emphasized that an employer who has received a final order in a prior citation has an affirmative duty to search out and eliminate any substantially similar hazardous condition. It would appear that an employer who does try in good faith but who fails to remove the hazardous condition cannot use that good faith as a defense against a citation for a repeated violation.

[5]—Willful Violations

Within a hierarchical ranking of degrees of severity, willful violations are the most severe of all violations. The Act authorizes a maximum penalty of $10,000 for each willful violation and also authorizes criminal penalties including a maximum of six months imprisonment where an employee death results from a willful violation.[95] Because the Secretary does not have jurisdiction to impose criminal sanctions, criminal willful violations are referred to the Department of Justice for prosecution.

[a]—Definition

Although the Act imposes severe penalties for willful violations, it does not define what constitutes willfulness. Early decisions by OSHRC and the courts showed disagreement about whether to define willfulness broadly or restrictively. For example, the Third Circuit defined willful violations restrictively: "Willfulness connotes defiance or such reckless disregard of consequences as to be equivalent to a knowing, conscious and deliberate flaunting (*sic*) of the Act. Willful means more than merely voluntary action or omission—it involves an element of obstinate refusal to comply . . . . We believe that a restrictive definition is appropriate here since otherwise there would be no distinction between a 'serious' offense and a 'willful' one."[96]

The Third Circuit's definition was widely criticized by other courts, particularly because the Third Circuit also applied the "flaunting" or "flouting" test to repeated violations leaving little basis to distinguish willful violations from repeated violations.[97]

The First Circuit, in contrast, adopted a broad definition of willful violations saying:

> "Petitioner, through its foreman, made its choice, a *conscious, intentional, deliberate voluntary decision which, regardless of venal motive,* properly is described as willful."[98]

Subsequently, the First Circuit's broad definition was adopted by the Fourth Circuit which added that good faith could be no defense.

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[95] OSH Act § 17(a); 29 U.S.C. § 666(a).

[96] Frank Irey, Jr., Inc. v. OSHRC, 519 F.2d 1200, 1207 (3d Cir. 1974), *aff'd en banc* 519 F.2d 1215 (3d Cir. 1975).

[97] Bethlehem Steel Corp. v. OSHRC, 540 F.2d 157 (3d Cir. 1976).

[98] F. X. Messina Construction Corp. v. OSHRC, 505 F.2d 701, 702 (1st Cir. 1974). (Emphasis added.)

> ". . . Willful means *action taken knowledgeably* by one subject to the statutory provisions in disregard of the action's legality. No showing of malicious intent is necessary. A conscious, intentional, deliberate, voluntary decision is properly described as willful 'regardless of venal motive.' . . . Regardless of any good faith belief that the work area remained safe, the fact is that the company knowingly chose not to comply with OSHA regulations and requirements."[99]

Other courts soon joined the First Circuit in rejecting the Third Circuit's requirement of an "obstinate refusal to comply." In a criminal prosecution, the Tenth Circuit said that a willful violation was "deliberate, voluntary and intentional as distinguished from one committed through inadvertence, accidentally or by ordinary negligence."[100] The Tenth Circuit reiterated that position in a civil case.[101] The Fifth Circuit[102] followed the Fourth Circuit's definition of willful, as did the Sixth,[103] Eighth,[104] Ninth,[105] and Eleventh[106] Circuits. More recent decisions have defined a willful violation as one that is committed with "intentional disregard of, or plain indifference to," the requirements of the OSH Act.[107]

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[99] Intercounty Construction Co. v. OSHRC, 522 F.2d 777, 779-780 (4th Cir. 1975), *cert. denied* 423 U.S. 1072 (1976). (Emphasis added.)

[100] United States v. Dye Construction Co., 510 F.2d 78 (10th Cir. 1975).

[101] Kent Nowlin Construction Co. v. OSHRC, 593 F.2d 368 (10th Cir. 1979). See also, Martin v. OSHRC, 941 F.2d 1051 (10th Cir. 1991), where an employer had failed to take any corrective action after several employees found that their face pieces were admitting coke oven emissions. The court held that the employer's failure to correct the problem was a willful violation of the act. The employer was required to insure that the respirators fit properly before the employees were forced to return to work.

[102] Georgia Electric Co. v. Marshall, 595 F.2d 309, 318-319 (5th Cir. 1979).

[103] National Engineering & Contracting Co. v. Herman, 181 F.3d 715, 721 (6th Cir.), *cert. denied* 120 S.Ct. 578 (1999); Empire-Detroit Steel v. OSHRC, 579 F.2d 378, 384 (6th Cir. 1978).

