOSHD 55, Docket No. 77 CvS 762 (Superior Ct. 1977).

30. N.C. GEN. STAT. § 95-131(a) (1985 and Supp. 1987).

31. *Id.* at §§ 95-129(1)-(2) (1985).

32. *Id.* at § 95-131(b)(7) (1985).

33. N.C. GEN. STAT. §§ 95-131(b)(3)-(4) (1985).

34. *Creel v. Aluminum Co. of Am.*, 2 NCOSHD 13 (RB 1976), *aff'd*, 2 NCOSHD 19, Docket No. 76 CvS 4671 (Superior Ct. 1978).

35. See *infra* text accompanying notes 103-06.

36. N.C. GEN. STAT. § 95-132 (1985).

modification of a time period specified in a citation for the correction of a condition.³⁷ In either instance, the burden of proving the inability to comply is upon the employer.

BURDEN OF PROOF — GENERALLY

Regarding OSHANC issues, the allocation of the burden of proof, the elements to be proven, and the quantum of proof, are found in the Act, the Review Board's *Rules of Procedure*, and decisions of the Board and North Carolina courts.

The Review Board operates under its own rules.³⁸ Except for matters which regard agricultural employers, the Board is exempt from the Administrative Procedure Act.³⁹

Questions regarding the burden of proof are answered as case law develops, if the questions are essential to deciding the issues.⁴⁰ If an issue can be satisfactorily resolved, an ancillary burden of proof question will not be decided.⁴¹

OSHANC proceedings are civil and administrative, and penalties involved "are civil . . . rather than penal."⁴² The quantum of proof for the civil OSHANC proceedings is the preponderance of the evidence,⁴³ rather than clear and convincing evidence.⁴⁴ The quantum of proof is the preponderance of the evidence for establishing citations, and for proving particular defenses.

In proceedings before the Review Board, the Commissioner bears the burden of proving each element in the citation.⁴⁵ The employer has no burden of proof with respect to allegations in the citation.⁴⁶

When a citation is issued to an employer it must specify the standard or other regulation which was allegedly violated, "describe with particularity the nature of the violation," and set a reasonable time period for the abatement of the violation.⁴⁷ In addition, there must be proof of em-

37. N.C. GEN. STAT. §§ 95-137(4) (1985), 95-137(5) (1988); R.P. .0305 (*Rules of Procedure of the Safety and Health Review Board of North Carolina*, § .0305 (hereinafter R.P.)).

38. *Brooks v. House of Raeford Farms, Inc.*, 2 NCOSHD 412, 63 N.C. App. 106, 304 S.E.2d 619 (1983).

39. N.C. GEN. STAT. § 150(B)(1)(d) (Supp. 1988).

40. *See for example*, *Brooks v. Quality Embroidery, Inc.*, 3 NCOSHD —, OSHANC 87-1368 (RB 1988) regarding economic feasibility.

41. *See Brooks v. O. S. Steel Erectors*, 2 NCOSCH 227 (RB 1981) regarding proof of enforcement of the employer's safety program.

42. *Brooks v. Maxton Hardwood Corp.* 2 NCOSHD 277, 281 (RB 1981).

43. *Brooks v. Daniel Constr. Co.*, 2 NCOSHD 299 (RB 1981).

44. *Brooks v. Budd-Piper Roofing Co.*, 2 NCOSHD 323 (RB 1983).

45. R.P. .0514(a).

46. *Creel v. Safety and Health Review Board and Gastonia Sheet Metal Works, Inc.*, 2 NCOSHD 9 (Superior Ct. 1975).

47. N.C. GEN. STAT. § 95-137(a) (1985).

ployer access to the violative condition,⁴⁸ and there must be proof of employer knowledge of the condition and/or standard.⁴⁹

Thus, to summarize the Commissioner's burden, generally, to establish a *prima facie* case, there must be proof that: (1) the cited standard or regulation is applicable; (2) there was a condition in contravention of the standard or regulation; (3) an employee had access to the condition; and, (4) there was employer knowledge.

BURDEN OF PROOF — SPECIFICALLY — CITATIONS, NOTICES

Information in this section first addresses elements (except for the subject of employer knowledge) which must be established by the Commissioner of Labor to prove notices, or citations of various types; then addresses employer knowledge. Employer knowledge is treated separately because, depending upon the type of alleged violation, the researcher may need easy access to information about employer knowledge as it relates in various ways. A citation which alleges a serious-repeated violation of a generally-phrases standard would occasion such a necessity.

1

Elements of the Burden of Proof, Except for Employer Knowledge

The citation or notice which must be proven by the Commissioner may characterize the alleged violation by either of, or by a combination of, the following denominations: *de minimus*; nonserious; serious; repeated; willful; failure to correct. Additionally, the citation or notice will allege a violation of, or a failure to abate: a specific standard; a generally-phrased standard; a standard which may require the use of "feasible" controls; or the General Duty Clause.

The denomination of the alleged violation and the cited standard or regulation may invoke additional elements of proof which the Commissioner must establish. For example, in particular instances, the Commissioner must prove that there is a feasible means of abating the condition alleged as violative.

1-A

De Minimus Violations

The Act allows the Director to issue notices rather than citations "with respect to *de minimus* violations which have no direct or immediate relationship to safety or health, and violations of State agencies or

48. See *infra* text accompanying notes 87-101.

49. See *infra* text accompanying notes 206-11.

political subdivisions thereof.”⁵⁰ Though *de minimus* violations are not at issue at hearings,⁵¹ the Commissioner may elect to reduce citations for nonserious violations to *de minimus* violations, at the hearing.⁵²

Hearing examiners may treat as *de minimus* what they view as technical nonserious violations of standards.⁵³ Similarly, treatment of nonserious violations as *de minimus* may provide the rationale for the elimination of a penalty, where there was a penalty because more than nine nonserious violations were cited.⁵⁴

1-B

Nonserious (Other than Serious) Violations

Penalties of up to \$1000 per violation *may* be imposed for each violation adjudged not to be of a serious nature.⁵⁵ Discussion below informs that a *de minimus* violation has no direct or immediate relationship to safety or health. A “serious” violation is reported as a condition in which there is a possibility of an accident a substantially probable result of which is death or serious physical injury. In contrast, “nonserious” violations are not defined by statute, and have not been defined by the Review Board or North Carolina courts.

The compliance officer decides to recommend that a citation be classified serious or nonserious on the basis of guidelines in his or her *Operations Manual*. If the violative condition or practice would *not* most predictably yield serious injury or death, it would be classified as “other” than serious (nonserious).⁵⁶ But the Review Board is not bound by the

50. N.C. GEN. STAT. § 95-137(a) (1985).

51. Notices of contest may only be filed to challenge citations, including alleged violations, abatement dates and penalties. See N.C. Gen. Stat. §§ 95-129(5), 95-137(b) (1985).

52. *Brooks v. Milliken & Co., Inc.*, 1 NCOSHD 1033 (1984). The notice of contest was appropriately withdrawn after the nonserious violation was reduced to *de minimus*.

53. See for example, *Brooks v. Onslow County Economic Dev. Comm'n.* 1 NCOSHD 1110 (1983), *rev'd on point*, 2 NCOSHD 522 (RB 1984), where a citation for a nonserious violation of a standard requiring hot or tepid running water was considered “at most a *de minimis* violation,” and was vacated. See also *Brooks v. C. P. Buckner Steel Erection Co.*, 2 NCOSHD 1137 (1987), where a citation for a nonserious violation of a standard regarding crane inspection records was reduced to *de minimus*.

54. *Brooks v. Lancer, Inc.*, 1 NCOSHD 329 (1978). All but two of the employer's exits were marked with exit signs. See M. Smith, OSHA Law in North Carolina Chapter 7 (1985; and Supp. 1988) for more information about the assessment of penalties for more than nine nonserious violations.

55. N.C. GEN. STAT. § 95-138(a) (1985).

56. See generally *Operations Manual*, Ch. VII B-1, and B-2, and specifically, Ch. VII B-1-c-Step(3) (hereinafter, cited for example, O.M. Ch. VII B-1). The *Operations Manual*, frequently referred to as the “Field Operations Manual,” is a book of instructions for compliance personnel within the Division of Occupational Safety and Health, North Carolina Department of Labor and is a public document. Injuries resulting in permanent, prolonged or temporary impairments of the body, and illnesses which could shorten life or significantly reduce physical or mental efficiency would be “serious.”

*Operations Manual.*⁵⁷

Citations for nonserious violations, *per se*, are not frequently at issue before the appellate level of the Review Board. However, particular elements of the Commissioner's burden of proof with respect to nonserious violations have emerged from the Board's decisions.

Beyond *prima facie* evidence of the actual existence of the alleged condition, and applicability of the standard cited, there must be proof of employee access or exposure to the condition.⁵⁸ There must also be proof of employer knowledge of the condition.⁵⁹

However, proof that the cited condition created the possibility of an accident has not been required to sustain a citation for a nonserious violation. The North Carolina Supreme Court has held that a nonserious violation was shown by the Commissioner, though the possibility of an accident was not established.⁶⁰ Congruently, the Review Board has reduced serious citations and affirmed them as nonserious where the record did not establish the possibility of an accident.⁶¹ Likewise, the Board has restored citations to their classification as serious where the record did show proof of the possibility of an accident.⁶²

Consistent with the rationale upon which nonserious citation is founded, if there is no proof of the likelihood of a condition resulting in serious injury or death, the citation will be affirmed as nonserious,⁶³ or reduced to nonserious.⁶⁴

1-C

Serious Violations

The Act states that the Commissioner *shall* assess a penalty of up to \$1000 for each "serious" violation.⁶⁵ Compliance officers may also group violations considered independently as nonserious into a single serious violation.⁶⁶

57. *Brooks v. Maxton Hardwood Corp.* 2 NCOSHD 277, 281 (RB 1981). The manual "has neither the force nor effect of law . . . [and] does not and cannot vary rules of law applicable with a reference to the burden of proof."

58. *Brooks v. George W. Kane, Inc.*, 2 NCOSHD 79 (RB 1977).

59. See *infra* text accompanying notes 213-22.

60. *Brooks v. McWhirter Grading Co., Inc.*, 2 NCOSHD 115, 303 N.C. 573, 281 S.E.2d 24 (1981). Not requiring proof of the possibility of an accident to sustain a citation for a nonserious violation appears anomalous in that a citation for a nonserious violation assumes that the condition will yield an injury or illness, though of lesser gravity than a serious violation.

61. *Brooks v. Snow Hill Metalcraft Corp.*, 2 NCOSHD 377 (RB 1983).

62. *Id.*

63. *Brooks v. Miller Brewing Co.*, 2 NCOSHD 365 (RB 1982).

64. *Brooks v. Mechanical Specialty Co.*, 2 NCOSHD 317 (RB 1981).

65. N.C. GEN. STAT. § 95-138(a) (1985).

66. O.M. Ch. VII B-2-b; O.M. Ch. IX C-1-b. The practice of grouping nonserious violations into a serious violation was accepted by the hearing examiner in *Brooks v. Rose's Stores, Inc.* #360, 2 NCOSHD 1227 (1988).

A serious violation is defined by statute.

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, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use in such place of employment, unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation.⁶⁷

Proving a Serious Violation

The North Carolina Supreme Court has considered the Act's definition of a serious violation, and held that to establish a serious violation, "the Commissioner must show by substantial evidence, see G.S. 150A-51(5), that the violation created a *possibility* of an accident a *substantially probable* result of which was death or serious physical injury."⁶⁸

Possibility of an Accident

Evidence of the existence of a condition does not establish the possibility of an accident.⁶⁹ There must be substantial evidence, in the form of data or opinion that the condition created the possibility of an accident.⁷⁰ Administrative notice of the dangers inherent in a particular condition cannot compensate for a lack of proof of the possibility of an accident.⁷¹ Competent opinion testimony from the compliance officer is frequently accepted as evidence of the possibility of an accident.⁷²

It is incorrect to construe the Act's definition of a serious violation as requiring proof of the "substantial probability" of the occurrence of an accident.⁷³ However, the remote probability of an accident may be justification for reducing a penalty.⁷⁴

The language of particular standards has formerly been construed to require more than proof of the possibility of an accident. Citations for alleged violations of 29 C.F.R. 1910.133(a)(1) (1988) have been vacated for lack of proof that employees not wearing eye protection were exposed

67. N.C. GEN. STAT. § 95-127(18) (1985).

68. *Brooks v. McWhirter Grading Co.*, 2 NCOSHD 115, 128, 303 N.C. 573, 585-86, 281 S.E.2d 24, 32 (1981).

69. *Brooks v. Utility Constr. Co. of Charlotte*, 2 NCOSHD 481 (RB 1983). Previously, the Board had accepted the thesis that the possibility of an accident had been contemplated within the standard-promulgation process.

70. *Brooks v. McWhirter Grading Co., Inc.*, 2 NCOSHD 115, 303 N.C. 573, 281 S.E.2d 24 (1981).

71. *Brooks v. L. P. Cox Constr. Co.*, 2 NCOSHD 331 (RB 1982).

72. *See, e.g., Brooks v. O. S. Steel Erectors*, 2 NCOSHD 237, (RB 1984).

