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Top Misconceptions Ab

By Arthur G. Sapper

ATTORNEYS WHO SPECIALIZE IN OSHA LAW often find themselves correcting employers and even safety professionals about certain misconceptions that could cause them to waste time and resources, and even cause a loss of legal rights. Employers commonly misunderstand things such as:

- what a “serious” violation is (the answer may surprise you),
- the difference between OSHA and Occupational Safety and Health Review Commission (OSHRC),
- whether OSHA must prove that a cited condition is a hazard,
- whether OSHA is bound by its field operation manuals,
- whether a judge may freely disagree with OSHA’s legal interpretations, and
- whether a showing of infeasibility is enough to defeat an OSHA citation.

This article discusses the reasons why employers commonly misunderstand these and other points, and what the correct understanding is.

“Serious” Violations Are Not Necessarily Serious

The most common misconception about the OSH Act by both safety professionals and employers is that a “serious” violation is serious in its ordinary sense. It is not.

This assertion might surprise safety professionals familiar with the OSH Act’s definition that a serious violation presents “a substantial probability that death or serious physical harm could result. . . .” But notice the word “could.” That implies a mere possibility, not a substantial probability, so the definition seems internally inconsistent. That inconsistency provided a platform for the independent OSHRC to hold that the probability of an accident occurring as a result of a violation is irrelevant (*Pete Miller Inc.*, 2000). Instead, OSHA need show only that, *if* an accident occurs (regardless of its improb-

ability), a serious consequence is *then* substantially probable. The federal courts have agreed (*California Stevedore and Ballast Co. v. OSHRC*, 1975).

To understand how this works in practice, consider a trench. OSHA’s standards do not require shoring or sloping in “stable rock.” Suppose a deep trench is dug in such near-stable rock that the probability of a trench collapse is, as a practical matter, nearly zero, and thus not “substantially” probable. If the trench *does* collapse, however, it

would be substantially probable *then* that any employee in it will be killed. That is a serious violation.

Why did the commission construe the word “serious” in this odd way? To stop parties and judges from wasting time and resources in nearly useless litigation. In the OSH Act’s early days, employers were litigating, and judges were holding trials and issuing decisions on whether a violation was “serious” (*Portland Stevedoring Co.*, 1973). But whether a violation is serious or nonserious does not affect one’s compliance or abatement obligations, and the difference in penalty amount between the two violations can logically consist of only one penny. How is that so? Both violation types must be abated, both have the same statutory maximum and the penalties for both must be computed using the same statutory factors: the employer’s size, good faith and history of previous violations, and

KEY TAKEAWAYS

- Attorneys specializing in OSHA law often encounter employers and safety professionals who hold certain misconceptions that can waste time and resources, or even cause a loss of legal rights.
- A long-time legal practitioner discusses several common misconceptions about OSHA law that safety professionals advising employers should keep in mind.



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the gravity of the violation. These penalty factors remain constant whether the violation is serious or not. This is true even as to gravity because that factor encompasses all variables that determine whether a violation is “serious” and more. The gravity factor encompasses both the probability of serious injury in the event of an accident (the sole determinant of a “serious” violation) *and* the probability of an accident (*Tacoma Boatbuilding Co.*, 1973).

That is why “it is quite possible for a serious violation to be of low gravity and a nonserious violation to be of high gravity” [Rothstein, 2019, § 14.3, p. 507; see also OSHA’s (2019) Field Operations Manual, pp. 65, Ch. 6, § III.A.4.a (referring to “low gravity” and “high gravity” serious violations)]. This also explains cases such as *GAF Corp.* (1981), where the commissioners disagreed on whether the violation was serious but agreed that a \$1,000 penalty should be assessed.

The only difference between serious and nonserious violations is their minimums: For a nonserious violation, a penalty “may” be assessed, whereas for a serious violation, a penalty “shall” be assessed, which can be satisfied by assessing a penny. The commission’s first chair thus used to say that there is not even “a dime’s worth” of difference between the two violations (*Emory H. Mixon*, 1973). Adopting this interpretation thus eliminated pointless controversy. Its downside for employers was that serious violations could be easily proven.

That seriousness is so easily proven explains why experienced OSHA officials and lawyers for OSHA are generally unimpressed by arguments that a violation is not serious. They think that unless the substantially probable consequence of an accident is no more grave than a paper cut (which is rare), or that the violation involves a paperwork requirement (e.g., keeping an injury log), all violations are serious. Yes, they may trade away a “serious” characterization to induce settlement, but that is rarely required by the case law.

Safety professionals know that many employers fear the practical consequence of being publicly accused of being a “serious” lawbreaker. If OSHA refuses to change the characterization to induce settlement, the employer should try to negotiate a settlement stating that the violation is one of “low gravity.” That might take away some of the ill-deserved sting of being called a “serious” violator.

The Commission Is Not Part of OSHA

Despite the similarities in their names, the Occupational Safety and Health Review Commission is not part of the Occupational Safety and Health Administration. It is not even part of the U.S. Department of Labor. It is a completely independent agency in the executive branch. Its three members, each of whom serve staggered 6-year terms, are nominated by the President and confirmed by the Senate. They are responsible only to the President, not the Secretary of Labor, for the conduct of their offices.