[104] Valdak Corp. v. OSHA, 73 F.3d 1466 (8th Cir. 1996); Western Waterproofing Co. v. Marshall, 576 F.2d 139, 142 (8th Cir.), *cert. denied* 439 U.S. 965 (1979).

[105] National Steel & Shipbuilding Co. v. OSHRC, 607 F.2d 311 (9th Cir. 1979).

[106] Reich v. Trinity Industries, Inc., 16 F.3d 1149 (11th Cir. 1994), where the employer mistakenly believed that his alternative solution to high noise levels was in compliance with the regulations. The court held that although there was no bad faith by the employer, he knew what the regulation required and intentionally chose not to comply, and consequently he had willfully violated the Act.

[107] *Seventh Circuit:* Globe Contractors, Inc. v. Herman, 132 F.3d 367, 372-373 (7th Cir. 1997); Caterpillar Inc. v. OSHRC, 122 F.3d 437, 440 (7th Cir. 1997).

Eighth Circuit: Dakota Underground, Inc. v. Secretary of Labor, 200 F.3d 564, 566-567 (8th Cir. 2000); McKie Ford, Inc. v. Secretary of Labor, 191 F.3d 853, 856 (8th Cir. 1999).

Eleventh Circuit: J.A.M. Builders, Inc. v. Herman, 233 F.3d 1350, 1355-1356 (11th Cir. 2000).

District of Columbia Circuit: A. J. McNulty & Co. v. Secretary of Labor, 283 F.3d 328, 337-338 (D.C. Cir. 2002) (rejecting employer's argument that OSHRC may find willfulness only when employer exhibits reckless disregard); Kaspar Wire Works, Inc. v. Secretary of Labor, 268 F.3d 1123, 1127 (D.C. Cir. 2001).

The District of Columbia Circuit noted that virtually all other circuits had rejected a requirement of "obstinate refusal" as a prerequisite for finding a willful violation.[108] At the same time, however, the court stated that in most cases, there was no meaningful difference between "obstinate refusal" and "deliberate or intentional disregard" of the Act's requirements. The court found that the common denominator in all the willful violation cases was an employer state of mind that was consistent with more than mere negligence.

Subsequently, the Third Circuit abandoned its position of requiring a "flaunting" of the OSH Act and followed instead the District of Columbia Circuit's reasoning.[109]

OSHRC formally defined its test for willful violations, saying:

> "The Commission defines a 'willful' violation as action taken knowledgeably by one subject to the statutory provisions of the Act in disregard of the action's legality. No showing of malicious intent is necessary. A conscious, intentional, deliberate, voluntary decision is properly described as willful."[110]

A willful violation is distinguished from other types of violations by a heightened awareness of the illegality of the violative conduct or conditions, and by a state of mind of conscious disregard for OSHA regulations or plain indifference to employee safety.[111] The Seventh Circuit has compared this distinction to the difference between recklessness and negligence in tort law.[112] An employer's failure to act in the face of a known duty demonstrates knowing disregard that characterizes willfulness. The Secretary can also establish willfulness by showing that the employer, if informed of its duty to act, would not have cared.[113] Willfulness relates to the employer's underlying state of

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[108] Cedar Construction Co. v. OSHRC, 587 F.2d 1303 (D.C. Cir. 1978). See also, Conie Construction, Inc. v. Reich, 73 F.3d 382 (D.C. Cir. 1995).

[109] Babcock & Wilcox Co. v. OSHRC, 622 F.2d 1160 (3d Cir. 1979). See also, Universal Radiator Manufacturing Co. v. Marshall, 631 F.2d 20 (3d Cir. 1980).

[110] P.A.F. Equipment Co., 7 O.S.H.C. 1209 (1979).

[111] *Seventh Circuit:* Caterpillar Inc. v. OSHRC, 122 F.3d 437, 440 (7th Cir. 1997).

Occupational Safety and Health Review Commission: Secretary of Labor v. Midwest Generation, 19 O.S.H.C. 1520, 1527 (2001); Secretary of Labor v. C-Post, 19 O.S.H.C. 1457, 1458 (2001); Secretary of Labor v. Great Lakes Packaging Corp., 18 O.S.H.C. 2138, 2141 (2000); Secretary of Labor v. L & B Products Corp., 18 O.S.H.C. 1323, 1332 (1998); Secretary of Labor v. C.E.M. Plumbing, Inc., 17 O.S.H.C. 2080, 2081 (1997).

[112] Caterpillar, Inc. v. Herman, 154 F.3d 400, 402 (7th Cir. 1998). *Accord*, IBP, Inc. v. Iowa Employment Appeals Board, 604 N.W.2d 307, 321 (Iowa 1999) (applying Iowa law patterned after OSHA and citing *Caterpillar*).