73. *Brooks v. McWhirter Grading Co., Inc.*, 2 NCOSHD 115, 127, 303 N.C. 573, 281 S.E.2d 24 (1981). Requiring proof of the probability of an accident would encourage employers to guess at whether an accident might occur while deciding if a standard should be followed.

74. *Brooks v. Croft Metals, Inc.*, 2 NCOSHD 441 (RB 1984).

to a "reasonable probability of injury."⁷⁵ However, recent decisions required no more than proof of the possibility of an accident, notwithstanding the language of standards.⁷⁶

Death or Serious Physical Harm

The violative condition must have created the possibility of an accident a *substantially probable* result of which was death or serious physical injury. If a violative condition is shown but there is a lack of proof of the substantial probability of serious injury, the citation may be reduced to and affirmed as nonserious.⁷⁷

The requirement of proof of the probability of serious physical harm from the *chronic* exposure of employees to toxic substances has not been specifically decided. To date, citations for such conditions have been vacated because the testing methods were unrefined.⁷⁸

That serious injury may result from a discrete occurrence may be so obvious from the condition that, seemingly, administrative notice would be sufficient. The Review Board has observed that if there must be evidence to prove the possibility of an accident, there should also be evidence to establish that the accident would yield serious injury.⁷⁹

The medium for the evidence is frequently the compliance officer's or other OSHA official's opinion testimony.⁸⁰ Testimony is also accepted from the respondent's employees about their prior injuries from similar situations.⁸¹ The injury which resulted in the case before the Board may also provide evidence. For example, "the fact that an activity in question actually caused one death constitutes at least *prima facie* evidence of like-

75. *Brooks v. Caravan, Inc.*, 2 NCOSHD 216, 219 (RB 1979). Personal protective equipment is required by 29 C.F.R. 1910.133(a)(1) (1988) if there is a "reasonable probability of injury" which such equipment would prevent. C.F.R. refers to *Code of Federal Regulations*, which is a codification of rules and standards of federal executive departments, such as the U.S. Department of Labor. Each item that appears in the C.F.R. was published in the Federal Register.

76. See *Brooks v. Croft Metals, Inc.*, 2 NCOSHD 441 (RB 1984). The standard involved was 29 C.F.R. 1910.133(a)(1) (1988). And, in particular, see the Review Board's discussion in *Brooks v. McDevitt & Street Co.*, 2 NCOSHD 1032, 1037, 1039-40 (RB 1987).

77. See *supra* text accompanying notes 55-64.

78. See, for example, *Creel v. Aluminum Co. of Am.*, 2 NCOSHD 13 (RB 1976), *aff'd*, 2 NCOSHD 19, Docket No. 76 CVS 4671 (Superior Ct. 1978), where a citation for exposing employees to excess levels of coal tar pitch volatiles was vacated. See also *Brooks v. William T. Burnett and Co.*, 2 NCOSHD 155 (RB 1985) and 2 NCOSHD 164 (1986) where a citation for exposing employees to excess levels of "cotton dust 'raw'" was vacated. Given the nascent stage of knowledge about safe exposure levels, the unsophisticated testing methods, and the fact that disease may result only after chronic exposure to substances, requiring proof of the *probability* of serious injury would pose a heavy burden.

79. *Brooks v. O. S. Steel Erectors*, 2 NCOSHD 237, (RB 1984).

80. *Id.*

81. *Brooks v. C. P. Buckner Steel Erection, Inc.*, 2 NCOSHD 432 at 439 (RB 1984). The employee had fallen eleven times, occasioning torn ligaments, paralysis, and a blood clot on his brain.

lihood" of serious physical injury.⁸²

The gravity of the expected or actual injury is assessed on an *ad hoc* basis. The court of appeals has held that a "mutilated or amputated foot" from the failure to wear safety shoes would constitute serious injury.⁸³ The Review Board has reasoned that the loss of a finger to the die of a press,⁸⁴ and to an unguarded saw⁸⁵ would be serious injury. However, whether a laceration would be serious would depend upon the "type, extent and degree of laceration possible on any given set of facts."⁸⁶

Exposure/Access

The Commissioner must establish that there was exposure of an employee to the alleged violation. Since the Act requires employers to comply with standards to protect their employees,⁸⁷ it is exposure of the employee of the employer, proper, which must be established.⁸⁸

While most exposures of employees are to discrete violative conditions such as fall hazards, employees may also be exposed to continuous conditions. Exposure to excess noise is an example of the latter type of condition. For proof of exposure to continuous conditions, the Review Board accepts time-weighted averages obtained from sample monitoring then extrapolated to an eight-hour period.⁸⁹ Standards regarding continuous conditions establish "permissible exposure limits" against which representative samples may be compared.

The hearing examiner must set forth in the order, the evidence relied upon to establish employee exposure.⁹⁰ Frequently, evidence of employee exposure is established by testimony from the employer's own employees. Photographs taken by the compliance officer are evidence of employee exposure.⁹¹ Testimony of the compliance officer about his observations may also be competent evidence regarding employee exposure.

It is not necessary that the compliance officer actually observe employee exposure.⁹² Yet, the evidence must be substantive. For example,

82. *Brooks v. Rebarco, Inc.*, 3 NCOSHD —, OSHANC 83-1039, 91 N.C. App. 459, 467, 372 S.E.2d 342, 347 (1988).

83. *Brooks v. Daniel Constr. Co.*, 2 NCOSHD 311, 317, 73 N.C. App. 426, 432, 326 S.E.2d 339, 342-43 (1985). Objects carried by the employees varied in weight from 25-350 pounds. The court rejected the employer's argument that its absence of foot injuries forestalled the need for the safety shoes.

84. *Brooks v. Snow Hill Metalcraft Corp.*, 2 NCOSHD 377 (RB 1983).

85. *Brooks v. Sunward Yacht Corp.*, 2 NCOSHD 266 (RB 1980).

86. *Id.* at 268.

87. N.C. GEN. STAT. § 95-129(1)-(2) (1985).

88. *Brooks v. Hughes Roofing Services, Inc.*, 2 NCOSHD 1181 (1987).

89. *Brooks v. Cool Springs Lumber Co.*, 2 NCOSHD 848 (RB 1987).

90. *Brooks v. Daniel Constr. Co.*, 2 NCOSHD 260 (RB 1980).

91. *Brooks v. Steel & Tank Service Co.*, 1 NCOSHD 632 (1981).

92. *Brooks v. Biggers Brothers, Inc.*, 2 NCOSHD 183 (RB 1980), *rev'd.*, 2 NCOSHD 188 (Su-

the compliance officer's mere review of the employer's injury and illness records is not probative.⁹³ Similarly, an employee injury might or might not be pertinent.⁹⁴

Proof of employee exposure does not necessarily mean that there was *actual* exposure, as long as an employee had *access* to the hazard. "The issue is whether employees in the course of their work, while on the job, or going from work are reasonably likely to be in the immediate zone of danger."⁹⁵

The test used by the Review Board to determine whether employees had access to the immediate zone of danger is the "reasonable foreseeability" standard. The Commissioner must prove that the employee was "reasonably likely to be exposed to the cited hazards."⁹⁶

Thus, employees within three feet of the edge of a flat roof were exposed to the "zone of danger," whereas employees who never went closer than ten feet to the edge would not have been exposed.⁹⁷ Likewise, employees on the ground within six feet of a scaffold, and employees who descended the scaffold, were in the zone of danger of objects falling from the scaffold.⁹⁸

Proof of employee exposure to a condition cited as serious does not, *per se*, establish the serious citation. For example, the Review Board has explained that an unguarded power transmission apparatus may pose a serious hazard to an exposed employee. Or, further examination of the evidence may reveal that the exposure was necessitated by maintenance requirements.⁹⁹

Technically, any employee exposure to a condition in contravention of an OSHA standard is a violation. However, brief employee exposure may be required to abate a hazard, following an accident.¹⁰⁰ A wide variety of other demurrers and defenses are available to rebut the Commissioner's *prima facie* proof of employee exposure.¹⁰¹

Employer Knowledge

The Act requires the Commissioner to prove employer knowledge of

terior Ct. 1984). The court failed to set forth reasons for the reversal. However, the lower decision makes clear that the reversal issued from the applicability of the standard, rather than a lack of evidence of employee exposure.

93. Brooks v. Quality Embroidery, Inc., 3 NCOSHD —, OSHANC 87-1368 (RB 1988).

94. Brooks v. Robbinsville Contracting, 2 NCOSHD 202 (RB 1979).

95. Brooks v. Maxton Hardwood Corp., 2 NCOSHD 277, 277-78 (RB 1981).

96. Brooks v. Budd-Piper Roofing Co., 2 NCOSHD 323, 327 (RB 1983).

97. Brooks v. E. L. Scott Roofing Co., 2 NCOSHD 208 (RB 1979).

98. Brooks v. Andrew Hanes & Co., 2 NCOSHD 288 (RB 1980).

99. Brooks v. Maxton Hardwood Corp., 2 NCOSHD 277 (RB 1981).

100. Brooks v. McDevitt & Street Co., 1 NCOSHD 1209 (1985).

101. See *infra* text accompanying notes 259-331. Also, see M. Smith, *OSHA Law in North Carolina* Chapter 5 (1985; and Supp. 1988).

the condition, in order to establish a violation alleged as serious.¹⁰²

Feasibility

The purpose of the Act imports that a citation will not be affirmed unless there is evidence that the abatement performance required by the standard is feasible. Workers are to be assured safe and healthful working conditions "so far as possible."¹⁰³

If the standard involved in the citation was promulgated by federal-OSHA and adopted by NC-OSHA,¹⁰⁴ then the feasibility of the standard would have been a concern at the federal level.¹⁰⁵ If the standard was promulgated by the Commissioner, feasibility would have been considered and, to the extent practical, the standard would be expressed in "terms of objective criteria and of the performance desired."¹⁰⁶

Technological Feasibility

If the promulgation process has addressed the feasibility of a specific standard, the Review Board has not required the Commissioner to establish feasibility in order to prove a violation.¹⁰⁷ Further, employers are free to decide the most efficient and cost-effective way to abate a condition if a standard specifies what to do but not how it must be done.¹⁰⁸

Generally-phrased standards,¹⁰⁹ and the General Duty Clause¹¹⁰ pro-

102. N.C. GEN. STAT. § 95-127(18) (1985); see also *supra* text accompanying notes 66-76.

103. *Id.* at § 95-126(b)(2).

104. See *id.* at § 95-131(a) empowering the Commissioner to adopt federal-OSHA standards.

105. 29 U.S.C. § 652(8) (1970) requires the U.S. Secretary of Labor to determine that a new standard is "reasonably necessary or appropriate" to provide safe or healthful employment. 29 U.S.C. § 655(6)(5) (1970) also requires a consideration of "feasibility of the standards" and, "when-ever practicable," expression of the standard in "objective criteria and of the performance desired." However, federal case law has not settled the issue of whether § 6(b)(5) is limited to standards regarding toxic, or durational hazards. Executive Order 12,291, 46 Fed. Reg. 13, 193 (1981), Employment Safety and Health Guide (CCH) § 6491 requires federal-OSHA to subject new standards to a cost-benefit analysis. Federal case law has excluded toxic, or durational standards from this requirement. See *American Textile Mfrs., Inc. v. Donovan*, 452 U.S. 490 (1981).

106. N.C. GEN. STAT. § 95-131(d)(1) (1985).

107. *Nye v. Mitchell Eng. Co.*, 2 NCOSHD 23 (RB 1976). The burden would properly be upon the employer to prove that abatement is not "possible." See *infra* text accompanying notes 259-331 for information on the "impossibility of compliance" defense.

108. *Brooks v. Custom Indus.*, 2 NCOSHD 89 (RB 1977).

109. Two of the most frequently cited generally-phrased standards are 29 C.F.R. 1926.28(a) (1988), and 39 C.F.R. 1910.132(a) (1988):

29 C.F.R. 1926.28(a) — The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

29 C.F.R. 1910.132(a) — Protective equipment, including personal protective equipment for eyes, face, head and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

vide scant abatement direction beyond the requirement to correct particular hazards. Thus, for these requirements, the Review Board has held that fair play (due process) requires the Commissioner to demonstrate that abatement means are both "practical and available."¹¹¹

Evidence that a crane could have been employed for an additional two minutes to set a concrete form was proof that an abatement means was practical and available, to sustain a citation for violation of the General Duty Clause.¹¹² Steel pipes extending through a roof were a practical and available means for securing lifelines.¹¹³ Likewise, an air conditioning unit was an available and practical anchor for lifelines, though roof vent pipes were not.¹¹⁴

The abatement of a condition *may* require that the employer use technology beyond that in use within its industry.¹¹⁵ That is, industry custom and practice are not controlling; nor is it a defense that other companies are not in compliance. Conversely, technology which employers within an industry are able to afford does not necessarily dictate alternative abatement means to be used by a less wealthy employer in the industry.¹¹⁶

If new technology is required, the complainant may have to show that the technology is available. To require the development of new technology until the complainant is satisfied may pose an intolerable economic burden for the employer.¹¹⁷ Similarly, abatement may be economically prohibitive unless the Commissioner can show the cause of a condition.¹¹⁸ Technological and economic feasibility may be inextricably intertwined.

