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SHEDDING SOME LIGHT ON THE BURDEN OF PROOF IN DEMONSTRATING A VIOLATION OF THE GENERAL DUTY CLAUSE OF OSHA: NATIONAL REALTY

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The general duty clause of the Occupational Safety and Health Act of 1970 (OSHA or the Act)¹ requires each employer² to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees . . ."³ The general duty clause has been the subject of much debate among legislators, administrative law judges, commissioners, and interested observers—not to mention employers. What is the scope of the duty? To whom does it apply and what does it cover? Whose judgment controls? These are but a few of the myriad questions which have arisen concerning this seemingly innocuous and straightforward provision of OSHA.

The Occupational Safety and Health Act has as its central purpose "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . ."⁴ The highly significant part that the general duty clause was to play in the effort to achieve these goals was presaged by the many debates which dealt with the wording by

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¹ 29 U.S.C. §§ 651-78 (1970).

² The definition of "employer" in OSHA is extremely broad: "The term 'employer' means a person engaged in a business *affecting* commerce who has employees . . ." 29 U.S.C. § 652(5) (1970) (emphasis added). This language indicates that the coverage of the Act is designed to be as extensive as possible. *Brennan v. Occupational Safety & Health Review Comm'n*, 492 F.2d 1027, 1030 (2d Cir. 1974).

³ OSHA § 5(a)(1), 29 U.S.C. § 654(a)(1) (1970).

⁴ OSHA § 2(b), 29 U.S.C. § 651(b) (1970).

which the duty was to be expressed.⁵ Although the precise scope of the duty is not yet clearly delineated, certain indications as to its nature may be gleaned from the legislative history of the clause. As stated in the committee report which accompanied the Senate version⁶ of the Act (and which substantially embodied the Act as ultimately passed):

The committee has concluded that such a provision is based on sound and reasonable policy. Under principles of common law, individuals are obliged to refrain from actions which cause harm to others. Courts often refer to this as a general duty to others. Statutes usually increase but sometimes modify this duty. The committee believes that employers are equally bound by this general and common duty to bring no adverse effects to the life and health of employees throughout the course of their employment. Employers have primary control of the work environment and should insure that it is safe and healthful. Section 5(a), in providing that employers must furnish employment "which is free from recognized hazards so as to provide safe and healthful working conditions," merely restates that each employer shall furnish this degree of care.⁷

This stated relationship between the general duty clause and the common law has caused some confusion, both before and after enactment.⁸ One definite difference from the common law approach is the unavailability under the general duty clause of the common

⁵ See, e.g., 116 Cong. Rec. 42206 (1970) (remarks of Representative Steiger). See also American Smelting & Ref. Co., CCH Empl. Safety & Health Guide ¶ 16,456, at 21, 329 n.9 (Review Comm'n 1973) (OSHR Doc. No. 10) (dissenting opinion); 1970 U.S. Code Cong. & Ad. News 5222-23 (Individual views of Senator Javits); Morey, The General Duty Clause of the Occupational Safety and Health Act of 1970, 86 Harv. L. Rev. 988, 990-91 (1973).

Indeed, many provisions of the Act aroused strenuous and, at times, bitter debate. See, e.g., Moran, A Critique of the Occupational Safety and Health Act of 1970, 67 Nw. U.L. Rev. 200-01 (1972). See also BNA, The Job Safety and Health Act of 1970, 13-21 (1971); Gross, The Occupational Safety and Health Act: Much Ado About Something, 3 Loyola Chi. L.J. 247, 249-51 (1972); 1970 U.S. Code Cong. & Ad. News 5218-19 (Individual views of Senator Javits).

⁶ S. Rep. No. 91-1282, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S. Code Cong. & Ad. News 5177-5227. The Senate version was S. 2193; the House version was H.R. 16785.

⁷ S. Rep. No. 91-1282, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S. Code Cong. & Ad. News 5177, 5186.

⁸ See, e.g., 116 Cong. Rec. 38382-83 (1970); National Realty & Constr. Co. v. Occupational Safety & Health Review Comm'n, 489 F.2d 1257, 1265 n.34 (D.C. Cir. 1973). Although the Occupational Safety and Health Review Commission [hereinafter referred to as the Review Commission or the Commission] is named as the defendant in *National Realty*, supra, considerable controversy exists as to the status of the Review Commission as a party before the court of appeals. See, Moran, Parties to Proceedings in the Court of Appeals Under the Occupational Safety and Health Act of 1970, 15 B.C. Ind. & Com. L. Rev. 1089 (1974).

law defenses such as contributory negligence, fellow servant negligence, and assumption of risk.⁹ Ultimately, it appears that the general duty clause is designed to serve a dual purpose: to place an affirmative duty upon the employer—which duty could be enforced via penalties before injuries occurred¹⁰—and to cover situations for which no standards have been promulgated by the Secretary of Labor.¹¹ This duty is not to be construed as absolute:¹² “The duty was to be an achievable one.”¹³

Since OSHA is still in its infancy, the terrain which it covers is still largely unexplored. However, some illumination has recently been shed which facilitates the resolution of some of the knotty interpretive problems concerning the general duty clause. In *National Realty & Construction Co. v. Occupational Safety & Health Review Commission*,¹⁴ the Court of Appeals for the District of Columbia Circuit reversed a decision of the Review Commission which had imposed a penalty on National Realty for a “serious violation” of the general duty clause.¹⁵ The events, which culmi-

⁹ *National Realty & Constr. Co.*, [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,188, at 20,265, 20,267 (Review Comm'n 1972) (OSHRC Doc. No. 85). But see Morey, *supra* note 5, at 1004-05.