[113] *Eleventh Circuit:* J.A.M. Builders, Inc. v. Herman, 233 F.3d 1350, 1355-1356 (11th Cir. 2000).

Occupational Safety and Health Review Commission: Secretary of Labor v. J. Masterson Construction Corp., 19 O.S.H.C. 1791, 1792 (2001); Secretary of Labor v. C-Post, 19 O.S.H.C. 1457, 1458 (2001); Secretary of Labor v. Fiore Construction Co., 19 O.S.H.C. 1408, 1409 (2001); Secretary of Labor v. A. E. Staley Manufacturing Co., 19 O.S.H.C. 1199, 1211 (2000); Secretary of Labor v. Branham Sign Co., 18 O.S.H.C. 2132, 2134 (2000).

mind at the time it commits the violation.[114] However, the requisite state of mind need not include an evil motive or bad purpose.[114.1] Furthermore, an employer's knowledge of a standard and a subsequent violation of that standard do not automatically prove willfulness.[114.2]

[b]—Application

OSHRC and the courts have reached agreement that the Secretary must show three elements to avoid reduction of a citation for willful violation to a lesser degree of violation. The Secretary must show (1) that the employer knew or should have known that a violation existed, (2) that the employer voluntarily chose not to comply with the Act to remove the violative condition, and (3) that the employer made this choice not to comply with intentional disregard of the Act's requirements or plain indifference to them properly characterized as reckless.

A series of disparate violations that are not part of a pattern, practice or course of conduct are not considered willful. Nonetheless, the Commission may find that any individual violation in the series was willful.[115]

Despite the appearance of unanimity, however, unresolved issues remain concerning the role of good faith and the question of what knowledge can be imputed to the employer.

[i]—Good Faith

Although the Secretary need not show bad faith, a good-faith attempt to comply with the Act is a defense to the Secretary's *prima facie* case.[116] A violation is not willful if the employer had a good-faith reasonable belief that the violative condition conformed to the requirements of the cited standard.[117] In addition, an employer's good-faith efforts to make its workplace safe and protect its employees may show that an offense was not willful.[118] Even good-faith efforts at compliance that are incomplete or not entirely

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[114] Secretary of Labor v. C.E.M. Plumbing, Inc., 17 O.S.H.C. 2080, 2082 (1997).

[114.1] Kaspar Wire Works, Inc. v. Secretary of Labor, 268 F.3d 1123, 1129 (D.C. Cir. 2001) (rejecting employer's argument that willfulness finding was inappropriate because employer had nothing to gain by violating OSHA's recordkeeping regulations).

[114.2] Secretary of Labor v. SC Development Corp., 19 O.S.H.C. 1883, 1889 (2002).

[115] Secretary of Labor v. A. E. Staley Manufacturing Co., 19 O.S.H.C. 1199, 1213 (2000).

[116] See, e.g.: Secretary of Labor v. Fluor Daniel, 19 O.S.H.C. 1529, 1534 (2001); Secretary of Labor v. L. R. Willson & Sons, Inc., 17 O.S.H.C. 2059, 2063 (1997), *aff'd in part, rev'd in part on other grounds* 134 F.3d 1235 (4th Cir. 1998).

[117] *District of Columbia Circuit:* A. J. McNulty & Co. v. Secretary of Labor, 283 F.3d 328, 338 (D.C. Cir. 2002).

Occupational Safety and Health Review Commission: Secretary of Labor v. MJP Construction Co., 19 O.S.H.C. 1638, 1648 (2001); Secretary of Labor v. North Landing Line Construction Co., 19 O.S.H.C. 1465, 1475-1476 (2001); Secretary of Labor v. C.E.M. Plumbing, Inc., 17 O.S.H.C. 2080, 2081 (1997). See also, United States v. Ladish Malting Co., 135 F.3d 484, 491 (7th Cir. 1998) (violation is not willful when it is based on non-frivolous interpretation of OSHA's regulations).