110. See *infra* text accompanying notes 126-51.

111. *Nye v. Mitchell Eng. Co.*, 2 NCOSHD 23 (RB 1976).

112. *Brooks v. Rebarco, Inc.*, 3 NCOSHD —, OSHANC 83-1039, 91 N.C. App. 459, 372 S.E.2d 342 (1988).

113. *Brooks v. Trout & Riggs Constr. Co., Inc.*, 2 NCOSHD 395 (RB 1982). The standard was 29 C.F.R. 1926.28(a) (1988). It was of no consequence that holes would have had to be drilled through the pipes. Inconvenience is no defense. The holes could be closed by welding.

114. *Brooks v. Bonitz Insulation Co.*, 2 NCOSHD 350 (RB 1985). The hearing examiner must consider each abatement means suggested by the Commissioner.

115. *Nye v. Stewart Warner Corp.*, 2 NCOSHD 46 (RB 1976). The standard involved, 29 C.F.R. 1910.95(b)(1), requires the use of "feasible" administrative or engineering controls, but like other generally-phrased standards, does not provide abatement direction.

116. *Brooks v. Cool Springs Lumber Co.*, 2 NCOSHD 848 (RB 1987). The standard was 29 C.F.R. 1910.95(b)(1).

117. *Brooks v. Quality Emproidery, Inc.*, 3 NCOSHD —, OSHANC 87-1368 (RB 1988). The standard (29 C.F.R. 1910.212(a)(3)(ii) (1988)) is generally-phrased and requires the guarding of "points of operation" on numerous types of machinery where a hazard is presented to employees. The complainant failed to show that guards were available anywhere in the United States, or that the machines could be guarded.

118. *Brooks v. Cole Mfg. Co.*, 2 NCOSHD 213 (RB 1979). The citation was for an alleged violation of the General Duty Clause.

Economic Feasibility

The United States Supreme Court has interpreted the federal-OSH Act to proscribe cost-benefit analyses for health standards.¹¹⁹ The Review Board is reluctant to engage in *ad hoc* cost-benefit analyses regarding the abatement of conditions.¹²⁰

Nonetheless, for particular citations, demonstrating the economic feasibility of abating a condition is part of the burden of proving feasibility. However, once the Commissioner demonstrates that abatement means are available and practical, successful rebuttal requires proof of "severe economic consequences" from compliance.¹²¹ Proof of severe economic consequences means demonstrating that compliance costs cannot be absorbed and that the cost of compliance cannot be passed on as a necessary expense.¹²²

The Commissioner has sustained his burden of demonstrating that it was economically feasible to require that chemical splash-proof goggles be provided;¹²³ that employees be supplied safety-shoes;¹²⁴ and that a crane be provided to set each concrete form, at an extra cost of two dollars per form.¹²⁵

1-D

General Duty Clause (GDC) Violations

In addition to the duty to comply with OSHA standards or regulations,¹²⁶ each employer is charged with a more general duty:

Each employer shall furnish to each of his employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or serious physi-

119. See *supra* text accompanying notes 103-06. There is a noteworthy difference between the federal-OSH and NC-OSH Acts respecting the promulgation of standards for "toxic materials or harmful physical agents" (health as opposed to safety standards). The former requires the development of the standard which most adequately assures, to the extent "feasible," the health of employees; whereas, the latter uses the word, "possible." The distinction is significant. Feasible carries the understanding that a proposition is achievable, whereas possible means that given certain conditions, a proposal could be achieved. Contrast P.L. 91-596 § 6(b)(5) 29 U.S.C. § 655 (1970 & Supp. IV 1986 & Supp. V 1987), with N.C. Gen. Stat. § 95-131(d)(1) (1985). Nothing prevents NC-OSHA from enforcing standards which are more stringent than those of federal-OSHA.

120. *Brooks v. Salem Coatings, Inc.*, 2 NCOSHD 84, 88 (RB 1977). "Balancing the potential injury against the cost of eliminating it is a dangerous exercise; however, here the gravity is so serious and the cost so minimal that the result is clear that the hazard must be eliminated."

121. *Brooks v. Raleigh Tractor & Truck Co.*, 2 NCOSHD 445, 449 (RB 1983).

122. See *Brooks v. Austin Berryhill Fabricators, Inc.*, 2 NCOSHD 460, 469 (RB 1983) for pertinent dicta.

123. *Brooks v. Salem Coatings, Inc.*, 2 NCOSHD 84 (RB 1977).

124. *Brooks v. Daniel Constr. Co.*, 2 NCOSHD 299, 326 (RB 1981), *aff'd.*, 2 NCOSHD 311, 73 N.C. App. 426, 326 S.E.2d 339 (1985).

125. *Brooks v. Rebarco, Inc.*, 3 NCOSHD —, OSHANC 83-1039, 91 N.C. App. 459, 372 S.E.2d 342 (1988).

126. N.C. GEN. STAT. § 95-129(2) (1985).

cal harm to his employees.¹²⁷

The purpose of the GDC is to protect employees in situations where the need for a standard has not been anticipated.

The GDC does not substitute for the standard promulgation process. Wherever possible, standards include the performance required for compliance. Thus, due process dictates against citation under the GDC where a specific standard applies to the "four corners" of the subject of the citation.¹²⁸

If the Commissioner fails to cite a standard which may be seen as applicable, citation under the GDC is not thereby automatically voided. The burden is on the employer to show that a standard applies and that there was compliance.¹²⁹ However, "the failure of the Commissioner to establish a specific safety regulation for hazards does not relieve the employer from its general obligation to provide employees 'conditions of employment . . . free from recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm.'"¹³⁰

It may not be possible to know with certainty that a standard applies to a particular circumstance. Thus, the Commissioner is allowed to cite (or to amend the pleadings to cite) a standard as an alternative to the GDC (or *vice versa*).¹³¹

Citations under the GDC are issued only to the employer whose own employees are exposed to the hazard.¹³² The Act requires each employer to furnish to *his* employees protection from hazards likely to injure *his* employees.¹³³

The GDC is only cited for "serious" violations.¹³⁴ The Act limits the GDC to hazards which are causing or are likely to cause serious physical harm or death.¹³⁵

Proving a Violation of the GDC

To prove that the employer violated the GDC, the "complainant must show that an employer failed to render its workplace free of a hazard which was 'recognized' and causing or likely to cause death or serious

127. *Id.* at § 95-129(1) (1985).

128. *Brooks v. Dover Elevator Co.*, 3 NCOSHD —, — N.C. App. —, 379 S.E.2d 707 (1989).

129. *Brooks v. Fruehauf Corp.*, 2 NCOSHD 271 (RB 1981).

130. *Brooks v. Dover Elevator Co.*, 3 NCOSHD —, — N.C. App. —, 379 S.E.2d 707, 710 (1989).

131. *Brooks v. Rebarco, Inc.*, 2 NCOSHD 577 (1985). The hearing examiner found that the standard was not applicable; however, citation under the GDC remained.

132. O.M. Ch. IX F-2-g.

133. N.C. GEN. STAT. § 95-129(1) (1985).

134. O.M. Ch. X C-5-c; O.M. Ch. VII A-2-d.

135. N.C. GEN. STAT. § 95-129(1) (1985).

physical harm.”¹³⁶ Additionally, the Commissioner must demonstrate that there is a feasible means to abate the hazard.¹³⁷

Failure to Render

The employer has the affirmative obligation to *render* its workplace free of a hazard. Still, “Congress, by the absolute terms of the ‘general duty clause,’ did not intend to impose strict liability upon employers. Only preventable hazards must be eliminated.”¹³⁸

In *Brooks v. Cole Manufacturing Company*,¹³⁹ the majority view was that the employer had not failed to perform its duty because its practices and procedures were limited to those recognized by its industry. The dissenting opinion was that regardless of whether the practices were standard in the industry, the employer should have been able to foresee the emerging hazard; thus, the hazard was preventable.

Because the duty imposed by the GDC upon employers is *general*, the Review Board will scrutinize the employer’s safety program. In particular, the Board is interested in whether any safety rule or policy specifically, and effectively, addressed the hazard at issue.¹⁴⁰

Its Workplace

The workplace contemplates both “conditions of employment” and “a place of employment.”¹⁴¹ Conditions of employment include the practices and procedures which the employees follow.¹⁴² A place of employment is wherever the employees’ duty takes them.¹⁴³

Free of a Hazard Which was Recognized

The Commissioner must establish that the hazard was “recognized,” and in deciding that, the Board may employ the “reasonable man” test.¹⁴⁴ It must also be established that the employer was aware that the

136. *Brooks v. Rebarco, Inc.*, 3 NCOSHD —, OSHANC 83-1039, 91 N.C. App. 459, 372 S.E.2d 342 (1988).

137. *Id.*

138. *Id.* at —, 91 N.C. App. at 464, 372 S.E.2d at 345.

139. 2 NCOSHD 213 (RB 1979). The company kept the furnace in operation, despite warnings from its maintenance superintendent who was also the most experienced furnace operator, and despite a history of difficulty on the day of the accident. Ultimately, the furnace erupted molten metal upon employees.

140. *Brooks v. Rebarco, Inc.*, 2 NCOSHD 584 (RB 1985).

141. N.C. GEN. STAT. § 95-129(2) (1985).

142. *Brooks v. Raleigh City Coach Lines, Inc.*, 2 NCOSHD 705 (1985). The employees followed the practice of working beneath buses upon hydraulic lifts which did not have operable automatic locking devices.

143. Such as remote logging areas, *Brooks v. Ted Pack Logging Co.*, 1 NCOSHD 248 (1978); or multi-employer worksites, *Brooks v. Yeargin Constr. Co.*, 1 NCOSHD 431 (1979).

144. *Brooks v. Rebarco, Inc.*, 3 NCOSHD —, OSHANC 83-1039, 91 N.C. App. 459, 372 S.E.2d 342 (1988).

conduct or condition existed in its employee's workplace.¹⁴⁵

Causing or Likely to Cause

The cases do not suggest that the Commissioner's burden regarding this element is any more stringent than that required in order to prove any other serious violation. That is, the Commissioner must present substantial evidence that the subject of the citation created the *possibility* of an accident.¹⁴⁶ Because the citation involves a general duty, however, the Review Board will closely attend to the quality of the evidence.¹⁴⁷

There is no requirement that an accident or injury be involved. Rather, the Commissioner is only required to prove that the hazard is likely to cause serious injury or death. Therefore, an accident and injury of unknown origin may exist along side of the cited hazard without the need to show a causal nexus between them.¹⁴⁸

Death or Serious Physical Harm

As with any other citation for an alleged serious violation, there must be evidence to show that death or serious physical harm would be the *substantially probable* result of an accident which was possible to occur because of the hazard.¹⁴⁹

Feasibility of Abatement

The demonstration of a feasible means to abate the hazard is necessary to ensure due process where a requirement does not address that matter. Proving feasibility of abatement is linked to establishing that the condition was "recognized."¹⁵⁰ In order to show how a condition could be corrected, the Commissioner may have to show what caused the condition.¹⁵¹

1-E

Repeated Violations

A penalty of up to \$10,000 per occurrence may be assessed by the Commissioner upon an employer for "repeated" violations.¹⁵² The North Carolina Supreme Court has written, "we think the purpose be-

145. See *infra* text accompanying notes 223-37.

146. See *supra* text accompanying notes 69-76.

147. See, e.g., *Brooks v. Metrolina Greenhouses, Inc.*, 1 NCOSHD 284 (1978), *aff'd*, 2 NCOSHD 171 (RB 1978). The citation was vacated because the compliance officer's testimony about the condition was vague and uncertain.

148. *Brooks v. Dover Elevator Co.*, 2 NCOSHD 891 (RB 1986).

149. See *supra* text accompanying notes 77-86.

150. *Brooks v. Rebarco, Inc.*, 3 NCOSHD —, OSHANC 83-1039, 91 N.C. App. 459, 372 S.E.2d 342 (1988).

151. *Brooks v. Cole Mfg. Co.*, 2 NCOSHD 213 (RB 1979).

152. N.C. GEN. STAT. § 95-138(a) (1985).

hind the much greater fine for repeated violations is to punish an employer for failure to comply with a standard about which, because of prior violations, he should be cognizant.”¹⁵³

A citation for a repeated violation may characterize the violation as serious, or nonserious.¹⁵⁴ Also, the repeated denomination is determined by the fact of the prior violation, rather than by whether the previous violation was serious or nonserious. For example, a repeated-serious violation may be founded upon a previous nonserious violation.¹⁵⁵ Similarly, a repeated-nonserious violation may be based upon a prior nonserious violation.¹⁵⁶

A violation of a safety standard will not be described as repeated if the prior violation was nonserious and occurred more than two years previous, or was serious and occurred more than three years previous. No maximum time limit is considered if the prior violation was serious and involved a health standard.¹⁵⁷

If a violation can be described as repeated and “willful,” it will be cited as willful.¹⁵⁸ In addition to violations of standards and other regulations, violations of the General Duty Clause may also be cited as repeated.¹⁵⁹

A violation is properly classified as repeated if the prior violation was abated. If the subject of the prior citation was not abated, discovery of the unabated condition would prompt a “failure to correct” notice.¹⁶⁰ However, the Review Board may amend the pleadings to conform to the evidence, especially if the proper citation were tried and proven, without objection.¹⁶¹

Proving a Repeated Violation

A “repeated” violation is not defined by the Act. In interpreting the word “repeated,” the Supreme Court of North Carolina said: “We hold that a subsequent violation by the same employer substantially similar to a prior violation or violations is a repeated violation only if the employer should have known of the standard by virtue of the prior citation or citations.”¹⁶²

153. *Brooks v. McWhirter Grading Co., Inc.*, 2 NCOSHD 115, 130, 303 N.C. 573, 588, 281 S.E.2d 24, 33 (1981).