¹⁰ See 116 Cong. Rec. 38383 (1970) (Remarks of Representative Hathaway).

¹¹ See 116 Cong. Rec. 42206 (1970) (Remarks of Representative Steiger). See also *Brisk Waterproofing Co.*, CCH Empl. Safety & Health Guide ¶ 16,345, at 21,261 (Review Comm'n 1973) (OSHRC Doc. No. 1046). The Secretary of Labor may issue specific standards under OSHA § 6, 29 U.S.C. § 655 (1970), which employers and employees are required to observe. OSHA §§ 5(a)(2), (b), 29 U.S.C. §§ 654(a)(2), (b) (1970).

When specific standards are promulgated by the Secretary, they take precedence over any general standard applicable to the same condition. 29 C.F.R. §§ 1910.5(c)(1), (f) (1973). *Brisk Waterproofing*, *supra*. See *National Realty*, 489 F.2d at 1261 n.9.

¹² *National Realty*, 489 F.2d at 1265-66. See Engstrom & Nourse, [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,468, at 20,742 (Review Comm'n 1973) (OSHRC Doc. No. 74) (dissenting opinion).

As stated in the House report on an earlier version of OSHA:

An employer's duty under [the general duty clause] is not an absolute one. It is the Committee's intent that an employer exercise care to furnish a safe and healthful place to work and to provide safe tools and equipment. This is not a vague duty, but is protection of the worker from preventable dangers.

H.R. Rep. No. 91-1291, 91st Cong., 2d Sess. (1970), reprinted in BNA, *The Job Safety and Health Act of 1970*, 159 (1971). See also 116 Cong. Rec. 38371-72 (1970) (remarks of Representative Steiger).

¹³ *National Realty*, 489 F.2d at 1266.

¹⁴ 489 F.2d 1257 (D.C. Cir. 1973).

¹⁵ *Id.* at 1260. “Serious violation” is defined in § 17 of the Act, 29 U.S.C. § 666(j) (1970). Section 17 specifies the penalties which may be imposed for violations of OSHA's provisions. For violations of the general duty clause or of any standard, rule or order promulgated pursuant to § 6, 29 U.S.C. § 655 (1970), the employer: (a) may be assessed a penalty up to \$10,000 for each violation which is willful or repeated; (b) *must* be assessed a penalty, up to \$1,000, for a serious violation for which the employer received a citation; (c) *may* be assessed a penalty up to \$1,000 for a non-serious violation for which the employer received a citation. 29 U.S.C. §§ 666(a)-(c) (1970). An employer may be subjected to criminal sanctions for aggravated violations. 29 U.S.C. §§ 666(e)-(g) (1970).

nated in a citation¹⁶ and penalty against National Realty, are as follows.¹⁷ O.C. Smith, a foreman of National Realty, was riding upon the running board of a front end loader operated by a subordinate at a construction site. As the loader began to descend an earthen ramp, the engine stalled; the loader began to accelerate and swerve. Smith jumped off the machine but was killed when it fell on top of him. After an investigation, the Secretary issued a citation for violation of the general duty clause, asserting that the employer (National Realty) had

fail[ed] to provide his employee employment which was free from recognized hazards which caused and were likely to cause death or serious physical harm to his employees in that an employee was permitted to stand as a passenger on the running board of a . . . front end loader while the loader was in motion.¹⁸

The Secretary also proposed a penalty of \$800.

When National Realty contested the citation and penalty, the Secretary filed a formal complaint essentially restating the violation charged in the citation. The Review Commission thereupon appointed a hearing examiner (now called an administrative law judge)¹⁹ to take evidence and dispose of the case. At the hearing, one of Smith's supervisors, who had not seen the accident, testified that it was against company policy for passengers to ride on construction equipment and that foreman Smith's own safety record was very good. In addition, the supervisor stated that, in each of the "4 or 5" instances of equipment riding in the prior two year period, he had reprimanded the offenders and threatened them with dis-

Under the original Senate bill, there was to be no penalty assessed for a violation of the general duty clause; the employer was to be charged with a fine only for failure to correct a condition after being served with notice of a violation. S. Rep. No. 91-1282, 91st Cong., 2d Sess., (1970) reprinted in 1970 U.S. Code Cong. & Ad. News 5177, 5186, 5192-93.