[118] Secretary of Labor v. Aviation Constructors Inc., 18 O.S.H.C. 1917, 1920 (1999).

effective can negate a willfulness finding, provided they were objectively reasonable under the circumstances.[119] For example, in an early OSHRC decision,[120] the employer's attempts to steady a large crane counterweight were inadequate, but those unsuccessful attempts were enough to prevent citation for a willful violation. While the Commission does not apply a "percentage of compliance" test, a small number of prior violations in relationship to the total volume of work may be relevant in determining the employer's state of mind.[121]

Evidence of good faith may take two forms: (1) the employer may seek to establish its good faith belief that, as a factual matter, the conditions in its workplace conformed to OSHA requirements; or (2) the employer may introduce evidence to show that it made efforts to comply with OSHA requirements.[122]

Some administrative law judges have found that an employer rebutted a citation for a willful violation by showing good faith. For example, in one case,[123] the employer had a good faith belief that dismissal of a previous citation relieved responsibility for instituting safety measures for employees exposed to elevators without gate bars; the administrative law judge found no willful violation of the general duty clause. In a second case, the employer knew that truck brakes were unsafe but did not intend employees to use the truck, and the employer's good faith belief that employees were removed from the hazard was sufficient to find the violation non-willful.[124]

More has been required, however, than an employer's good faith to excuse deliberate disregard of the Act's requirements. One test has been whether "there is a reasonable, good-faith difference of opinion as to a critical fact and the resolution of this question determines whether there is a violation."[125] Later the Commission further clarified this test, stating that

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[119] *Seventh Circuit:* Caterpillar Inc. v. OSHRC, 122 F.3d 437, 441-442 (7th Cir. 1997) (employer's decision to install warning tape and signs was not objectively reasonable, since it offered no protection to employees working within danger zone).

Occupational Safety and Health Review Commission: Secretary of Labor v. SC Development Corp., 19 O.S.H.C. 1883, 1889 (2002) (violation was not willful in light of employer's good-faith effort to comply with what it thought was required to remove lead); Secretary of Labor v. Selkirk Inc., 19 O.S.H.C. 1428, 1429-1430 (2001); Secretary of Labor v. A. J. McNulty & Co., 19 O.S.H.C. 1121, 1135 (2000); Secretary of Labor v. Great Lakes Packaging Corp., 18 O.S.H.C. 2138, 2141 (2000); Secretary of Labor v. Venango Environmental, Inc., 18 O.S.H.C. 1785, 1787-1788 (1999) (good-faith defense not available since employer's efforts to repair defective steering of front end loader were incomplete, ineffective and unreasonable).

[120] Williams Enterprises, Inc., 4 O.S.H.C. 1663 (1976).

[121] *Secretary of Labor v. A. E. Staley Manufacturing Co.*, N. 115 *supra*, 19 O.S.H.C. at 1212.

[122] Secretary of Labor v. Aviation Constructors Inc., 18 O.S.H.C. 1917, 1920-1921 (1999).

[123] Atlantic Gummed Paper Corp., 8 O.S.H.C. 1042 (Administrative Law Judge, 1980).

[124] Chrysler Corp., 8 O.S.H.C. 1088 (Administrative Law Judge, 1980).

[125] Acme Fence & Iron Co., 7 O.S.H.C. 2228, 2231 (1980). See also: Communications, Inc., 7 O.S.H.C. 1598 (1979); C.N. Flagg & Co., d/b/a/ Northeastern Contracting Co., 2 O.S.H.C. 1539 (1975).

"[t]he test of an employer's good faith, for purposes of determining willfulness, is an objective one, i.e., was the employer's belief concerning a factual matter or concerning the interpretation of a standard, reasonable under the circumstances."[126] Similarly, when the employer argues that it attempted to comply with the applicable standard, the issue is whether the employer's efforts were objectively reasonable even if they were not totally effective.[127] One employer genuinely believed that installation of guardrails required by the standards was more dangerous to employees than non-compliance, and that the installation was in fact impossible to accomplish.[128] OSHRC found that the employer should have known that alternative means of protection were available, and the intentional non-compliance therefore was a willful violation.

Thus, when an employer raises a defense unsuccessfully, while conceding deliberate intent to violate a safety or health standard, good faith will not prevent a citation for a willful violation.[129] In such cases, however, good faith may be a factor to reduce the penalty.[130] Furthermore, the existence of an employer safety program lessens the likelihood of criminal prosecution if a death nonetheless occurs.[131]

The role of good faith in citations for willful violations is analytically uncertain. Where good faith has prevented citation for willful violation, it has been another way of saying that the Secretary failed to show the requisite state of mind for a willful violation. It has functioned as an affirmative defense, usually, but not always, in combination with other defenses, to rebut the Secretary's *prima facie* case. At the same time, good faith may be found irrelevant to an intentional violation of the Act and merely a factor to adjust penalties. The Seventh Circuit has pointed out that an employer's efforts to make its workplace safe may show that an offense was not willful; however, if willfulness is nonetheless established, there is no residual room for a good faith defense.[132]

[ii]—Employer Knowledge

The Secretary must show that the employer knew that a standard was being violated and that the employer voluntarily chose not to comply,