The practical consequence of this for safety professionals assisting employers is that agreements with OSHA’s lawyer on certain matters (e.g., whether the trial date should be changed) are not binding on the judge assigned by the commission to hear the case. This has come as a surprise to some unwary employers.

It’s Not About a Hazard

Another common misconception, even among safety professionals, is that once a case is taken to the commission, OSHA must prove that a violation presented a hazard.



That is often not true. It is true only if the cited standard uses the word “hazard” or the like, or OSHA is alleging a violation of the General Duty Clause, which uses the word “hazard,” or if the standard would be considered unconstitutionally vague without such a showing. Otherwise, OSHA need not prove a hazard (*Austin Bridge Co.*, 1979).

Although an employer may try to defend by affirmatively shouldering the burden of proving that no hazard existed and thus that any violation was “*de minimis*,” that is often difficult. An experienced OSHA inspector once told the author that “every standard is written in someone’s blood,” a sentiment with which many safety professionals may well agree. (In recent years, OSHA has adopted requirements that are program- or procedure-oriented, such as those in the lockout standard and the process safety management standard, of which that cannot always be said, but that is another subject.)

It’s Not About the Accident

OSHA often issues citations on the heels of an accident. There is a saying within OSHA, “There’s blood on the floor” (MSHA inspectors say, “There’s blood on the coal”). The implication is that the employer must therefore be made to pay. Inasmuch as the OSH Act is a preventive rather than a retributive statute, and inasmuch as it does not impose strict liability, that is an improper motive for a citation. Worse, citations often compound the error by alleging that a violation caused a certain injury. That is improper because citations are supposed to allege violations, not injury causation. But OSHA officials are human.

As a result of these practices, employers and inexperienced attorneys litigate the case and the cause of the accident vigorously on the assumption that the judge will be deciding whether the alleged violation caused the accident, injury or death. But the assumption is often wrong. As the commission has held, the “issue is not the cause of the accident, but whether the standard has been violated” (*Propellex Corp.*, 1999).

Their assumption may be true if the circumstances of the injury or accident are used to show a disputed but relevant fact. For example, if the flammability of a certain liquid is disputed, the circumstances of an injury or accident may be used to show flammability; similarly, if the amount of a proposed penalty is disputed, those circumstances may be used to show the cited condition’s gravity. But otherwise, safety professionals advising employers must be mindful that causation need not be litigated or decided.

It’s Not About OSHA

Employers often come to a judge complaining about the OSHA inspector, that the individual knew nothing about their businesses, had never seen this machinery before, or said something untoward during the inspection, and so forth.

The problem is that these complaints typically will not be legally relevant. The judge will want to know whether the cited standard was violated, for example, whether the guardrail was up or not. If the qualifications of the inspector are irrelevant to that question, as is often the case, the complaint will do no good.

Attacking the inspector’s knowledge might be useful in some circumstances, however. If the standard requires a judgment call (e.g., uses the term “hazard” or “feasible”) and the inspector testifies to that issue, giving his opinion,

the employer’s attorney, with the assistance of a knowledgeable safety professional, might be able to impeach the inspector’s credibility by showing that the individual knows nothing about the equipment. Or if the inspector testifies that certain specialized terms in the standard (e.g., “aerial lift”) apply to the equipment, an employer’s attorney, again with a safety professional’s assistance, might be able to convince the judge that the inspector is incorrect.

OSHA Is Not as Bound by Its Manuals as Employers May Be Bound by Theirs

Many employers argue that OSHA’s behavior during the inspection or its arguments in litigation are inconsistent with its Field Operations Manual. Such arguments nearly always lose. As the Second Circuit recently stated, the manual is “only a guide for OSHA personnel to promote efficiency and uniformity, [is] not binding on OSHA or the Commission, and [does] not create any substantive rights for employers” (*Triumph Construction Corp. v. Secretary of Labor*, 2018).

It may seem unfair, but the same forgiving attitude is not often extended to employers’ safety and health manuals. For example, a judge recently faulted a hospital for not, contrary to its workplace violence policy, debriefing employees subjected to patient violence (the citation was upheld in *BHC Northwest Psychiatric Hospital LLC v. Secretary of Labor*, 2020). But there is a reason for the difference. OSHA’s manual is a guide to good administration. By contrast, employer safety manuals are intended—indeed, often legally required—to state *rules* that employees must follow to avoid *injury*. Safety professionals need to be mindful of this when drafting safety manuals and programs.

What about OSHA procedures for testing, for example, air contaminant samples? The picture there is more complicated, but it can plausibly be argued that such procedures reflect OSHA’s own expert view on how testing must be conducted to reliably measure workplace conditions (*Equitable Shipyards Inc.*, 1987, involving an OSHA welding fume protocol). For those manuals, OSHA’s adherence to them may well be required to show that the sampling was reliable.