¹⁶ The Secretary of Labor is authorized to issue citations for violations of OSHA. OSHA § 9, 29 U.S.C. § 658 (1970). Penalties may be imposed in connection with any violation for which a citation has issued. OSHA § 17, 29 U.S.C. § 666 (1970). See note 15 *supra*.

¹⁷ The facts have been compiled from the Hearing Examiner's Report, National Realty & Constr. Co., [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,028, at 20,031, and the Review Commission's decision, National Realty & Constr. Co., [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,188, at 20,263 (Review Comm'n 1973) (OSHRC Doc. No. 85).

¹⁸ 489 F.2d at 1261 n.11.

¹⁹ As provided for in §§ 10(c) and 12(j) of OSHA, 29 U.S.C. §§ 659(c) and 661(i) (1970). The hearing must be conducted in accordance with § 5 of the Administrative Procedure Act, 5 U.S.C. § 554 (1970) (but without regard to § 654(a)(3)). After the judge's decision at the hearing, a unique provision of OSHA provides that the judge's order automatically becomes final in 30 days unless one of the three commissioners directs that it shall be reviewed by the Commission. OSHA § 12(j), 29 U.S.C. § 661(i) (1970). Any person adversely affected or aggrieved by a final order of the Commission has the right of appeal to a circuit court of appeals. OSHA § 11(a), 29 U.S.C. § 660(a) (1970).

charge for any subsequent violation; there had been no second offense by any employee. The hearing examiner dismissed the citation and penalty because, in his view, the Secretary had failed to prove that National Realty had "permitted" the hazard to exist or that it had "permitted" Smith to ride the loader. The hearing examiner found that the few occasions on which equipment riding did occur demonstrated that these were rare and isolated instances and were not the result of permission: a company did not permit an activity which its safety policies prohibited unless the policies were not enforced or were not effective. Such constructive permission could be found only if the hazardous activity were a "practice" rather than a rare occurrence.

The Review Commission, 2-1, reversed the hearing examiner and affirmed the citation (but reduced the penalty).²⁰ Commissioner Burch found that National Realty had breached the general duty clause by "permitting, or failing to prevent"²¹ the hazard, and Commissioner Van Namee found a violation in that National Realty had not "effectively implemented"²² its policy against equipment riding. Each of the majority commissioners suggested possible improvements in National Realty's safety program. Chairman Moran dissented²³ on the grounds that: (a) the Secretary had not proven his charge that National Realty had "permitted" either equipment riding in general or the particular incident which caused Smith's death; (b) the Secretary had failed to prove that equipment riding was a "recognized hazard" within the meaning of section 5(a)(1); and (c) the construction company had been penalized upon the basis that it had "failed to prevent" the foreman's unsafe act, something with which it had never been charged.

Judge J. Skelly Wright, writing for the court of appeals, based the reversal of the Review Commission's decision on the ground that the Secretary of Labor had failed to carry his burden of proof in the case.²⁴ The court emphasized the fact that it was dealing here with the Secretary's burden of production;²⁵ where the Secretary had produced "substantial evidence" which will support a Commission finding, the Commission's view on the preponderance of the evidence (the burden of persuasion) is not reviewable by the court of

²⁰ [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,188, at 20,266.

²¹ Id. at 20,265.

²² Id. at 20,268 (concurring opinion).

²³ Id. at 20,268-71 (dissenting opinion).

²⁴ 489 F.2d at 1268. The Secretary of Labor has the burden of proof as to each element in establishing a violation. 29 C.F.R. § 2200.73(a) (1973).

²⁵ 489 F.2d at 1263 n.24. See *Secretary of Labor v. Crescent Wharf & Warehouse Co.*, [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,047, at 20,074-75 (Admin. Law Judge 1972), *aff'd* and modified, [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,687, at 20,978 (Review Comm'n 1973) (OSHR Doc. No. 1).

appeals.²⁶ Judge Wright succinctly laid out a burden of proof rule consisting of three elements to establish a violation of the general duty clause: the Secretary is required to prove that the employer failed to (a) render his workplace "free" of a hazard which was (b) "recognized," and (c) "causing or likely to cause death or serious physical harm."²⁷ Unless the record revealed "substantial evidence" to support each of these elements, a finding of violation could not be upheld. Since the court found that there was substantial evidence to support the Commission's finding that the hazard of riding heavy equipment was "recognized" and "likely to cause death or serious physical harm," it did not discuss these elements further.²⁸ The remaining question, which was one of first impression for the District of Columbia Circuit,²⁹ was whether National Realty had rendered its construction site "free" of the recognized hazard. This comment will explore each of the three elements; the recognition and injury potential elements will be discussed first, followed by an exposition of Judge Wright's treatment of the remaining burden of proof element.

There has been much disagreement among the commissioners as to what constitutes a "recognized" hazard. In numerous cases raising this issue, a majority of commissioners has relied upon standards which had been promulgated but were not yet effective,³⁰

²⁶ 489 F.2d at 1263 n.24. See OSHA § 11(a), 29 U.S.C. § 660(a) (1970).