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[126] S. Zara and Sons Contracting Co., 10 O.S.H.C. 1334 (1982), *aff'd* 11 O.S.H.C. 1121 (2d Cir. 1982). See also: Secretary of Labor v. North Landing Line Construction Co., 19 O.S.H.C. 1465, 1476 (2001); Secretary of Labor v. C-Post, 19 O.S.H.C. 1457, 1458 (2001); *Secretary of Labor v. Great Lakes Packaging Corp.*, N. 119 *supra*, 18 O.S.H.C. at 2141; Secretary of Labor v. L & B Products Corp., 18 O.S.H.C. 1323, 1332 (1998); Secretary of Labor v. L. R. Willson & Sons, Inc., 17 O.S.H.C. 2059, 2063 (1997), *aff'd in part, rev'd in part on other grounds* 134 F.3d 1235 (4th Cir. 1998).

[127] Secretary of Labor v. SC Development Corp., 19 O.S.H.C. 1883, 1889 (2002); Secretary of Labor v. Aviation Constructors Inc., 18 O.S.H.C. 1917, 1921 (1999).

[128] Acme Fence & Iron Co., 7 O.S.H.C. 2228 (1980).

[129] See, e.g., United States v. Ladish Malting Co., 135 F.3d 484, 491 (7th Cir. 1998) (if employer's act was willful, there is no residual room for good-faith defense).

[130] See § 5.02 *infra*.

[131] United States v. Ladish Malting Co., 135 F.3d 484, 491 (7th Cir. 1998).

[132] *Id.*

intentionally or with plain indifference that amounted to recklessness.[133] The employer's knowledge of the violative condition may be actual or imputed. The failure to comply must be voluntary, as distinguished from accidental or unsuccessful attempts to comply. To phrase the requirements differently, the employer must have known of a violative condition and chosen to disregard the safety or health standard applicable to that condition.[134]

Citations have been vacated where the Secretary has failed to show that the employer knew or should have known of the violative condition. For example, an administrative law judge vacated a citation for willful violation because the Secretary failed to show that the employer knew oxygen tanks were in the entryway of the basement of a building scheduled for demolition.[135] OSHRC vacated a citation because the Secretary failed to show that the employer either controlled a backhoe operation or knew that the general contractor had failed to provide signalmen.[136]

The Secretary need not show, however, that the employer had actual knowledge of the violative condition or act. The knowledge of a supervi-sor[137] or other employee responsible for reporting safety hazards[138] may be imputed to the employer who should have known of the violation, even if the person subsequently left the employ of the employer.[139] A history of prior citations involving similar standards or even the context in which an employer would reasonably search out violative conditions can also substitute for actual employer knowledge.[140] However, an employee's disregard of a company rule does not automatically establish willful disregard of an OSHA requirement.[141]

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[133] See, e.g., Secretary of Labor v. A. J. McNulty & Co., 19 O.S.H.C. 1121, 1135 (2000).

[134] Secretary of Labor v. Aviation Constructors Inc., 18 O.S.H.C. 1917, 1920 (1999).

[135] Smith & Mahoney, Inc., 8 O.S.H.C. 2070 (Administrative Law Judge, 1980).

[136] Electrical Contractors of America, Inc., 8 O.S.H.C. 2117 (1980).

[137] Secretary of Labor v. Branham Sign Co., 18 O.S.H.C. 2132, 2134 (2000); Secretary of Labor v. George Campbell Painting Corp., 18 O.S.H.C. 1929, 1934 (1999); Secretary of Labor v. L. R. Willson & Sons, Inc., 17 O.S.H.C. 2059, 2063 (1997), *aff'd in part, rev'd in part on other grounds* 134 F.3d 1235 (4th Cir. 1998); Western Waterproofing Co., 5 O.S.H.C. 1064 (1977), *aff'd in part, rev'd and remanded in part* 576 F.2d 139 (8th Cir.), *cert. denied* 429 U.S. 965 (1978).

[138] *Seventh Circuit:* United States v. Ladish Malting Co., 135 F.3d 484, 491 (7th Cir. 1998) (rejecting employer's argument that corporate knowledge means only supervisors' knowledge).

Eighth Circuit: Dakota Underground, Inc. v. Secretary of Labor, 200 F.3d 564, 567 (8th Cir. 2000) (knowledge of competent person responsible for OSHA compliance at site is attributable to employer).

[139] Caterpillar Inc. v. OSHRC, 122 F.3d 437, 440-441 (7th Cir. 1997) (mere fact that previous supervisors who were aware of hazard were no longer supervisors at time of accident did not cancel employer's knowledge).

[140] *Seventh Circuit:* Globe Contractors, Inc. v. Herman, 132 F.3d 367, 373 (7th Cir. 1997) (contractor had been cited for violating standard at least eleven times before).