154. *Brooks v. Baker Cammack Hosiery Mills*, 2 NCOSHD 94 (RB 1977).

155. *Brooks v. Naegele Outdoor Advertising*, 1 NCOSHD 885 (1982).

156. *Brooks v. Weldon Roofing & Sheetmetal, Inc.*, 1 NCOSHD 961 (1982).

157. O.M. Ch. VII B-4-a.

158. O.M. Ch. VII B-4-c. See *infra* text accompanying notes 177-87.

159. O.M. Ch. X C-5-c. Being a violation of the General Duty Clause, it would also be serious.

160. O.M. Ch. VII B-4-d.

161. *Brooks v. Pelkey Wood Products Co.*, 2 NCOSHD 169 (RB 1978).

162. *Brooks v. McWhirter Grading Co., Inc.*, 2 NCOSHD 115, 132, 303 N.C. 573, 590, 281 S.E.2d 24, 34 (1981).

Subsequent Violation

The North Carolina Supreme Court rejected the notion that before a citation can allege a repeated violation there must be more than one prior similar violation. Rather, the court held that a second violation could be characterized as repeated.¹⁶³

The words "subsequent violation" logically convey the existence of a prior violation. However, a hearing examiner has affirmed a citation as repeated without deciding whether there was a prior violation. The repeated charge was affirmed on the strength of the prior citation, which had imparted knowledge of the subject standard.¹⁶⁴

A settlement agreement has been accepted as a basis for a repeated citation.¹⁶⁵

Same Employer

For "fixed establishments" like factories or stores, the Commissioner's regulations limit consideration for repeated citations to the history of the cited establishment. For construction, excavation, and similar businesses which work at changing sites, repeated citations are founded upon a prior violation within the state's boundaries.¹⁶⁶

The same employer does not mean that the supervisor during the condition alleged as repeated must be the same as during the prior violation.¹⁶⁷ An employer is the same, for purposes of a repeated citation, despite a change in the name of the business,¹⁶⁸ and despite the fact that the business may close then reopen a year later in a new location.¹⁶⁹

Substantially Similar to a Prior Violation

The previous and subsequent violations must be of the same standard.¹⁷⁰ However, the violations may be of different substandards within

163. *Id.*

164. *Brooks v. Capital Lightning Protection Co.*, 1 NCOSHD 817 (1981). The Commissioner's regulations (O.M. Ch. IV G-1-b-(2)) treat a citation as final when the contest period has expired though a notice of contest issued but was limited to the penalty. The Board has not addressed that point, and the Act (N.C. Gen. Stat. § 95-137(b) (1) (1985) is not clear. What is clear is that penalties stem from and are effected by alleged violations, that employers frequently represent themselves in OSHANC proceedings, and that pleadings can be very confusing.

165. *Brooks v. Center of Textiles Supplies, Inc.*, 1 NCOSHD 202 (1977).

166. O.M. Ch. VII B-4-f. The probable logic for the different standard is that non-fixed businesses should not be allowed to commit one violation at each site before being cited for a repeated violation.

167. See the hearing examiner's discussion at *Brooks v. Rebarco, Inc.*, 2 NCOSHD 859 (1987). However, differences in supervision in combination with other factors *may* affect the employer's knowledge. *Brooks v. McWhirter Grading Co.*, 2 NCOSHD 115, 303 N.C. 573, 281 S.E.2d 24 (1981).

168. *Brooks v. Naegele Outdoor Advertising*, 1 NCOSHD 885 (1982).

169. *Brooks v. Center of Textiles Supplies, Inc.*, 1 NCOSHD 202 (1977). The citation was vacated on other grounds.

170. *Brooks v. Baker-Cammack Hosiery Mills*, 2 NCOSHD 94 (RB 1977).

the standard.¹⁷¹ The essential question is whether the conditions surrounding the prior and subsequent violations were similar enough that the employer would know that the same standard was being violated again.

A hearing examiner has held that a missing midrail around an elevator shaft would not have notified the employer that uncovered floor holes would violate the same standard.¹⁷² Likewise, the failure to erect guardrails around a six-foot-high platform was not sufficient notice that an unguarded section of the twentieth floor of a building would violate the same standard.¹⁷³

Conditions cited in the prior and subsequent citations may be in different locations within the same fixed establishment, and the subjects of the citations may differ. For example, different machinery in various locations within a manufacturing concern may be the subject of a repeated citation.¹⁷⁴

If the Employer Should Have Known of the Standard by Virtue of the Prior Citation

Factors set by the Review Board were adopted by the court, to determine whether the employer should have known of the standard. Those factors were "the extent to which the condition was obviously unsafe, the proximity in time to the prior citation, whether management or key employees had changed between citations, and the number of prior substantially similar violations."¹⁷⁵

Normally, proof of a prior citation is in the form of documentation drawn from OSHANC files and proffered by the compliance officer. However, a compliance officer's testimony, unsubstantiated by documentation, has also been admitted, where the respondent's counsel failed to object.¹⁷⁶

1-F

Willful Violations

The history of the Act suggests that, initially, penalties for "willful" violations were only to be imposed as criminal sanctions.¹⁷⁷ Conviction for the willful violation of the Act's provisions, which results in an em-

171. Brooks v. McWhirter Grading Co., 2 NCOSHD 115, 303 N.C. 573, 281 S.E.2d 24 (1981).

172. Brooks v. Ceko Corp., 1 NCOSHD 915 (1984).

173. Brooks v. McDevitt & Street Co., 1 NCOSHD 1209 (1985).

174. Brooks v. Baker-Cammack Hosiery Mills, 1 NCOSHD 193 (1977), 2 NCOSHD 94 (RB 1977).

175. Brooks v. McWhirter Grading Co., 2 NCOSHD 115, 132, 303 N.C. 573, 590, 281 S.E.2d 24, 34 (1981).

176. Brooks v. McDevitt & Street Co., 3 NCOSH —, OSHANC 87-1347 (RB 1988).

177. Brooks v. Baker-Cammack Hosiery Mills, 1 NCOSHD 193 (1977).

ployee's death, does invoke criminal penalties. However, a provision was added to impose civil penalties for willful violations which do not result in the death of an employee.¹⁷⁸

A citation for a willful violation may be characterized as nonserious or serious.¹⁷⁹ The citation may also allege a willful violation of a standard, or the General Duty Clause. Though, in the latter instance, the violation would be serious. The Commissioner's regulations provide for citation as willful where there is evidence that the employer consciously violated the Act, or though not conscious of the violation, knew of the condition and made no attempt to eliminate it.¹⁸⁰

Proving a Willful Violation

A willful violation is not defined by the Act. However, the Review Board, and the North Carolina Court of Appeals have set forth elements of proof which must be satisfied by the Commissioner, in order to prove a willful violation.¹⁸¹ The court has written that: "A violation is deemed to be willful when there is shown 'a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another.'"¹⁸²

Deliberate Purpose

The Act's civil penalty provision speaks of "any employer who willfully or repeatedly violates the requirements of this Article . . ."¹⁸³ The North Carolina Supreme Court has refused to equate willful and repeated violations in terms of employer conduct. Willful violations require a showing of greater culpability on the part of the employer.¹⁸⁴

There is no requirement that the Commissioner prove that the employer acted out of "malice," in order to establish deliberate purpose.¹⁸⁵ Rather, in the Review Board's leading opinion on willful violations, evi-

178. N.C. GEN. STAT. § 95-139 (1985) (criminal penalties); N.C. Gen. Stat. § 95-138 (1985) (civil penalties).

179. Brooks v. Hobson Constr. Co., 3 NCOSHD —, OSHANC 86-1268 (1988).

180. O.M. Ch. VII B-3-a.

181. Brooks v. O. S. Steel Erectors, 2 NCOSHD 237 (RB 1984). According to the Review Board, "these elements are: (1) employer knowledge of the violative condition, (2) employer knowledge of the standard, (3) a subsequent violation of the standard, and (4) the violation being committed voluntarily or with intentional disregard of the standard or with demonstrated plain indifference of the Act." *Id.* at 239.

182. Brooks v. O.S. Steel Erectors, 2 NCOSHD 529, 531, 84 N.C. App. 630, 632, 353 S.E.2d 869, 871 (1987) (quoting Foster v. Hyman, 197 N.C. 189, 191, 148 S.E. 36, 37 (1929)).

183. "Any employer who willfully or repeatedly violates the requirements of this Article, any standard, rule or order promulgated pursuant to this Article, may upon the recommendation of the Director to the Commissioner be assessed by the Commissioner a civil penalty of not more than ten thousand dollars (\$10,000) for each violation." N.C. Gen. Stat. § 95-138(a) (1985).

184. Brooks v. McWhirter Grading Co., Inc., 2 NCOSHD 115, 303 N.C. 573, 281 S.E.2d 24 (1981).

185. Brooks v. O.S. Steel Erectors, 2 NCOSHD 237, 241 (RB 1984).

dence of deliberate purpose included: (1) the fact of the prior violations and the employer's knowledge of them; (2) the lack of an effective safety program — there was no written safety program and safety instructions were limited to impromptu comments, occasioned by employee acts; and (3) the absence of discipline for employees who worked in violation of the Act.¹⁸⁶

Not to Discharge Some Duty

The deliberate failure to discharge a duty imposed by law suggests the presence of employer knowledge of the condition, and (arguably) of the legal requirement. The Review Board requires the Commissioner to prove employer knowledge of the condition and standard.¹⁸⁷

1-G

Failure to Correct Notices

The Act states that “a citation shall fix a reasonable time for the abatement of the violation.”¹⁸⁸ If within fifteen working days of receipt of the citation the employer fails to file a notice of contest, the citation and any proposed penalty will be deemed final.¹⁸⁹ In that case, the condition should have been corrected within the time period set by the citation.

If the employer does initiate any review proceedings before the Board, the period during which the condition must be corrected will not begin to run until the Board enters a final decision.¹⁹⁰ An abatement period with different limits may be set by the Board in its final decision.

If a follow-up inspection reveals that a condition was not corrected during the period for abatement, the employer will be issued a “failure to correct notice” and a proposal for additional penalties.¹⁹¹ The penalty may be up to \$1000 per violation for each day the violation was not corrected.¹⁹² The employer may then file a notice of contest to challenge the failure to correct notice and penalty proposal.¹⁹³

Proving a Failure to Correct Notice

186. *Id.* at 242, *aff'd*, 2 NCOSHD 248, Docket No. 85 CVS 660 (Superior Ct. 1986).

187. If the citation were for the willful violation of the General Duty Clause, the complainant's burden would logically be limited to establishing employer knowledge of the condition.

188. N.C. GEN. STAT. § 95-137(a) (1985).

189. N.C. GEN. STAT. § 95-137(b)(1) (1985).

190. N.C. GEN. STAT. § 95-137(b)(2) (1985). The Act does not contain a similar provision for automatic stay pending judicial review. *See id.* at § 95-141.

191. N.C. GEN. STAT. § 95-137(b)(2) (1985). If the abatement period expires prior to expiration of the period for contesting, a failure to correct notice will not issue until after the contest period has elapsed. *See* O.M. Ch. X C-7-d.

192. N.C. GEN. STAT. § 95-138 (1985). The penalty is calculated for the number of “working days” the violation was not abated. Normally, a 10-day limit is observed (O.M. Ch. X C-7-d).

193. N.C. GEN. STAT. § 95-137(b)(2) (1985).

A hearing examiner has integrated from various NC-OSHA decisions, the elements of proof required to establish a notice for failure to correct.

The complainant must prove by a preponderance of the evidence that: (1) an inspection occurred and a citation issued; (2) an abatement period extension was not granted; (3) the violation became final; (4) a follow-up inspection took place; (5) the exact violation previously cited remained; and, (6) the condition alleged not to have been abated was a violation both at the time of the inspection and at the time of the follow-up inspection.¹⁹⁴

An Inspection Occurred and a Citation Issued

Employer knowledge of the condition is normally established by documentary evidence of the original inspection and citation.¹⁹⁵ Such proof substantiates that the subjects of the citation and failure to correct notice are the same.

AN ABATEMENT PERIOD EXTENSION WAS NOT GRANTED

Logically, one cannot have failed to correct a condition by a certain date if that same abatement deadline was later extended.¹⁹⁶

The Violation Became Final

If the citation was not contested, the period permitted in the citation for the correction of the violation will determine whether the violation was final. If the citation was challenged, the final Review Board order will specify the abatement period.¹⁹⁷ In either instance, proving that the violation was final is the complainant's burden.