OSHA Violations Are Forever

Many employers think that after a violation is 3 or 5 years old, it may no longer be used as the basis for a “repeated” violation allegation. There is no such rule. Similarly, there is no period after which an OSHA citation will not be on an employer’s record. OSHA violations are forever.

The reason many employers think that there is a 3- or 5-year rule for repeated violations is that OSHA’s Field Operations Manual states that “the following policy shall generally be followed: A citation will be issued as a repeated violation if . . . the citation is issued within 5 years of the final order date of the previous citation” (OSHA, 2019, Ch. 4, § VII.E.1.a, p. 426; it used to say 3 years). But the word “generally” cuts all the force out of that sentence. If an employer is considered a bad actor, OSHA will go—and has gone—back as many years as necessary to prove that a violation was repeated. Safety professionals must be mindful of this when advising employers about the consequences of an OSHA violation.

Know the Difference Between Abatement & Compliance

Many safety professionals, employers, attorneys, OSHA inspectors and even judges have confused abatement with

compliance. Abatement pertains to cessation of past or current violations. Compliance pertains to avoidance of future violations. The difference is important for two reasons: 1. it tells employers how to draft abatement certifications; and 2. it helps judges and OSHA officials distinguish failures to abate (with their daily penalties) from repeated violations (with their one-time enhanced penalty).

Consider OSHA's lead standard. It requires that certain lead-contaminated protective clothing be "placed in a closed container." Suppose an inspector sees a container uncovered and mentions this to the employer's walkaround representative, who promptly covers the container. This is abatement. If an employee later leaves the container uncovered, that is a repeated violation, not a failure to abate. As OSHA's (2019) Field Operations Manual states, "if . . . the violation was corrected, but later recurs, the subsequent occurrence is a repeated violation" (Ch. 4, § VII.F, pp. 427).

Thus, when an employer completes an abatement certification required by OSHA's regulations, it is enough to say, for example, that the operation during which the cited violation occurred is now over. The employer is not required to say how future violations will be prevented. And usually the less said, the better.

It's Not Whether OSHA's Legal Interpretation Is Right or Wrong, But Whether It Is Unreasonable

The OSH Act was not passed until the business community received the promise of a substantial check on what they feared would be the usual excesses of any single-minded bureaucracy. That promised check was the establishment of the independent OSHRC.

That promise has, unfortunately, been broken, for a Supreme Court decision in 1991 [*Martin v. OSHRC (CF&I Steel Corp.)*] as a practical matter removed the commission as a check on OSHA's legal interpretations. The decision in effect held that the commission may no longer second-guess OSHA's legal interpretations unless they are unreasonable—not wrong, but unreasonable. (The decision does not apply to the commission's findings of fact, which it continues to make with complete independence.) The problem for employers is that *proving* that OSHA's legal position is unreasonable is often extraordinarily difficult, even when it *is* unreasonable.

The same deference rule (called *Chevron* deference) applies to courts, which means that they too will rarely be a check on OSHA's legal views. The situation gives new meaning to the old phrase, "good enough for government work." The *Chevron* rule may soon be reconsidered by the Supreme Court, but until then, true justice may be difficult to obtain.

So, when is it now worthwhile litigating against OSHA? When either 1. the facts are in dispute; or 2. the law is in dispute *and* your lawyer is knowledgeable enough about OSHA law to prove that OSHA's interpretation is not just wrong but unreasonable.

Settlement Talks Do Not Postpone Contest Dates

One of the most common misconceptions among employers is that talking to OSHA officials about settlement somehow postpones the 15 working-day deadline to file a notice of contest. It does not, and if the employer fails to file, the citation and its penalty become enforceable. Good OSHA area directors warn employers of this; their words should be heeded.

If a safety professional assisting an employer with settlement talks during the contest period finds that the contest date is looming, the best practice is to file a written notice of contest and include in it a statement that the notice is being filed to protect the employer's rights and that you would like to keep discussing settlement. You can still settle after the citation is contested.

Infeasibility Might Not Get You Off the Hook

Inasmuch as OSHRC and OSHA recognize an infeasibility defense, many employers and safety professionals have gotten the impression that to defeat an OSHA citation they need prove only that compliance was infeasible. They would be mistaken; if infeasibility is all they prove, they would lose, and the citation would be affirmed.

Why? Because the infeasibility defense has a second element: that the employer took alternative protective measures to the extent feasible. In other words, infeasibility does not permit the employer to do nothing; it must still protect employees as much as it feasibly can. Similarly, the greater hazard defense has that same second element, plus a third: that a variance application would be inappropriate. Many cases have been lost because this point was overlooked.

If an employer or safety professional does decide that full compliance with an OSHA standard is infeasible, the decision, the reasons for it and what alternative measures will be taken should be stated in a memorandum to the file. The memorandum would not only help defend against an OSHA citation but one that claims that any violation was willful.

Conclusion

Safety professionals advising employers on OSHA compliance often find themselves navigating between safety and health principles on the one hand and legal principles on the other hand. For them, a working knowledge of the rudiments of OSHA law is not just advisable, but necessary. Knowing common misconceptions will help them and their employers or clients avoid traps for the unwary. **PSJ**

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