Eighth Circuit: Dakota Underground, Inc. v. Secretary of Labor, N. 138 *supra,* 200 F.3d at 567 (employer had previously been cited for multiple violations of OSHA trenching regulations and had generally fostered working environment in which safety regulations were frequently ignored or even mocked).

At times, however, imputed knowledge has acted to make an employer liable for willful violation where the employer was no more than negligent in failing to take a course of action. One administrative law judge, for example, said that common sense should have told the employer to wait to get a standard guard for a crane or even use a photo-electric eye to protect employees.[142] In another case, a trench caved in on an employee who was being trained.[143] The employer gave safety instructions and employed a person experienced in excavation work to train his own employees. Although the employer had relied on the experienced employee and instructed on safety, OSHRC found a willful violation through the employer's poor judgment in hiring.

The Secretary must also show that the employer voluntarily violated the Act, with a state of mind that was intentionally or recklessly indifferent to the Act's requirements. Where the employer acts in knowing and voluntary violation of the Act without concern for employee health or safety, the Secretary has had little difficulty in showing a willful violation. For example, an employer that fails to comply with the Act because of the high cost of compliance is clearly aware of the requirements of the standard or the need to abate the hazard.[144]

More difficult to assess are cases in which the employer is charged with "reckless disregard" or "plain indifference" to the Act's requirements. Recognizing the difficulty of distinguishing between plain indifference and mere negligence, the Eighth Circuit stated: "There must be evidence of aggravating circumstances, apart from mere lack of diligence or adequate care, in order to satisfy the standard. In other words, simply failing to address a recognized hazard will not support a willful violation."[145] OSHRC said in one case that willful violation consists of "action taken knowingly by one subject to the statutory provisions of the Act in disregard of the action's legality. . . or, conduct marked by a careless disregard of a standard or employee safety."[146] The Eleventh Circuit found that a subcontractor acted with "intentional disregard" and "plain indifference" when it required its employees to work in dangerous proximity to energized electrical lines and expressed no concern about their safety.[147]

In some cases, the Secretary may establish knowledge by showing an employer's awareness of a significant risk coupled with steps to avoid additional information. According to OSHRC, it makes no sense to require

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District of Columbia Circuit: A. J. McNulty & Co. v. Secretary of Labor, 283 F.3d 328, 338 (D.C. Cir. 2002).

Occupational Safety and Health Review Commission: Georgia Electric Co., 5 O.S.H.C. 1112 (1977), *aff'd* 595 F.2d 309 (5th Cir. 1979).

[141] *Secretary of Labor v. Branham Sign Co.*, N. 137 *supra*, 18 O.S.H.C. at 2134 (noting that OSHRC is reluctant to find willfulness when company rules refer only to use of safety equipment in general); Secretary of Labor v. George Campbell Painting Corp., 18 O.S.H.C. 1929, 1934 (1999).

[142] Whaley Engineering Corp., 8 O.S.H.C. 1644 (Administrative Law Judge, 1980).

[143] Bergin Corp., 8 O.S.H.C. 1773 (1980).

[144] Secretary of Labor v. C.E.M. Plumbing, Inc., 17 O.S.H.C. 2080, 2081 (1997).

[145] McKie Ford, Inc. v. Secretary of Labor, 191 F.3d 853, 856 (8th Cir. 1999) (plain indifference was shown where employer had no meaningful safety program and another employee had been injured in similar accident). See also, Secretary of Labor v. B & B Plumbing Inc., 19 O.S.H.C. 1047, 1048 (2000).

[146] Duane Meyer d/b/a D. T. Construction Co., 7 O.S.H.C. 1560, 1564 (1979).

[147] J.A.M. Builders, Inc. v. Herman, 233 F.3d 1350, 1355-1356 (11th Cir. 2000).

§ 10.13 Judicial Review

[1]—Introduction

The OSH Act provides:

> "Upon [the filing of the petition for review] the Court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such record, a decree affirming, modifying, or setting aside in whole or in part, the order of the Commission and enforcing the same to the extent it is affirmed or modified."[1]

The administrative review process established by the OSH Act is ordinarily regarded as the only means through which an employer can obtain review of OSHA enforcement proceedings in the first instance.[2] Since exhaustion of administrative remedies is generally required, an appeal must arise from a final order of OSHRC. Ordinarily, only the agency's conclusive decision adversely affects or aggrieves a party.[3] A remand by OSHRC to the administrative law judge for a further hearing does not constitute a final order by which a party to the proceeding is aggrieved and entitled to seek judicial review, since the party may yet prevail on remand.[4] Statements of the agency's position in an administrative opinion concerning the meaning of existing rules are not reviewable in the absence of a formal order requiring a party to take concrete action.[5]

However, OSHRC's failure to act on an aggrieved party's petition for discretionary review is tantamount to a denial of review.[6] Thus, within sixty days after service of a final order, i.e., an unreviewed administrative law judge decision or a decision by OSHRC, any party may file a request for review in any of three courts of appeals.[7] Review may occur in the circuit where the

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[1] 29 U.S.C. § 660(a).