²⁷ 489 F.2d at 1265. With respect to the charge itself, the court found that the wording was "doubly unfortunate" in that permission "usually connotes knowing consent, which is not a necessary element of a general duty violation," and because "the charge overemphasized a single incident rather than directly indicting the adequacy of National Realty's safety precautions regarding equipment riding." *Id.* at 1264. Nevertheless, the court found that the charge was not so deficient so as to preclude the Secretary from litigating the adequacy of National Realty's safety program under the general duty clause. Under the circumstances of the case, the word permitted "could fairly have been read to suggest merely a wrongful *failure to prevent*" the Smith incident; in any event, any deficiencies or ambiguities in the charge could have been rectified at the hearing. "So long as fair notice is afforded, an issue litigated at an administrative hearing may be decided by the hearing agency even though the formal pleadings did not squarely raise the issue." *Id.* Judge Wright maintained that this was in accord with "the familiar rule that administrative pleadings are very liberally construed and very easily amended." *Id.*

However, observe that, although the pleadings did survive judicial scrutiny, the Secretary ultimately failed to cure the defects since National Realty was not properly informed at the hearing of the precise charges against it. See text at notes 77-79 *infra*.

²⁸ 489 F.2d at 1265.

²⁹ *Id.*

³⁰ American Smelting & Ref. Co., CCH Empl. Safety & Health Guide ¶ 16,456, at 21,326 (Review Comm'n 1973) (OSHR Doc. No. 10), appeal filed, CCH Empl. Safety & Health Guide 5923 (8th Cir., Nov. 16, 1973); M.A. Swatek & Co., [1971-1973] CCH Occ. Health Decs. ¶ 15,672, at 20,954 (Review Comm'n 1973) (OSHR Doc. No. 33); R.D. Blue Constr., Inc., [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,417, at 20,649 (Review Comm'n 1973) (OSHR Doc. No. 19); Hidden Valley Corp., [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,035, at 20,047 (Review Comm'n 1972) (OSHR Doc. No. 11). Chairman

or upon state standards of which the employer was aware,³¹ or upon the commissioner's own expert opinion in the absence of such relevant finding of fact by the administrative law judge,³² as proof that a given situation constituted a recognized hazard.

In *National Realty & Construction Co.*, the Commission majority had no difficulty in "recognizing" the hazard. In the decision, Commissioner Burch stated: "We believe the danger inherent in falling from construction equipment onto wheels which have no mud guards or under the wheels when travelling on uneven terrain common on construction sites, is not only a recognized, but an

Moran dissented in each of these decisions: *American Smelting*, supra, at 21,328; *Swatek*, supra, at 20,960; *Blue*, supra, at 20,649; *Hidden Valley*, supra, 20,048. In each case Chairman Moran maintained that the use of promulgated but not yet effective standards to establish a violation was improper and, since the Secretary had not introduced evidence to prove that a "recognized" hazard existed, he had failed to meet his burden of proof.

Perhaps the preferred method for dealing with these cases would be to subsequently amend the citation and complaint to allege violation of the standard which may have become effective in the interim. Chairman Moran in his dissent in *American Smelting*, supra, at 21,330, and Judge Wright in *National Realty*, 489 F.2d at 1264-65 n.31, suggest the propriety of such a procedure. See *Brisk Waterproofing Co.*, CCH Empl. Safety & Health Guide ¶ 16,345, at 21,260 (Review Comm'n 1973) (OSHR Doc. No. 1046); *Fed. R. Civ. P. 15(b)*, permitting amendment. But see *B. Heckerman Iron Works, Inc.*, CCH Empl. Safety & Health Guide ¶ 16,371, at 21,274 (Review Comm'n 1973) (OSHR Doc. No. 111), appeal filed, CCH Empl. Safety & Health Guide 5937 (2d Cir., Nov. 7, 1973), where the Commission affirmed a judge's decision refusing to allow the Secretary to amend his complaint to allege a general duty violation when the Secretary had initially proceeded upon a specific standard subsequently held to be inapplicable. *Id.* at 21,274 (dissenting opinion). See also *Sun Shipbuilding & Drydock Co.*, CCH Empl. Safety & Health Guide ¶ 16,725, at 21,474 (Review Comm'n 1973) (OSHR Doc. No. 161) where Commissioner Cleary stated that the Secretary should be permitted to cite and plead in the alternative under *Fed. R. Civ. P. 8(1)(2)* even though the general duty citation will be inapplicable if the specific standard applies. *Id.* at 21,475 (concurring opinion).

Furthermore, it should be noted that the employer has a number of options open to him when he is found to be in violation of a specific standard, which options are not available to him if he is found in violation of the general duty clause. See OSHA § 6(b)(6), 29 U.S.C. § 655(b)(6), (d) (1970).