A Follow-up Inspection Took Place

The follow-up inspection must have been conducted in accordance with governing statutes.¹⁹⁸ If the follow-up inspection was defective, the evidence garnered may be excluded.¹⁹⁹

The Exact Violation Previously Cited Remained

If the previous condition was abated then recurred, proper procedure would be to cite a "repeated" violation. The distinction may be significant because the penalties may be substantially higher for a failure to correct notice. Also, unless the subject matter were tried without objec-

194. Brooks v. C and D Printing Co., 2 NCOSHD 689 (1984).

195. Brooks v. Raleigh Tractor & Truck Co., 2 NCOSHD 445 (RB 1983).

196. Brooks v. Gwinn Engineering Co., 1 NCOSHD 501 (1979).

197. N.C. GEN. STAT. § 95-137(b)(2) (1985). If the 15 working-day period for contesting elapsed and review proceedings were not invoked, the condition will be considered a final violation, by operation of the statute.

198. N.C. GEN. STAT. § 95-136 (1985) sets guidelines for all inspections.

199. Brooks v. D. C. Murray's Crane Service, 1 NCOSHD 774 (1981).

tion as “repeated,”²⁰⁰ the failure to correct notice will not be sustained.²⁰¹

The Condition Alleged not to Have Been Abated was a Violation Both at the Time of the Inspection and at the Time of the Follow-up Inspection

The complainant must establish all of the elements of a violation for the failure to correct condition.²⁰² Additionally, the employer may attack the original condition as having been nonviolative.²⁰³ An employer may, for many reasons, choose not to contest, or to withdraw a notice of contest prior to a hearing on the merits. Therefore, a citation may become final due to expiration of the contest period or because of inability to finance litigation.²⁰⁴ Yet, it may be that an actual violation was not determined by litigation on the merits.²⁰⁵

2

Employer Knowledge — Burden of Proof — Citations, Notices

In order to prove an alleged violation of an OSHA standard, or provision under the Act, the Commissioner of Labor must establish the existence of employer knowledge of the condition.²⁰⁶ Particular citations also require proof of employer knowledge of the standard, and/or proof of employer knowledge that the condition violated the standard or other provision. Citations may characterize violations in various ways, thus invoking the need for proof of different elements of employer knowledge. To illustrate, a citation may allege a willful violation of the General Duty Clause.²⁰⁷ The quantum of proof is the preponderance of the evidence.²⁰⁸

The direction of case law is away from the concept of “strict liability.” Employers are not always and in every instance responsible for the health and safety of employees.

- Where there can be no “foreseeability” of a condition, such as in the case of an unpreventable accident, there is not employer knowledge.

200. Brooks v. Pelkey Wood Products Co., 2 NCOSHD 169 (RB 1978).

201. Brooks v. Ava Indus. Inc., 1 NCOSHD 1173 (1984).

202. Brooks v. Caravan, Inc., 2 NCOSHD 216 (RB 1979).

203. Brooks v. Greensboro Industrial Platers, 1 NCOSHD 183 (1977).

204. See Brooks v. Baker Roofing Co., 3 NCOSHD —, OSHANC 88-1532 (1989). The respondent withdrew to avoid further litigation expenses.

205. Res judicata or collateral estoppel could preclude relitigating previously decided issues.

206. R.P. .0514(a).

207. This instance demands familiarity with requirements for proving employer knowledge for “serious” violations (all General Duty Clause violations are alleged as serious), for “General Duty Clause” violations (and possibly for violations of “generally-phrased standards”) and for “willful” violations.

208. See Brooks v. Maxton Hardwood Corp., 2 NCOSHD 277 (RB 1981); Brooks v. Daniel Constr. Co., 2 NCOSHD 299 (RB 1981).

. If the employer does satisfy reasonable expectations to ensure the health and safety of its employees, it will not be held accountable for employee misconduct. "Misconduct" of either a nonsupervisory or supervisory employee may serve to exculpate the employer.

. "Hidden" conditions, and even conditions in plain view but requiring an expert-eye to detect, may fail to convey employer knowledge. As one example, subcontractor employers may rely upon the expertise of others at multi-employer worksites for assurances regarding the absence of hazards not apparent to the untrained eye.

. Proof of employer knowledge is required to sustain a citation for an alleged violation, whether the citation is denominated "serious" or "nonserious."

At two places the Act specifically addresses the subject of employer knowledge, and at one place, the Act alludes to employer knowledge. "Actual" and "constructive" employer knowledge are used by the Act in its definition of a "serious violation."²⁰⁹ Keeping conditions and places of work free from "recognized hazards" is a duty assigned by the Act to employers.²¹⁰ Latitude to assign the severest monetary penalties is reserved for employers who repeatedly or willfully violate the Act, and for those who fail to correct a violation.²¹¹

2-A

Knowledge — Citations for Nonserious Violations

In 1985, the Review Board concluded that proof of employer knowledge of the violative condition is required to sustain a citation denominated "nonserious."²¹² Thus, "nonserious" violations require the same proof of employer knowledge as do "serious" violations. Additionally, citations for nonserious violations denominated "repeated" or "willful" require other forms of proof.

2-B

Knowledge — Citations for Serious Violations

The requirement of proof of employer knowledge for a serious violation is set by the Act. A citation for a serious violation will not be sus-

209. N.C. GEN. STAT. § 95-127(18) (1985).

210. N.C. GEN. STAT. § 95-129(1) (1985).

211. N.C. GEN. STAT. § 95-138(a) (1985). Repeated and willful acts, and "failure-to-correct" omissions imply the existence of employer knowledge of the standard and of the condition.

212. *Brooks v. L. P. Cox Co., Inc.*, 2 NCOSHD 637 (RB 1985), *aff'd*, 2 NCOSHD 645, Docket No. 85 CVS 9029 (Super. Ct. 1987). The Board faced the issue directly for the first time. The Act does not define a nonserious violation. Thus, the Board concluded from the purpose of the Act that the legislature had not intended to impose a strict liability standard upon employers. N.C. Gen. Stat. § 95-126(b)(2) (1985) states in pertinent part that the purpose of the Act is "to assure so far as possible every working man and woman in the State of North Carolina safe and healthful working conditions. . . ."

tained if the “. . . employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation.”²¹³ At issue is the employer’s knowledge of the violative condition or conduct, not of the standard or regulation.

Actual Knowledge — Admitted

The employer which has first hand knowledge of the violations, is said to possess “actual” knowledge. If the employer acknowledges an awareness of the violative condition then, generally, the Commissioner’s burden of proof is satisfied.²¹⁴

Knowledge — Imputed through the Supervisor

Knowledge of the violative condition may be “imputed” to the employer through its supervisor. There is an agency relationship between the employer and its “supervisor, working within the bounds of the authority delegated to him by the employer. . . .”²¹⁵ As the Board has explained, failure to impute the supervisor’s knowledge to the employer would breach the agency relationship and may actually encourage employers to conduct work through unsupervised employees.²¹⁶

There are prerequisites to imputing knowledge to the employer. The employee through which knowledge is to be imputed must be shown to have been the employer’s bona fide supervisor. The National Labor Relations Act has been used as a criterion for determining supervisory status.²¹⁷

Also, the employer must have authorized its supervisory relationship. The Board has held that knowledge could not be imputed to an employer through a third person, where the supervisor had delegated his own supervisory authority without informing the employer.²¹⁸

Knowledge — Imputed through Constructive Circumstances

Demonstration of the presence of a violative condition is generally not

213. N.C. GEN. STAT. § 95-127 (18) (1985).

214. *Brooks v. Independent Testing Lab.*, 2 NCOSHD 222 (RB 1979). An appropriate demurrer to the admission of actual knowledge is the employer’s proof of its lack of control of the workplace and of its provision of effective alternative protection.

215. *Brooks v. Schloss Outdoor Advertising Co.*, 2 NCOSHD 552 (RB 1985).

216. See *id.* at 564-66 for discussion and cases. However, see *infra* text accompanying notes for discussion on extension of the “isolated employee misconduct” defense to supervisors.

217. *Brooks v. Dover Elevator Co.*, 2 NCOSHD 904 (RB 1987). The lower order had imputed knowledge to the employer but the Board found the “mechanic-in-charge” to be an *ad hoc* crew leader, as opposed to a permanent supervisor. See *Brooks v. Dover Elevator Co.*, 2 NCOSHD 894 (1986).

218. *Brooks v. Acoustics, Inc.*, 2 NCOSHD 784 (RB 1986). To establish imputed knowledge, the complainant would first have had to show that the employer sanctioned the sub-supervisory arrangement.

sufficient to prove that the employer knew of the condition.²¹⁹ However, particular conditions or events can impute knowledge of the alleged violation to the employer. Such imputation, known as "constructive knowledge," results where the employer fails to exercise "reasonable diligence" to know of the presence of the violation. Two examples are illustrative: (a) constructive knowledge existed where the employer failed to enforce safety rules to forestall a violative condition well known to it, as evidenced by numerous prior citations for the same condition;²²⁰ (b) constructive knowledge was found where the employer partially reimbursed employees for purchasing equipment to protect against the condition which it professed not to recognize as a hazard.²²¹

"Reasonable diligence" in pursuit of employer knowledge of violations has not been defined by the Board. The Board has, however, held that a subcontractor exercised reasonable diligence when, at a multi-employer worksite, it relied upon determinations of licensed professionals with specialized knowledge.²²²

2-C

Knowledge — Citations for Generally-phrased Standards

To sustain a citation for the alleged violation of a generally-phrased standard,²²³ there must be proof of: (a) employer knowledge of the condition (or conduct); and (b) employer knowledge that the condition (or conduct) was a hazard, as contemplated by the generally-phrased standard.

Simply put, there must be evidence that the employer was or should have been placed on notice *by something*, "as to either what conduct would be required of him by this standard or what sort of condition it

219. *Id.* at 786.

220. *Brooks v. O. S. Steel Erectors*, 2 NCOSHD 237 (RB 1984), *aff'd*, 2 NCOSHD 529, 84 N.C. App. 630, 353 S.E.2d 869 (1987).

221. *Brooks v. Daniel Constr. Co.*, 2 NCOSHD (RB 1981), *aff'd*, 2 NCOSHD 311, 73 N.C. App. 426, 326 S.E.2d 339 (1985). *Brooks v. Rebarco, Inc.*, 3 NCOSHD —, OSHANC 83-1039, 91 N.C. App. 459, 372 S.E.2d 342 (1988), where the employer's efforts to stabilize a concrete form to prevent its falling were evidence that the employer recognized the hazard.

222. *Brooks v. L. P. Cox Co., Inc.*, 2 NCOSHD 637 (RB 1985).

223. Two of the most frequently contested generally-phrased standards are: 29 C.F.R. 1926.28(a) (1988) and 29 C.F.R. 1910.132(a) (1988). For the wording of those standards, see *supra* text accompanying notes 107-18.

Respondents have not been successful in claiming that generally-phrased standards are "facially" vague. A hearing examiner has held that 29 C.F.R. 1926.28(a) (1988) is not so vague on its face that it precludes employer knowledge (*Brooks v. CFW Constr. Co., Inc.*, 2 NCOSHD 1063 (1987)); and the Review Board has held similarly for 29 C.F.R. 1910.132(a) (1988). (*Nye v. Peden Steel Co.*, 2 NCOSHD 37 (RB 1976)). It is not possible to develop specific standards to apply to every conceivable condition or conduct. The Board recognizes the legitimate role of generally-phrased standards, where specific standards cannot or have not been promulgated.

would apply to.”²²⁴

To illustrate, the Board has held that the Commissioner did not prove that a particular employer could be expected to know that failing to provide a maintenance employee with rubber gloves for the purpose of changing a fuse would violate the general standard involved.²²⁵

The preponderance of the evidence showed that in the “common understanding” of the employer’s industry, rubber-insulated gloves are only required where 600 volts of electricity are involved. “No maintenance men anywhere commonly wear such gloves to change a fuse or perform ‘electrical maintenance.’”²²⁶

The “Reasonable Man” Test of Knowledge

Customs and practices within an employer’s industry can, and do, affect the Commissioner’s ability to establish proof of employer knowledge where generally-phrased standards are cited. However, in North Carolina, the crucial question is whether a “reasonably prudent employer” would have recognized the need for the protection, as required by the generally-phrased standard.²²⁷

Where industry custom and practice are determinative of employer knowledge, employees might be exposed to outmoded, or unsafe standards of safety.²²⁸ In addition, for any number of reasons, a particular industry may simply fail to address a particular hazard. Therefore, employers are required to become acquainted with hazards regarding their work, and with means of protecting their employees from the hazards, notwithstanding their industry’s practices.

Alleged violations are assessed on a case-by-case basis, with the industry’s customs and practices considered as but one of any number of factors. Examples of case-by-case assessments are:

(1) Where employees lifted objects from 25 to 350 pounds and carried them thirty feet or more, it was “reasonably foreseeable” that safety shoes were required to prevent foot injuries.²²⁹

(2) For employees who worked within 36 inches of the unguarded edge of a flat roof, the employer should have foreseen the need for personal fall protection equipment. However, if the same employees had worked 20 feet from the roof edge, there would not have been an expectancy of a fall.²³⁰

224. *Id.* at 41-42.

225. *Id.*

226. *Id.* at 41.