[2] Sturm Ruger & Co. v. Herman, 131 F. Supp.2d 211, 216-217 (2001) (noting that OSH Act authorizes original actions in district court only in limited situations, none of which includes actions by employers).

[3] CH2M Hill Central, Inc. v. Herman, 131 F.3d 1244, 1246 (7th Cir. 1997).

[4] *Fourth Circuit:* Fieldcrest Mills, Inc. v. OSHRC, 545 F.2d 1384 (4th Cir. 1976).

Seventh Circuit: CH2M Hill Central, Inc. v. Herman, 131 F.3d 1244, 1246 (7th Cir. 1997) (noting that there may be circumstances when remands *within* agencies are sufficiently conclusive to be reviewable).

District of Columbia Circuit: Gearhart-Owen Industries, Inc., 3 O.S.H.C. 1650 (D.C. Cir. 1975).

[5] CH2M Hill Central, Inc. v. Herman, 131 F.3d 1244, 1246-1247 (7th Cir. 1997) (noting that person merely disappointed by legal statements in administrative opinion is not adversely affected or aggrieved).

[6] P. Gioioso & Sons, Inc. v. OSHRC, 115 F.3d 100, 102-103 (1st Cir. 1997).

[7] A party wishing to file a cross-appeal from a final OSHRC order must also file its request for review within the same sixty day period as the party making the initial request for review. The filing of an appeal by an opposing party does not extend the time for filing a cross-appeal. See:

violation allegedly occurred, in the circuit where the employer maintains the principal place of business, or in the District of Columbia Circuit.[8]

A petition for review does not act as an automatic stay of the OSHRC final order.[9] An employer may apply directly to OSHRC for a stay[10] pending court review, or to the appropriate court of appeals where judicial review is sought.[11] If the employer does not obtain a stay, OSHA may attempt to collect the proposed penalties and enforce the abatement requirements of the citation. Indeed, the employer could receive additional penalties for failure to abate or take corrective action within the abatement period established by OSHA while judicial review is pending.[12] Any penalties, of course, would be vacated if judicial review ultimately vacated the underlying citation.

A reviewing court should liberally construe the OSH Act and the regulations issued under it so as to afford the broadest possible protection to workers.[13]

[2]—Substantial Evidence

When a court does review a final OSHRC order, it will apply a "substantial evidence" test in examining whether a violation should have been found.[14] The "substantial evidence" test differs from the "preponderance of the evidence" used by OSHRC in its factual determinations.[15] Substantial evidence is generally defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[16]

If the court finds that the OSHRC findings of fact are supported by substantial evidence in the record as a whole, the court will defer to OSHRC's ruling, even if the court could justifiably reach a different result *de novo*.[17]

Third Circuit: Secretary of Labor v. OSHRC (Erie Coke Corp.), 16 O.S.H.C. 1241 (3d Cir. 1993).

Sixth Circuit: Dole v. Briggs Construction Co., 942 F.2d 318, 320 (6th Cir. 1991).

[8] 29 U.S.C. § 660(a).

[9] *Id.*

[10] 29 C.F.R. § 2200.94.

[11] 29 U.S.C. § 660.

[12] 29 U.S.C. § 666(d).

[13] E & R Erectors, Inc. v. Secretary of Labor, 107 F.3d 157, 160 (3d Cir. 1997).

[14] 29 U.S.C. § 660(a). See Universal Camera Corp. v. NLRB, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

[15] The difference between the two tests is discussed in Chapter 11 *infra*.

[16] N & N Contractors, Inc. v. OSHRC, 255 F.3d 122, 125 (4th Cir. 2001). See § 11.02 *infra* for a discussion of the substantial evidence standard.

[17] *First Circuit:* Empire Co. v. OSHRC, 136 F.3d 873, 875 (1st Cir. 1998).

Fifth Circuit: Trinity Marine Nashville, Inc. v. OSHRC, 275 F.3d 423, 426-427 (5th Cir. 2001); Albemarle Corp. v. Herman, 221 F.3d 782, 784-785 (5th Cir. 2000); Accu-Namics, Inc. v. OSHRC, 515 F.2d 828 (5th Cir. 1975).