³¹ *Engstrum & Nourse*, [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,123, at 20,192 (Admin. Law Judge 1972), aff'd, [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,468, at 20,741 (Review Comm'n 1973) (OSHR Doc. No. 74). Chairman Moran dissented from the use of a state standard, with which the employer was familiar, to establish a "recognized" hazard; he stated that OSHA was enacted to promote uniform national standards and that reliance upon state standards raises the specter of unequal federal enforcement. [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,468, at 20,743 (dissenting opinion).

³² *Secretary of Labor v. Dale M. Madden Constr., Inc.*, [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,048, at 20,097 (Review Comm'n 1972) (OSHR Doc. No. 9), appeal filed, *id.* at 20,099 (9th Cir., May 17, 1972); *Ernest F. Donley's Sons, Inc.*, [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,628, at 20,913 (Review Comm'n 1973) (OSHR Doc. No. 43); *Broadview Constr. Co.* [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,399, at 20,603 (Review Comm'n 1973) (OSHR Doc. No. 124), aff'g Hearing Examiner's *opinion*, *id.* at 20,606. Chairman Moran dissented from the latter two cases asserting that finding a violation was improper where the hearing examiner had made no finding of fact, as required by OSHA § 10(c), 29 U.S.C. § 659(c) (1970), as to one of the essential elements of the violation, viz., that the hazard was "recognized." *Donley's Sons*, supra, at 20,915; *Broadview*, supra, at 20,606.

obvious hazard."³³ Chairman Moran, on the other hand, found the Secretary's evidence on this point too scanty and pointed out that the sole proof offered by the Secretary was the statement by his compliance officer that the Army Corps of Engineers had a general safety rule prohibiting passengers on such equipment.³⁴ Chairman Moran would therefore vacate the citation.³⁵

The Commission has also found that the basis of hazard recognition is not a question of the knowledge or lack thereof of the individual employer, but of the knowledge of the industry as a whole with respect to the hazard. In *Vy Lactos Laboratories, Inc.*,³⁶ the Commission, with one dissent, held an employer not responsible for a violation of the general duty since the record was devoid of any evidence that the hazard involved—hydrogen sulfide gas generated by decomposing proteinaceous material—constituted a hazard commonly known or "recognized" by employers in the respondent's industry.³⁷ The Commission majority specifically stated that the issue was not whether the employer was personally aware of the hazard, but whether the hazard was recognized in the industry generally; if the hazard was not widely recognized in the industry, there could be no violation of the general duty clause.³⁸ On petition for review, the Eighth Circuit Court of Appeals rejected this reasoning and instead agreed with the Commission dissent. The court found that "examination of the Act's legislative history clearly indicates that the term recognized was chosen by Congress not to exclude actual knowledge, but rather to include the generally recognized knowledge of the industry as well."³⁹ Under this line of reasoning, the standard for "recognition" becomes a question of whether the employer knew or should have known of the hazard, i.e., awareness based upon personal knowledge or industry standards.⁴⁰ In either case, the test is objective.⁴¹ In *National*

³³ *National Realty & Constr. Co.*, [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,188, at 20,264-65 (Review Comm'n 1972) (OSHRC Doc. No. 85).

³⁴ *Id.* at 20,270 (dissenting opinion).

³⁵ *Id.* at 20,271 (dissenting opinion).

³⁶ [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,488, at 20,772 (Review Comm'n 1973) (OSHRC Doc. No. 31).

³⁷ *Id.* at 20,773.

³⁸ *Id.* at 20,774.

³⁹ *Brennan v. Occupational Safety & Health Review Comm'n*, 494 F.2d 460 (8th Cir. 1974).

⁴⁰ See *Morey*, supra note 5, at 1002. The District of Columbia Circuit's remarks in *National Realty*, 489 F.2d at 1265, are not inconsistent with the Eighth Circuit's opinion in *Brennan v. Occupational Safety & Health Review Comm'n*, 494 F.2d 460 (8th Cir. 1974). In *National Realty*, the court was not presented with the actual knowledge issue. The conclusion that an employer's actual knowledge of the existence of a hazard would be sufficient to constitute recognition under the general duty clause is consonant with the objective test in *National Realty*. See 489 F.2d at 1265 n.32. Arguably, it would be quite inconsistent with the

Realty, the court, which was not confronted with the actual knowledge issue,⁴² stated that the standard for recognition would be "the common knowledge of safety experts who are familiar with the circumstances of the industry or the activity in question."⁴³ From this, it could be inferred that a showing of disagreement among safety experts may put a considerably greater burden of proof upon the Secretary.

Another issue in the recognition area is whether the general duty clause is intended to cover non-obvious⁴⁴ hazardous conditions which can be detected only by instrumentation or if only those hazards which can be detected by the unaided human senses come within its purview. In *American Smelting & Refining*,⁴⁵ the Commission held that "recognized hazards" under the general duty provision included health hazards which could be detected only by instrumentation.⁴⁶ Chairman Moran vigorously dissented from the majority determination in the case, and quoted the interpretation of the general duty clause contained in the final draft of the bill which became OSHA:

The conference bill takes the approach of this House to the general duty requirement that an employer maintain a safe and healthful working environment. The conference-reported bill recognizes the need for such a provision where there is no existing specific standard applicable to a given situation. However, this requirement is made realistic by its application only to those situations where there are 'recognized hazards' which are likely to cause or are causing serious injury or death. Such hazards are the type that can readily be detected on the basis of the basic human senses. Hazards which require technical or

stated purposes of OSHA, see text at note 4 *supra*, to allow an employer to escape liability, despite actual knowledge of a hazard, merely because the form of the danger was so unusual that safety experts might not yet be cognizant of it.