227. *Brooks v. Daniel Constr. Co.*, 2 NCOSHD 311, 73 N.C. App. 426, 326 S.E.2d 339 (1985).

228. *Id.*

229. *Id.* The generally-phrased standard cited for the “serious” violation was 29 C.F.R. 1926.28(a). The court also rejected the idea that “expert” testimony was required, saying that some things are a matter of “common sense,” which the Board is free to employ.

230. *Brooks v. Scott Roofing Co., Inc.* 1 NCOSHD 352 (1978), *aff’d*, *Brooks v. E.L. Scott*

(3) For "order pickers" — employees who selected and carried cases of groceries over their feet — the "reasonable man test" properly established a recognizable danger to their feet.²³¹

2-D

Knowledge — Citations for General Duty Clause Violations

The "General Duty Clause" (GDC) requires that each employer affirmatively "*furnish*" employees conditions and a place of employment free from "recognized" hazards.²³² If conditions or a place of employment contravene the GDC, to support the citation the Commissioner must: (1) prove that the employer knew that the conduct or condition (detailed in the citation) existed in the workplace; and (2) prove that the conduct or condition is "recognized" as a hazard.

Regarding the first requirement, constructive circumstances may impute knowledge of the conduct or condition to the employer.²³³ Regarding the second requirement, the Board may use the "reasonable man" test to assess employer recognition of the hazard.²³⁴ However, the Board will attempt to present probative evidence to support its finding.

*Brooks v. Rebarco, Inc.*²³⁵ illustrates the preceding discussion. There, a concrete form was placed in vertical position then released from the crane. The form fell and crushed the employee who had climbed upon it.

As to employer knowledge of the conduct or condition, the Board found constructive circumstances which imputed knowledge. The employer had stationed a man at the bottom of the concrete form to help prevent it from falling.

The requirement of proof that the hazard was "recognized" was satisfied by the "reasonable man" standard. The Board found and concluded that a reasonable, prudent employer within the concrete formwork industry would have recognized the condition as a hazard.²³⁶

Roofing Inc., 2 NCOSHD 211, Docket No. 79 CVS 7047 (Super. Ct. 1980). The generally-phrased standard was 29 C.F.R. 1926.28(a).

231. *Brooks v. Biggers Bros., Inc.*, 2 NCOSHD 189, 77 N.C. App. 459, 335 S.E.2d 540 (1985), review denied, 316 N.C. 192, 341 S.E.2d 570 (1986). The generally-phrased standard cited was 29 C.F.R. 1910.132(a).

232. N.C. GEN. STAT. § 95-129(1) (1985). "Each employer shall furnish to each of his employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or serious harm to his employees."

233. See *supra* text accompanying notes 219-22.

234. *Brooks v. Dover Elevator Co.*, 3 NCOSHD —, OSHANC 85-1188, Docket No. 8810SC734, — N.C. App. —, 379 S.E.2d 707 (1989).

235. 2 NCOSHD 584 (RB 1985), *aff'd*, 3 NCOSHD —, OSHANC 83-1039, 91 N.C. App. 459, 386 S.E.2d 885 (1988).

236. *Id.* The North Carolina Court of Appeals endorsed the use of the "reasonable man" test for assessing whether a hazard was "recognized" as contemplated by the GDC. The court analogized the GDC's requirements to those of the generally-phrased standard, 29 C.F.R. 1926.28(a) (1988),

Substantive evidence that the hazard was “*recognized*” was satisfied by an American National Standards Institute (ANSI) standard. The ANSI standard, which the employer’s industry helped develop, provided that “Vertical forms being raised. . . shall not be released until adequately braced or secured.”²³⁷

2-E

Knowledge — Citations for Repeated Violations

A penalty of up to \$10,000 is allowed for each instance where an employer is found to violate the Act “repeatedly.”²³⁸ Repeated violations will be either nonserious or serious; thus, proof of the employer’s knowledge of the *condition* will be required.²³⁹

There must also be proof of employer knowledge of the *standard* alleged to have been violated. The North Carolina Supreme Court has written: “We hold that a subsequent violation by the same employer substantially similar to a prior violation or violations is a repeated violation only if the employer should have known of the standard by virtue of the prior citation or citations.”²⁴⁰

Earlier, the Review Board had established factors to be considered in determining employer knowledge of the standard, and the North Carolina Supreme Court specifically adopted those factors as its own. The factors were: (1) the extent to which the condition was obviously unsafe; (2) the number of prior substantially similar violations; (3) the proximity in time to the prior citation; and (4) whether management or key employees had changed between citations.²⁴¹

Two examples of dispositions of repeated citations through consideration of the four preceding factors follow:

[A] The Review Board has affirmed a citation for a repeated violation because the (a) condition was obviously unsafe,²⁴² (b) the citation was for the second violative condition, (c) within three years,²⁴³ and (d) was

where the “reasonable man” test had previously been used by that court to determine “hazard recognition.”

237. *Id.*

238. N.C. GEN. STAT. § 95-138(a) (1985). Also see *supra* text accompanying notes 152-76.

239. See *supra* text accompanying notes 212-22.

240. Brooks v. McWhirter Grading Co., Inc., 2 NCOSHD 115, 132, 303 N.C. 573, 590, 281 S.E.2d at 34 (1981). A repeated violation is not defined in the Act, but the Supreme Court said: “We think the purpose behind the much greater fine for repeated violations is to punish an employer for failure to comply with a standard about which, because of prior violations, he should be cognizant.” *Id.* at 130, 303 N.C. at 588, 281 S.E.2d at 33.

241. *Id.*

242. Brooks v. Baker Cammack Hosiery Mills, 2 NCOSHD 94 (RB 1977). The unguarded V-belt (power transmission apparatus) was seen as an obvious condition to an employer of the respondent’s industry.

243. The Board linked the factors of number of prior substantially similar violations and proximity in time: is the subsequent violation “*sufficiently close in time to the first violation that it should*

committed by the same "employer."

[B] The North Carolina Supreme Court has vacated a repeated denomination since the conditions attending the prior violation and subject of the instant citation were varied enough to yield a condition (a) not obviously unsafe,²⁴⁴ since the citation was for the (b) second condition, (c) within two and one-half years; and (d) the "persons in charge of the jobsites" were not the same.

The factor, "the number of prior substantially similar violations," requires attention to the similarity of the standards involved,²⁴⁵ and to prior and instant conditions.²⁴⁶ The factor, "whether management or key employees had changed between citations," has troubled hearing examiners. For cogent reasoning on this point, see *Brooks v. Rebarco, Inc.*, where the hearing examiner held that the employer, as opposed to various job superintendents, is charged with responsibilities under the Act.²⁴⁷

Thus, neither a single (preceding) factor nor the sum of several factors determines employer knowledge for a repeated citation. Rather, the total effect (synergistic yield) of the combined factors establishes the requisite proof of employer knowledge.

2-F

Knowledge — Citations for Willful Violations

A penalty of up to \$10,000 may be assessed for each instance where an employer is found to violate the Act "willfully."²⁴⁸ Normally, only citations denominated "serious" are also characterized as willful, but citations may allege that "nonserious" violations were willful. Additionally, citations may charge a willful violation of the General Duty Clause, and/or generally-phrased standards, and/or specific standards.²⁴⁹

Knowledge of the Condition

still be in his mind?" *Id.* at 96. "A second violation of a standard 5 years later might not be a 'repeated' violation but a fifth violation might be a 'repeated' violation even if 5 years elapsed between the fourth and fifth violation." *Id.* at 97.

244. *Brooks v. McWhirter Grading Co.*, 2 NCOSH 115, 303 N.C. 573, 281 S.E.2d 340 (1981). The former trench was dug in unstable soil adjacent to a highway; the latter trench was dug in hard, compact soil. Additionally, the compliance officer had requested that someone get into the trench in hard, compact soil to help measure it.

245. *Brooks v. Rebarco, Inc.*, 3 NCOSH 85-1178 (RB 1988).

246. *Brooks v. McDevitt & Street Company*, 3 NCOSH 87-1347 (RB 1988).

247. 2 NCOSH 859 (1987). Especially in the construction industry, supervisors come and go. It was seen as the employers duty to communicate with its supervisory personnel. *See also Brooks v. Electricron, Inc.*, 2 NCOSH 1106 (1986). Since the employer and its supervisors had changed between citations, employer knowledge was not established.

248. N.C. GEN. STAT. § 95-138(a) (1985 & Supp. 1988). *See also supra* text accompanying notes 177-87.

249. Additional requirements for proof of employer knowledge would attach to a citation which alleged a willful violation of the General Duty Clause or of a generally-phrased standard. *See supra* text accompanying notes 103-51.

Since willful violations will be either nonserious or serious, proof of the employer's knowledge of the *condition* will be required. As is true for other types of violations, the knowledge may be actual or imputed, through supervisors or constructive circumstances.²⁵⁰

Knowledge of the Standard

In *Brooks v. O. S. Steel Erectors*,²⁵¹ the Review Board specifically established proof of employer knowledge of the standard itself as being one of the elements of the commissioner's burden in proving a willful violation of that standard. Apparently, the North Carolina Court of Appeals agreed:

A violation is deemed to be willful when there is shown "a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another;" "

That is, that it was a deliberate disregard of duty, imposed by statute, regulation or contract, necessary to the safety of a person or property."²⁵²

In holding that the violation was willful, one of the factors which the court considered was the employer's record of citations for similar violations.²⁵³ Such citations conveyed knowledge of the standard.

For citations alleging willful violations, the Review Board assesses employer knowledge of the standard by prior citations for the same standard or for different standards but for similar conditions; by evidence of management's presence at previous OSHA inspections where similar conditions existed; and by testimony indicating employer awareness of the standard.²⁵⁴ Hearing examiners have held top management officials responsible for disseminating information regarding standards which prior citations have addressed.²⁵⁵

2-G

Knowledge — Failure to Correct Notices

The severest penalties (up to \$1000 per day per violation) may be imposed if an employer fails to abate a *violation*.²⁵⁶ When a "failure-to-correct" notice is issued, it is founded upon the employer's failure to bring the condition into compliance with the standard specified in the

250. See *supra* text accompanying notes 212-22.

251. 2 NCOSHD 237 at 239 (RB 1984).

252. *Brooks v. O. S. Steel Erectors*, 2 NCOSHD 529 at 531, 534, 84 N.C. App. 630, 353 S.E.2d 869 (1987), (citing *Brewer v. Harris*, 279 N.C. 288, 29, 182 S.E.2d 345, 350 (1971)).

253. *Id.* at 534.

254. *Brooks v. O.S. Steel Erectors, Inc.*, 2 NCOSHD 237 (RB 1984).

255. *Brooks v. Naegele Outdoor Advertising Co.*, 1 NCOSHD 1083 (1983); *Brooks v. J. F. Wilkerson Contracting Co.*, 2 NCOSHD 1119 (1987).

256. N.C. Gen. Stat. § 95-138(a) (1985 & Supp. 1988).

original citation.²⁵⁷ Thus, employer knowledge of the violative condition and standard may be presumed. Nevertheless, there are ways in which the employer can defeat a failure-to-correct notice by establishing its lack of knowledge.²⁵⁸

II PROVING AFFIRMATIVE DEFENSES

Defenses to OSHA citations may be classified in numerous ways. "Rebuttal" defenses, and "affirmative" defenses are illustrative. Here, only defenses having been characterized by the Safety and Health Review Board of North Carolina (Review Board, or Board) as "affirmative" are treated. Thus, respondents are able to plead properly the defenses which have been named "affirmative." The respondent bears the burden of proving each affirmative defense which it pleads.²⁵⁹ Affirmative defenses must be raised in the initial pleadings, while other defenses will arise as rebuttal to elements of proof required to be established by the complainant. Some defenses are peculiar to the denomination of the violation as identified in the citation or in the failure to correct notice.

The Affirmative Defense

The Review Board's Rules of Procedure do not define an "affirmative defense." However, an affirmative defense can be thought of as "new matter which, assuming the complaint to be true, constitutes a defense to it."²⁶⁰ It is not wholly incorrect to conceptualize the affirmative defense as a demurrer, in that the defense says "yes, but. . . ." It seeks to avoid or get around the *prima facie* case.

An obvious example of an affirmative defense is the statute of limitations. Other examples in civil law are the defenses, "assumption of risk," and "contributory negligence."²⁶¹ In OSHA law, in North Carolina, claims which have been classified by the Review Board as affirmative defenses include: (A) impossibility of compliance, (B) isolated employee misconduct, (C) greater hazard, (D) multi-employer worksite, (E) economic infeasibility, and (F) the precedence of a specific standard over the general duty clause.²⁶²

If either party elects formal pleadings, an affirmative defense should be

257. *Brooks v. Raleigh Tractor & Truck Co.*, 2 NCOSHD 445 (RB 1983). The prior citation "effectively gave notice of non-compliance."