⁴¹ See *National Realty*, 489 F.2d at 1265 n.32.

⁴² See note 40 *supra*.

⁴³ 489 F.2d at 1265 n.32. Query whether a violation could be found even if the experts were unanimous in the opinion that a hazard did not exist, but a perhaps more reasonably objective consideration would indeed recognize a definite hazard. See *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932).

⁴⁴ "Non-obvious" could reasonably be interpreted to signify hazards which are not patently obvious but could be detected with the human senses upon a reasonably thorough investigation. However, the majority in *American Smelting* appears to interpret "non-obvious" as any hazard which cannot be detected through the unaided human senses. CCH Empl. Safety & Health Guide ¶ 16,456, at 21,327 (Review Comm'n 1973) (OSHR Doc. No. 10).

⁴⁵ *Id.* at 21,326.

⁴⁶ *Id.* at 21,327.

testing devices to detect them are not intended to be within the scope of the general duty requirement.⁴⁷

This statement by Representative Steiger evidences a concern which he expressed repeatedly during the consideration of this legislation. Earlier, in debate on the House version of the Act, he remarked:

If we are to include any sort of general-care duty in this legislation, . . . we should also limit its terms so that persons upon whom it would impose a duty are not unjustly held accountable for situations of which they are completely unaware.⁴⁸

The decision in *American Smelting* would seem to be contrary to the intent of Representative Steiger who was a major figure involved in the development of OSHA.

Even though a hazardous condition may exist, such as excessive levels of airborne lead particles as in *American Smelting*, the solution of the problem may require investigation as to feasibility and other factors.⁴⁹ Furthermore, the Secretary always has the option to immediately establish emergency temporary standards if the employees are exposed to grave danger as a result of the hazard.⁵⁰ The court in *National Realty* pointed out that where the employer "had no notice, *i.e.*, no duty to know, that its safety regime was defective," the proper course of action for the Secretary and the Commission might be to impose a zero penalty coupled with an abatement order.⁵¹

Another element in the proof of a violation of the general duty requirement is proof that the recognized hazard is "causing or likely to cause death or serious physical harm."⁵² As in *National Realty*, the court will usually defer to the Commission's expertise in the resolution of this issue.

If evidence is presented that a practice could eventuate in serious physical harm upon other than a freakish or utterly implausible occurrence of circumstances, the Commission's

⁴⁷ Id. at 21,328 (dissenting opinion), quoting from 116 Cong. Rec. 42206 (1970) (Remarks of Representative Steiger on the Conf. Rep. on S. 2193).

⁴⁸ 116 Cong. Rec. 38371 (1970) (Remarks of Representative Steiger).

⁴⁹ See the many factors which the Secretary must consider in devising specified standards. OSHA § 6(b)(5), 29 U.S.C. § 655(b)(5) (1970).

⁵⁰ OSHA § 6(c), 29 U.S.C. § 655(c) (1970). See *American Smelting*, CCH Empl. Safety & Health Guide ¶ 16,456, at 21,329 (Review Comm'n 1973) (OSHRC Doc. No. 10) (dissenting opinion); *Brisk Waterproofing Co.*, CCH Empl. Safety & Health Guide ¶ 16,345, at 21,261 (Review Comm'n 1973) (OSHRC Doc. No. 1046).

⁵¹ 489 F.2d at 1268 n.41.

⁵² OSHA § 5(a)(1), 29 U.S.C. § 654(a)(1) (1970).

expert determination of likelihood should be accorded considerable deference by the courts.⁵³

Implicit in the Commission's decision in *National Realty & Construction Co.*⁵⁴ is the principle that, for a serious violation to exist, it is not necessary that the probability be high that a hazard will result in an accident—i.e., that the accident be likely to occur—but rather that, if an accident resulting from the hazard should occur, there would be a substantial probability that serious injuries or death would result.⁵⁵

The final element in the Secretary's burden of proof, but perhaps the most significant, is proof that the employer did not render his place of employment "free"⁵⁶ from recognized hazards likely to result in severe injuries. The Commission has actually dealt with this element but in a rather general way. The Commission has found that an unforeseen occurrence falls outside the scope of the general duty clause.⁵⁷ In *Norman R. Bratcher Co.*,⁵⁸ a painting contractor was cited for a violation of the general duty clause after one of his employees was electrocuted when an aluminum ladder he was using came into contact with a power line. Two of the respondent's employees had found that an 18 foot extension ladder which they sought to use would not extend to the required length. In order to work on it, they moved the ladder some distance from the building they were to paint and thereafter raised the ladder in such

⁵³ 489 F.2d at 1265 n.33. See Morey, *supra* note 5, at 997-98.