258. See M. Smith OSHA Law in North Carolina 75.16 at 96 (1985 & Supp. 1988).

259. R.P. 0514(a). For information about an affirmative defense, see N.C. Gen. Stat. § 1A-1, R. Civ. P. 8(c) (1983).

260. BLACK'S LAW DICTIONARY 55 (5th ed. 1979).

261. N.C. GEN. STAT. § 1A-1, R. Civ. P. 8(c) (1983).

262. Each is treated below. Impossibility of compliance is almost impossible to establish. Isolated employee misconduct is plead with great frequency.

pled in the answer to the complaint.²⁶³ The failure to plead an affirmative defense in the answer may waive the defense.²⁶⁴

However, the Review Board clearly prefers to hear matters on the merits and, *in other matters*, the Board has been especially lenient with respect to application of the Rules of Procedure to *pro se* respondents.²⁶⁵ Attorneys at law should attend to pleadings with greater care than would be expected of *pro se* respondents.

Even for legal counsel, many safeguards operate to preserve affirmative defenses. Prior to or at the hearing, the respondent may move to amend the pleadings to assert an affirmative defense.²⁶⁶ At the hearing, the elements of the affirmative defense may necessarily be tried in order to establish the elements of the burden of proof for a particular citation.

If an affirmative defense is tried without objection, the Review Board will amend the pleadings to conform to the evidence.²⁶⁷ And, of course, if the parties are in agreement as to the existence of an affirmative defense which was tried, whether pled or not, the Board will take cognizance of the defense.²⁶⁸

The respondent bears the burden of proving each element of any affirmative defense it raises. The required quantum of proof is the greater weight of the evidence.²⁶⁹

A

Impossibility of Compliance

The Review Board has held that: "In establishing the defense of impossibility, an employer must prove either (1) that due to the employer's particular circumstances, it is functionally impossible to comply, or (2) that compliance would preclude performance of the required work *and*

263. R.P. .0304(b)(2). If, on the otherhand, neither party elects formal pleadings, then at the hearing the respondent may freely assert any type of defense.

264. Brooks v. Schloss Outdoor Advertising Co., 2 NCOSHD 552 (RB 1985). For example, the Board has said of the isolated employee misconduct defense: "There is a recognized defense of 'isolated employee misconduct,' but for it to be available, it must, as an affirmative defense, be pled in the respondent's answer to the complaint." *Id.* at 566.

265. Brooks v. Maxton Hardwood Corp., 2 NCOSHD 277 (RB 1981) (ambiguous pleadings and the scope of the contest); Brooks v. R. N. Rouse & Co., 2 NCOSHD 516 (RB 1983) (timely service of pleadings).

266. N.C. GEN STAT. § 1A-1, R. Civ. P. 15 (1983). Since the Rules of Procedure do not address amendments to the answer, the North Carolina Rules of Civil Procedure govern (R.P. .0102(2)); therefore, the answer may be amended with the consent of the hearing examiner.

267. Brooks v. C. P. Buckner Steel Erection, Inc., 2 NCOSHD 432 (RB 1984). At the complainant's motion to foreclose the isolated employee misconduct defense, the Board agreed that having pled the defense would have "sharpened the issues" but the defense entered without objection: "In light of the liberal rule with reference to amendment of the pleadings, a rule which should probably be even more liberal in an administrative context than in general civil litigation, we proceed to examine the issue." *Id.* at 435.

268. Brooks v. Dover Elevator Co., 2 NCOSHD 904 (RB 1987).

269. R.P. .0514(a).

that alternative means of employee protection are not available."²⁷⁰

It is Functionally Impossible to Comply

"Functionally impossible" means that it is physically, or literally, not possible to comply. It is not easy to prevail with that tactic. The employer in *Brooks v. Niemand Industries, Inc.* proved to the hearing examiner that it was literally impossible to use safety blocks between the dies of a power press when adjusting or repairing the press. The decision does not expatiate, but the absence of physical space was the employer's evidence. The same employer also proved to the hearing examiner that due to design deficiencies the power press literally could not accommodate "spring loaded turnover bars," as required by the standard.²⁷¹

More typically, apparent success after asserting functional impossibility is owed to the complainant's failure to carry the burden of proof.²⁷²

Compliance Would Preclude the Work and Alternative Means of Employee Protection are Not Available

This approach to establishing the defense is not fruitful either. Generally, the defense fails simply because the work can be performed while complying.²⁷³ The employer may confuse "impossibility" with "inconvenience"²⁷⁴ or with "infeasibility."²⁷⁵

Unsupported assertions of impossibility are inadequate, as are claims that compliance is burdensome, an impediment to production, or costly. Conversely, adequate proof is demonstrated by actual attempts to comply manifested by changes in the mode of operation and the expenditure of substantial sums of money to design protective devices.²⁷⁶

The respondent in *Brooks v. Ralph E. Blakely, Jr.* prevailed with the impossibility defense. The company produced pipe organs designed to

270. *Brooks v. Austin Berryhill Fabricators, Inc.*, 2 NCOSHD 460, 467 (RB 1983); app. pending to the Superior Ct.

271. 3 NCOSHD —, OSHANC 87-1416 (1989).

272. See, e.g., *Brooks v. Gas Spring Co.*, 2 NCOSHD 947 (1987).

273. See, e.g., *Brooks v. Bonitz, Inc.*, 1 NCOSHD 908 (1984) (it was not "impossible" to guard the skylight).

274. *Brooks v. Ray Erecting Co.*, 1 NCOSHD 1129 (1983). It was inconvenient to install aluminum panels from a scaffold with a guardrail on its front, but inconvenience is not a defense.

275. *Brooks v. The Ceco Corp.*, 1 NCOSHD 915, 928 (1984). The hearing examiner distinguished infeasibility. See *supra* text accompanying notes 119-25.

276. *Brooks v. Austin Berryhill Fabricators, Inc.*, 2 NCOSHD 460 (RB 1983). Part of the employer's business was devoted to the customized fashioning of metal air conditioning components. At issue was the press brakes used for the custom work. The array of sized of components and the range of bends to yield various angles were so great that the hearing examiner concluded that under existing technology, guarding the press brakes was not possible. On appeal, the Review Board observed that the respondent had not actually attempted to guard the press brakes and had admitted that guarding for each individual operation was possible. In essence, the respondent's contention was that having to change guards for each operation would be so impracticable that the work could not proceed without seriously diminishing the profits of the business.

last in excess of 300 years. To accomplish the total-customized work an unguarded radial arm saw was used. The saw was used to make ninety degree cuts to within 1/64th of an inch of exactness. The respondent proved that the precision work was not possible if either an opaque or plexiglass guard were used. Neither party suggested a feasible alternative to the guards. The training program for operating the saw required the operator's hands to be at precise places at specific times. No other person was allowed to talk to an employee in the act of operating the saw. Any violation of the safety rules resulted in immediate job termination. There was proof that the discipline had been enforced.²⁷⁷

Proving that compliance would preclude the work is essentially a requirement of the variance procedures. Thus, in *Brooks v. Austin Berryhill Fabricators, Inc.* the Review Board held that in any case "in which the employer asserts the defense of impossibility, the employer must have applied for a variance and had a decision rendered on its application."²⁷⁸ Subsequently, the Review Board Chairman issued an order directing hearing examiners to consider impossibility defenses "unfettered" by the variance requirement. "In an appropriate case the Board will reconsider the question."²⁷⁹

B-1

Isolated Employee Misconduct — Nonsupervisory Employees

The North Carolina Court of Appeals has held that:

In order to show that the safety violation was the result of isolated employee misconduct, the employer must show that it had taken all feasible steps to prevent an accident from occurring; that the employee action was contrary to an effectively communicated and enforced work rule; and that the employer had neither actual nor constructive knowledge of the violation.²⁸⁰

The Employer has Taken all Feasible Steps to Prevent an Accident [a Violation] from Occurring

277. 1 NCOSHD 948 (1983) (rendered prior to *Brooks v. Austin-Berryhill Fabricators, Inc.*, 2 NCOSHD 460 (RB 1983)).

278. 2 NCOSHD 460, 470 (RB 1983).

279. *Brooks v. Hercules Steel Co., Inc.*, 2 NCOSHD 567, 570 (RB Chairman 1985). Regarding variances, see N.C. GEN. STAT. § 95-132 (1985). The utility of the variance application requirement is that if a variance is denied, the impossibility defense would still be available. Also, both parties and the Board should gain from the record established during the variance application process. However, use of the variance application during litigation is questionable. The Act clearly seeks to encourage pre-inspection compliance. See N.C. GEN. STAT. § 95-126(2)(a), (d) and (i) (1981). Allowing employers to wait until cited to apply for a variance might frustrate the Act. Further, Department of Labor regulations allow the Commissioner the latitude to decline to consider a variance application regarding matter being litigated (13 NCAC 7B.0405). [NCAC refers to the North Carolina Administrative Code, which is analogous to the Code of Federal Regulations (C.F.R.)]

280. *Brooks v. O.S. Steel Erectors*, 2 NCOSHD 529, 534, 84 N.C. App. 630, 635, 353 S.E.2d 869, 873 (1987).

This first element focuses upon the employer's safety program and work rules.²⁸¹ The element derives from recognition that neither due process nor the Act imposes a strict liability standard upon the employer for its employees' safety and health.

Thus, historically, the Review Board has required proof that employers have "done everything possible to persuade their employees to comply" with the Act,²⁸² while recognizing that employee conduct may also be unforeseeable. The Board has consistently held that an employer cannot be expected to foresee employee behavior which appears to be "intentionally dangerous,"²⁸³ or intentionally reckless.²⁸⁴ Such expectancy would be beyond the pale of feasibility.

In summary, the employer must present evidence of a safety program or work rule which addresses the subject of the violation and seeks to prevent it.

The Employee Action was Contrary to an Effectively Communicated Work Rule

It is possible for an informal safety program to be effective and effectively communicated.²⁸⁵ However, the court will look for evidence of a clearly stated work rule.²⁸⁶ Thus, a written formal safety rule will improve the employer's chances of surviving this second element of proof of the isolated employee misconduct defense.

*Brook v. George W. Kane, Inc.*²⁸⁷ illustrates effectively communicated work rules:

- A safety program was in effect at the time of the inspection and for years prior to it;
- A scheduled company safety newsletter which discussed the subject of the citation had been distributed to employees;
- The company safety policy and newsletter regarding the subject of the citation were posted at the worksite where the inspection took place;
- The respondent had conducted scheduled on-the-job safety meetings, wherein the subject of the citation had been discussed;
- Each employee was required to and did sign a statement pledging compliance with company and OSHA safety rules.

The Employee Action was Contrary to an Effectively Enforced Work Rule

A record of a formal warning of dismissal for violation of the safety

281. *Brooks v. C.P. Buckner Steel Erection, Inc.*, 2 NCOSHD 432 (RB 1984).

282. *Nye v. Stewart Warner Corp.*, 2 NCOSHD 46, 49 (RB 1976).

283. *Nye v. Peden Steel Co.*, 2 NCOSHD 37, 42 (RB 1976).

284. *Nye v. Wadsworth Wrecking Co.*, 2 NCOSHD 50 (RB 1977).

285. *See Brooks v. O. S. Steel Erectors*, 2 NCOSHD 227 (RB 1981).

286. *Brooks v. O. S. Steel Erectors*, 2 NCOSHD 529, 84 N.C. App. 630, 353 S.E.2d 869 (1987).

287. 2 NCOSHD 79 (RB 1977).

rule at issue is persuasive.²⁸⁸ Evidence of disciplinary action against employees who were involved in conduct leading to previous similar citations is persuasive.²⁸⁹ Unsubstantiated claims that employees have been dismissed for prior similar conduct are not persuasive.²⁹⁰

Employee Carelessness and Negligence

To be enforced, the work rule must be enforceable; it must work. A work rule cannot work to forestall accidental behavior. Further, the Act extends to some degree of human carelessness. "Some carelessness and negligence is anticipated and expected, as standards requiring perimeter guarding and first-aid attest."²⁹¹ Even conduct approaching "contributory negligence" may be protected if, for example, the employer fails to provide the equipment and training needed to work safely.²⁹²

Particularly inept are oral work rules of a general nature, against careless or accidental behavior. Instructions to "work safely" or "not to make sudden movements" are not enforceable.²⁹³

*The Employer had Neither Actual nor Constructive Knowledge of the Violation*²⁹⁴

Of special significance with regard to this element is evidence of the employer's efforts to discover violations. Inadequate supervision, evidence of a failure to enforce the safety rule, and "widespread and blatant" noncompliance are proof that the violation was *not* idiosyncratic.²⁹⁵

B-2

Isolated Employee Misconduct — Supervisory Employees

Because the absence of employer knowledge is central to the claim of isolated employee misconduct, the defense has not been readily available for supervisory employees. In 1978, the Review Board held that: "[A] job foreman in charge of the actual performance of the employees, is a direct representative of the management of the company. Accordingly, the indifference of a foreman to the requirement of the Occupational

288. *Id.*

289. Brooks v. O. S. Steel Erectors, 2 NCOSHD 529, N.C. App. 630, 353 S.E.2d 869 (1987).

290. Brooks v. C. P. Buckner Steel Erection, Inc., 2 NCOSHD 432 (RB 1984).

291. Nye v. Wadsworth Wrecking Co., 2 NCOSHD 50, 54 (RB 1977).

292. For an eloquent discussion on point, see the dissenting opinion in Nye v. Peden Steel Co., 2 NCOSHD 37, 45 (RB 1976) (Denson, Alexander B., dissenting).