⁵⁴ [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,188, at 20,265 (Review Comm'n 1972) (OSHRC Doc. No. 85).

⁵⁵ See *National Realty*, 489 F.2d at 1265 n.33. OSHA is preventative legislation; therefore, the Commission may penalize a company for failing to prevent a hazardous condition even though no injuries have resulted. See *id.* at 1260 n.6; OSHA § 2, 29 U.S.C. § 651 (1970).

The "degree of probability of occurrence of an injury" is an element of the "gravity" of the violation, which, among other factors, the Commission should take into consideration in determining the size of the penalty to be assessed. *National Realty & Constr. Co.*, [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,188, at 20,266 (Review Comm'n 1972) (OSHRC Doc. No. 85).

If there is a "substantial probability that death or serious physical harm could result from a condition which exists, or . . . practices . . . in use, in such place of employment . . ." the employer may be cited for a serious violation, subject to a due diligence defense. OSHA § 17(k), 29 U.S.C. § 666(j) (1970); see note 15 *supra*. The distinction between determinations of "gravity" and "seriousness" of a violation was clarified in *Natkin & Co.*, [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,679, at 20,967 (Review Comm'n 1973) (OSHRC Doc. No. 401). From this decision it appears that there may be a serious violation although of minimal gravity, i.e., although the possibility of the accident occurring is slight, if it did occur, the probability is substantial that death or serious physical harm would result. See *id.* at 20,967. See also *National Realty & Constr. Co.*, [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,188, at 20,265-66 (Review Comm'n 1972) (OSHRC Doc. No. 85).

⁵⁶ OSHA § 5(a)(1), 29 U.S.C. § 654(a)(1) (1970).

⁵⁷ But cf. *National Realty*, 489 F.2d at 1266 n.37.

⁵⁸ [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,501, at 20,786 (Review Comm'n 1973) (OSHRC Doc. No. 83).

a way that it came into contact with the electric cable, resulting in the death of one employee. The Commission held that the respondent could not reasonably have anticipated that his employees would use the ladder in such a manner that it would come in contact with or in close proximity to, the power line: the wires were sufficiently removed from the building to pose no danger and no unusual conditions existed at the site.⁵⁹ The Commission majority concluded that the possibility of serious death or injury from furnishing the ladder under those conditions was "too remote" to find a violation of the general duty clause. Therefore, the citation and penalty were vacated.

In *Hansen Brothers Logging*,⁶⁰ the Commission came closer to directly dealing with the "free" from recognized hazards issue when it adopted a "practicality" standard.⁶¹ The case concerned a logging operation. Hansen was cited following an investigation of the accidental death of an employee who had stepped into the swing radius of a crane used as a log loader; the employee was struck by the counter weight of the machine and was killed. Since no standards covered the situation, the issue presented under the general duty clause was whether the respondent had taken reasonable precautions to keep employees out of the hazardous area created by the rotation of the loader. In a rare unanimous opinion, the Commission found that "practicality and reason"⁶² required the conclusion that the respondent had met this obligation on the bases that: (a) the respondent gave specific oral instructions to stay clear of the loading area while equipment was in motion and had repeatedly reminded employees of this policy; (b) the hazard was obvious; and (c) there was nothing to show that the respondent knew or reasonably should have known that the employee would disobey company policy.⁶³

⁵⁹ See text at notes 59-61 *infra*. The Commission majority must have concluded that there was nothing that the employer feasibly could have done to effectively prevent this "unforeseen" occurrence. Nevertheless, Commissioner Van Namee thought that the eventuality was highly foreseeable and would have found a violation. *Id.* at 20,788 (dissenting opinion).

⁶⁰ [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,258, at 20,340 (Review Comm'n 1972) (OSHRC Doc. No. 141).

⁶¹ *Id.* at 20,341.

⁶² *Id.*

⁶³ *Id.* Could not the same be said with respect to the circumstances surrounding the accident in *National Realty*? See text at notes 15-19 *supra*. See also Chairman Moran's dissent in *Southern Soya Corp.*, CCH Empl. Safety & Health Guide ¶ 16,957, at 21,640 (Review Comm'n 1973) (OSHRC Doc. No. 515) (dissenting opinion). *Southern Soya* contains a fact situation highly analogous to *Hansen Bros. Logging*, [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,258, at 20,340 (Review Comm'n 1972) (OSHRC Doc. No. 141); see text at notes 60-64. Respondent in *Southern Soya* was cited for a violation of the general duty clause for failure to furnish employees working in a cotton seed storage tank with a place of employment free from a recognized hazard because they were exposed to a cave-in from undercut walls of

The Commissioners further pointed out that "to require the respondent to provide one-on-one supervision of its employees would place respondent under the unreasonably burdensome duty of having to establish the whereabouts of each of its employees prior to every operation of its equipment."⁶⁴

In *National Realty*, the court set up a criterion of "preventability"⁶⁵ for determining whether an employer had rendered his workplace "free" of a hazard. "Preventability" was furthermore limited within the confines of utility and feasibility.⁶⁶ This represents an important breakthrough in determining the limits of the general duty clause: the Secretary must show that there were recognized safety measures⁶⁷ that the employer could have taken which were "demonstrably feasible"⁶⁸ and which "would have materially reduced the likelihood that such misconduct would have occurred."⁶⁹ If the employer's safety program is not feasibly curable⁷⁰ or if the accident-producing situation was "idiosyncratic and implausible in motive or means,"⁷¹ then it was not preventable and Congress could not have intended it to be "recognized" under the clause.⁷² Even though hazardous conduct may be recognized as such, if incidents of the conduct are not "feasibly curable inadequacies"⁷³ of the employer's safety program, the employer may not be cited for violation of the clause when these isolated and unpreventable incidents do occur.⁷⁴ A safety program may be

cotton seed. *Southern Soya*, supra, at 21,639. Chairman Moran found that the respondent had a strict company rule prohibiting any person from leaving the safety tunnel and entering the storage tank until the plant manager and foreman jointly determined that it was safe; that no unauthorized employee was ever seen in the tank; that no infraction of the rule was ever called to the respondent's attention; that there was no reason to foresee that an employee with the company for 20 years would disobey the rule and enter the tank; and that the violation occurred as a result of the employee's carelessness and heedlessness. *Id.* at 21,639-40 (dissenting opinion). Nevertheless, on these facts, which are arguably more exculpatory than in *Arnold Hansen*, the majority found a violation, although not one reason was given therefor.

⁶⁴ [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,258, at 20,340 (Review Comm'n 1972) (OSHRC Doc. No. 141). This sounds very much like the preventability-feasibility-utility standard developed by the court in *National Realty*. See text at notes 65-75 infra.

⁶⁵ 489 F.2d at 1266.

⁶⁶ *Id.* at 1267. See Morey, *The General Duty Clause of the Occupational Safety and Health Act of 1970*, 86 Harv. L. Rev. 988, 992 (1973).

⁶⁷ The court impliedly spoke of safety measures which "conscientious experts, familiar with the industry" would have taken into consideration "when prescribing a safety program" for the employer. 489 F.2d at 1266. But the test of feasibility is not customariness. *Id.* at 1266 n.37.

⁶⁸ *Id.* at 1267.

⁶⁹ *Id.*

⁷⁰ This may require closing down the operation entirely. See Morey, supra note 66, at 992-93.

⁷¹ 489 F.2d at 1266.

⁷² *Id.* See text at notes 9-13 supra.

⁷³ *Id.* at 1267.

⁷⁴ *Id.* at 1266.

deficient to this degree and yet not be incompatible with the statutory requirement that the workplace be maintained "free" of recognized hazards.⁷⁵

It was with regard to this final element that the Secretary failed to carry his burden of proof: he adduced no evidence as to definite feasible and effective measures which National Realty could have taken to prevent the hazard from existing at the construction site.⁷⁶ The court stated that the procedures which the Secretary claims that the employer should have followed must be brought up at the hearing so that the employer may have an adequate opportunity to prepare a defense to the charges.⁷⁷ Particularly unfair is the situation, as in *National Realty*, where the employer learns only at the Commission review stage of the exact nature of the charges against him and the deficiencies of his safety program. Furthermore, it is not the function of the Review Commission to suggest ways in which the employer could have avoided a violation. The commissioners are not to act as "expert witnesses for the Secretary."⁷⁸ The Secretary must outline the charges against the employer either in the citation or by amendments to the citation at the hearing.⁷⁹ Thereafter, the three elements of the Secretary's burden of proof must be proven by substantial evidence in order that a violation of the general duty clause may properly be laid to the charge of the employer.

National Realty requires the Secretary to prove that the employer failed to (a) render his workplace "free" of a hazard which was (b) "recognized," and (c) "causing or likely to cause death or serious physical harm."⁸⁰ As more cases arising under the general duty clause are litigated, the scope of the duty will doubtless become more clearly defined. By clearly enumerating the elements in the secretary's burden of proof, *National Realty* has brightened the path to consistent and rational interpretation of the general duty clause of OSHA.

⁷⁵ Id. The fact that a fatality or an injury occurred is not prima facie proof that a violation of the general duty clause existed. Id. at 1267. See note 55 supra.

⁷⁶ Id. at 1267.

⁷⁷ Id.

⁷⁸ Id. at 1267 n.40.

⁷⁹ See note 27 supra. See also Ernest F. Donley's Sons, Inc., [1971-1973] CCH Occ. Safety & Health Decs. ¶ 15,628, at 20,914-15 (Review Comm'n 1973) (OSHRC Doc. No. 43) (dissenting opinion).

⁸⁰ 489 F.2d at 1265.