293. Brooks v. Rebarco, Inc., 2 NCOSHD 584 (RB 1985), *aff'd* 3 NCOSHD —, 91 N.C. App. 459, 372 S.E.2d 342 (1988). The court found it significant that the experienced employee's history did not reveal a proclivity for reckless behavior.

294. See *supra* text accompanying notes 213-22.

295. Brooks v. C. P. Buckner Steel Erection, Inc., 2 NCOSHD 432 (RB 1984).

Safety and Health Act will be consistently imputed to the employer."²⁹⁶

Subsequently, an employer failed to prove the defense because the alleged misconduct was not an "isolated, unpredicted, idiosyncratic act on the part of the employee." However, the decision did not focus on the employee's status as a foreman.²⁹⁷

In 1985 the Board reviewed its early-stated position regarding imputed knowledge and observed that: "The Board is compelled to agree that the on-site job foreman's conduct must be imputable where, as here, he clearly is acting within the specific limits of the authority delegated to him by the employer's management."²⁹⁸

Two years later an employer prevailed with the defense with respect to its foreman. The majority-opinion commented that acts of the foreman are not imputed to the employer, "where the agent acts outside the scope of the authority delegated to him by the principal, i.e., his employer, where his acts or omissions are not authorized by the principal, or when his acts are not thereafter actually or constructively ratified by the principal."²⁹⁹

The decision employed the same test for the defense as used for nonsupervisory employees.

Hearing examiners have not been comfortable with the defense *vis-à-vis* supervisors. Denying the defense may impose a strict liability standard. Allowing the defense strikes at the traditional view that the supervisor acts in place of the employer.

One hearing examiner resolved the seeming dilemma by allowing the defense only where the employer can "show affirmatively that such supervisory personnel concealed or failed to report such conditions. . . ."³⁰⁰

C

Greater Hazard

"Greater hazard," is an affirmative defense,³⁰¹ so normally it must be pled in the answer. Yet, if the alleged violation is of a "general" stan-

296. *Brooks v. McWhirter Grading Co.*, 2 NCOSHD 98, 103 (RB 1978), *aff'd*, 2 NCOSHD 108, 49 N.C. App. 352, 271 S.E.2d 564 (1980), *rev'd*, 2 NCOSHD 115, 303 N.C. 573, 281 S.E.2d 24 (1981).

297. *Brooks v. Clear-Day, Inc.*, 2 NCOSHD 536 (RB 1984).

298. *Brooks v. Schloss Outdoor Advertising Co.*, 2 NCOSHD 552, 565 (RB 1985).

299. *Brooks v. Floyd S. Pike Electrical Contractors*, 2 NCOSHD 1170, 1176 (RB 1987), (Curtis, M., dissenting). The employer's reliance upon the foreman's extensive experience played a key part in forestalling knowledge.

300. *Brooks v. Steel & Tank Service Co.*, 1 NCOSHD 632, 633, 635 (1981). *But see contra Brooks v. Williams Electric Co.*, 3 NCOSHD —, OSHANC 88-1450 (1988), where the defense was denied even where the supervisor was shown to have falsified records to preclude employer knowledge. The hearing examiner reasoned that the area supervisor had constructive knowledge in that, with reasonable diligence, he could have known of the field supervisor's omissions.

301. *Brooks v. Trout & Riggs Constr. Co.*, 2 NCOSHD 395, 398 (RB 1982).

dard, the defense may enter into evidence in the form of rebuttal.³⁰²

The Review Board has held that to prove the greater hazard defense, the employer must: (1) establish that it applied for a variance or that a variance would have been inapplicable; and (2) prove that the "hazard of compliance is greater than the hazard of noncompliance."³⁰³

Application for a Variance or Proving its Inapplicability

The requirement to apply for a variance relates to citations for violations of *specific* standards.³⁰⁴ In general, the variance application process requires the employer to prove that it is unable to comply, that its employees are otherwise protected, and that it is pursuing a program to come into compliance.³⁰⁵

The Hazard of Compliance is Greater than the Hazard of Noncompliance

Evidence to establish this element of the defense will include data relative to "the probability, frequency, or severity of any injury" expected from compliance.³⁰⁶ Unsupported speculation as to the hazards of compliance is not persuasive.³⁰⁷

Most decisions involving the greater hazard defense were rendered by hearing examiners and prior to the date at which the Board established the elements of the defense. Nonetheless, a review of several decisions is instructive.

A hearing examiner has held that requiring employees to wear rubber gloves for working on energized electric lines posed greater hazards. Without the gloves, the experienced men would avoid the power lines. With the gloves, moisture from sweating hands posed a hazard; or unbeknownst to the user, the gloves could wear through.³⁰⁸

A fall protection method suggested by the Commissioner was shown to pose a greater hazard. Using the suggested method, had one employee fallen off of the roof, he would have dragged other employees with him.³⁰⁹

A hearing examiner has held that covering a pit in the floor of a sawmill would have provided a surface from which broken and detached saw

302. *Nye v. Mitchell Engineering Co.*, 2 NCOSHD 23 (RB 1976). When the citation is for the alleged violation of a "general" standard, the Commissioner must prove the feasibility of abatement. See *supra* text accompanying notes 103-06. Thus, the employer can rebut the complainant's *prima facie* proof of feasibility by showing that compliance by the suggested method would be a greater hazard.

303. *Brooks v. Bonitz Insulation Co.*, 2 NCOSHD 350, 354 (RB 1985).

304. *Id.* Logically, a variance would be inapposite to a general standard.

305. See N.C. GEN. STAT. § 95-132(a) and (b) (1985).

306. *Brooks v. Bonitz Insulation Co.*, 2 NCOSHD 350, 355 (RB 1985).

307. *Nye v. Cieszko Constr. Co.*, 1 NCOSHD 172 (1977).

308. *Nye v. Duke Power Co.*, 1 NCOSHD 141, *modified*, 2 NCOSHD 74 (RB 1977).

309. *Nye v. Mitchell Engineering Co.*, 2 NCOSHD 23 (RB 1976).

blades could ricochet into employees. The fall hazard which the citation addressed clearly posed the lesser threat.³¹⁰

D

Multi-Employer Worksite

The Review Board has addressed the multi-employer worksite defense. "The multi-employer worksite defense absolves an employer who neither created nor controlled the hazard if either (1) the employer did not know of the hazard and could not have known with reasonable diligence or (2) the employer took reasonable alternative measures to ensure the safety of its workers."³¹¹

More recently, the North Carolina Court of Appeals characterized the defense in this manner:

The general rule as to employer culpability for safety violations is that each employer is responsible for the safety of his own employees. . . . However, this rule has been modified in cases involving multi-employer work sites. An employer is expected to make reasonable efforts to detect and abate any violation of safety standards of which it is aware and to which its employees are exposed despite the fact that the employer did not commit the violation.³¹²

Both the Review Board and the court of appeals bring into question the elements of employer knowledge, employee exposure, control/creation of the hazard, and alternative measures taken to ensure employees' safety.

Multi-Employer Worksite and Employer Knowledge

Perhaps the most efficacious tack for the employer is to establish its lack of knowledge. The burden is lessened somewhat since the work setting involves numerous types of specialized knowledge.

The employer simply may not have the requisite expertise to be aware of a hazard. Thus, a carpenter successfully asserted that it could not have known of a particular electrical hazard.³¹³ A general contractor proved it could not have known of a defective tar kettle a lessor had furnished an independent contractor at the general contractor's worksite.³¹⁴

Similarly, employers at multi-employer sites are entitled to rely upon the plans and specifications of licensed professionals. "There is nothing in the record to suggest that a reasonably prudent person should not rely on a structural design prepared by competent licensed professionals. To

310. Brooks v. Wade Wood, Inc., 1 NCOSHD 656 (1981).

311. Brooks v. Budd Piper Roofing Co., 2 NCOSHD 323, 328 (RB 1983).

312. Brooks v. Rebarco, Inc., 3 NCOSHD —, OSHANC 83-1039, 91 N.C. App. 459, 468, 469, 372 S.E.2d 342, 347 (1988).

313. Brooks v. Kay Building Co., 1 NCOSHD 1135 (1983).

314. Brooks v. L. P. Cox Co. of Concord, 2 NCOSHD 836 (1986).

hold otherwise would cause chaos in the construction industry without materially improving safety.”³¹⁵

Multi-Employer Worksite and Employee Exposure

A citation for an alleged violation of the General Duty Clause is only issued to the employer, proper, whose employees are exposed to the hazard.³¹⁶ For the alleged violation of an OSHA standard, the employer must show that its employees were neither exposed nor had “access” to the hazard.³¹⁷ The employer which can establish that its employees were not exposed and did not have access must also be prepared to show that it did not create or control the hazard. If it created or controlled the hazard, the defense may be unsuccessful though the only exposed employees were those of another employer.³¹⁸

There has not been a case to assess the citation of a general contractor which neither controlled the hazard nor had employees exposed. However, hearing examiners frequently note that general contractors have the ultimate responsibility for the worksite and all who work there.³¹⁹

Multi-Employer Worksite — Control/Creation of the Hazard

Before the employer can proceed to show how it alternatively protected its employees from a hazard, it must establish that it did not create the hazard. It must also show that it did not have the capacity to abate (control) the hazard.

Employers frequently assert that since hazardous equipment which its employees used belonged to another employer, it neither created nor controlled the hazard. The question of ownership is not determinative, however.³²⁰

Multi-Employer Worksite and Alternative Employee Protection

Having established the inability to control the hazard, the respondent must show its reasonable attempt to provide alternative protection for employees who were exposed to the hazard. It does not matter that the violation was of nonserious gravity.³²¹ Yet it is reasonable to expect that

315. *Brooks v. L. P. Cox Co.*, 2 NCOSHD 637, 644 (RB 1985), 2 NCOSHD 645, Docket 85 CVS 9029 (Super. Ct. 1987).

316. See *supra* text accompanying notes 126-51.

317. See *supra* text accompanying notes 87-101.

318. See *Brooks v. McDevitt & Street Co.*, 1 NCOSHD 1209 (1985). The general contractor controlled the hazard and knew that subcontractors' employees were exposed. See also *Brooks v. Waco Electrical Co.*, 2 NCOSHD 570 (1985). The electrical subcontractor created the hazard to which the brick mason's employees were exposed.

319. See, e.g., *Brooks v. Precision Walls, Inc.*, 1 NCOSHD 799 (1982); *Brooks v. Homeowner's Carpet Warehouse*, 1 NCOSHD 479 (1979).

320. *Brooks v. Rebarco, Inc.*, 3 NCOSHD —, OSHANC 83-1039, 91 N.C. App. 459, 372 S.E.2d 342 (1988).

321. *Brooks v. Waco Elec. Co.*, 2 NCOSHD 570 (1985) (nonserious electrical hazard).

the extent of efforts to afford alternative protection would correlate positively with the gravity of the condition.³²²

Subcontractors can show an attempt to have the general contractor correct the condition. If unsuccessful, the subcontractor must prove that it *did* something.³²³ For example, the subcontractor might have directed employees not to work in the hazardous area.³²⁴ Undoubtedly, many problems could be avoided if the contract clarified responsibilities and attending expenses for employees' safety.³²⁵

E

Economic Infeasibility

Economic infeasibility is available to employers as an affirmative defense. The Review Board has quoted with favor federal-OSHA law which said: "The defense of economic infeasibility may be established if the employer can demonstrate that it is unable to absorb the costs for compliance and is unable to include the costs for compliance as a necessary expense."³²⁶

Proving economic infeasibility is not easy.³²⁷ The reason it proves difficult is that OSHA contemplates that in most instances compliance is a normal cost of business for all within a given industry.³²⁸ Nonetheless, it is possible to show that compliance technology within the economic ability of one employer may be prohibitive to another.³²⁹

F

Precedence of a Standard Over the General Duty Clause

Due process considerations require the Commissioner to cite a specific standard, if one is available. If the employer is cited under the General Duty Clause,³³⁰ it may plead, then prove it was erroneously cited, if a standard applies. However, that defense is limited by the extent to which the standard specifically covers the hazard in question.³³¹

322. *Brooks v. Hamlin Roofing Co.*, 3 NOOSHD —, OSHANC 88-1485 (1988) (unguarded roof opening through which an employee fell to his death).

323. *Brooks v. Independent. Testing Lab.*, 2 NCOSHD 222 (RB 1979).

324. *Brooks v. S. & S Elec.*, 2 NCOSHD 1211 (1987).

325. *Id.*

326. *Brooks v. Austin Berryhill Fabricators, Inc.*, 2 NCOSHD 460, 469 (RB 1983).

327. *See supra* text accompanying notes 119-25.

328. *Brooks v. Scott Roofing Co.*, 1 NCOSHD 352 (1978), *aff'd*, 2 NCOSHD 211, Docket No. 79 Cvs 7047 (Superior Ct. 1980).

329. *Brooks v. Cool Springs Lumber Co.*, 2 NCOSHD 848 (RB 1987). *See supra* text accompanying notes 107-18.

330. *See supra* text accompanying notes 126-51.

331. *Brooks v. Dover Elevator Co.*, 3 NCOSHD —, — N.C. App. —, 379 S.E.2d 707 (1989).