Sixth Circuit: W. G. Fairfield Co. v. OSHRC, 285 F.3d 499, 503 (6th Cir. 2002); CMC Electric, Inc. v. OSHA, 221 F.3d 861, 865 (6th Cir. 2000).

Seventh Circuit: Sierra Resources, Inc. v. Herman, 213 F.3d 989, 992 (7th Cir. 2000).

Eleventh Circuit: J.A.M. Builders, Inc. v. Herman, 233 F.3d 1350, 1352 (11th Cir. 2000).

This is true even if the Commission did not hear witnesses itself, but instead adopted an administrative law judge's findings of fact.[18] Ordinarily, a reviewing court will not substitute its own credibility determinations for those of the ALJ.[19] Jurisdiction to review and power to modify a penalty will lie only when the court finds that OSHRC has abused its discretion.[20] However, in deciding a purely legal question, the court need not adopt the reasoning relied on below.[21] The court is free to make independent determinations on any issue that is a question of law rather than a finding of fact.[22] Legal conclusions may be set aside if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.[23]

[3]—Deference to OSHA Interpretation

An agency's interpretation of its own regulations is entitled to substantial deference and must be given effect if it is consistent with the regulatory language and is otherwise reasonable, i.e., if it sensibly conforms to the purpose and wording of the regulation.[24] This is true even if a regulation is

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District of Columbia Circuit: Montgomery Kone, Inc. v. Secretary of Labor, 234 F.3d 720, 722 (D.C. Cir. 2000); S.G. Loewendick & Sons, Inc. v. Reich, 70 F.3d 1291 (D.C. Cir. 1995); American Bridge/Lashcon v. Reich, 70 F.3d 131 (D.C. Cir. 1995).

[18] Riverdale Mills Corp. v. OSHRC, 19 O.S.H.C. 1730, 1734 (1st Cir. 2002) (unpublished opinion); Modern Continental/Obayashi v. OSHRC, 196 F.3d 274, 282 (1st Cir. 1999); Empire Co. v. OSHRC, 136 F.3d 873, 875 (1st Cir. 1998); P. Gioioso & Sons, Inc. v. OSHRC, 115 F.3d 100, 108 (1st Cir. 1997) (hearing examiner's credibility determinations are entitled to great deference).

[19] *Sierra Resources, Inc. v. Herman*, N. 17 *supra*, 213 F.3d at 993.

[20] *Eighth Circuit:* Secretary of Labor v. OSHRC (Interstate Glass Co.), 487 F.2d 438 (8th Cir. 1973).

District of Columbia Circuit: S.G. Loewendick & Sons, Inc. v. Reich, 70 F.3d 1291 (D.C. Cir. 1995); American Bridge/Lashcon v. Reich, 70 F.3d 131 (D.C. Cir. 1995).

[21] Wood v. Department of Labor, 275 F.3d 107, 110 (D.C. Cir. 2001).

[22] *First Circuit:* Empire Co. v. OSHRC, 136 F.3d 873, 875 (1st Cir. 1998).

Eighth Circuit: Dunlop v. Haybuster Manufacturing Co., 524 F.2d 222 (8th Cir. 1975).

[23] *Third Circuit:* E & R Erectors, Inc. v. Secretary of Labor, 107 F.3d 157, 160 (3d Cir. 1997).

Fifth Circuit: Trinity Marine Nashville, Inc. v. OSHRC, 275 F.3d 423, 427 (5th Cir. 2001).

Seventh Circuit: Sierra Resources, Inc. v. Herman, N. 17 *supra*, 213 F.3d at 992.

District of Columbia Circuit: Montgomery Kone, Inc. v. Secretary of Labor, 234 F.3d 720, 722 (D.C. Cir. 2000).

[24] *First Circuit:* Empire Co. v. OSHRC, 136 F.3d 873, 875 (1st Cir. 1998).

Fourth Circuit: N & N Contractors, Inc. v. OSHRC, 255 F.3d 122, 125 (4th Cir. 2001).

Fifth Circuit: Trinity Marine Nashville, Inc. v. OSHRC, 275 F.3d 423, 427 (5th Cir. 2001).

Sixth Circuit: CMC Electric, Inc. v. OSHA, 221 F.3d 861, 865 (6th Cir. 2000).

Seventh Circuit: Sierra Resources, Inc. v. Herman, N. 17 *supra*, 213 F.3d at 992; CH2M Hill, Inc. v. Herman, 192 F.3d 711, 716 (7th Cir. 1999); Union Tank Car Co. v. OSHA, 192 F.3d 701, 705 (7th Cir. 1999).

ambiguous.[25] An agency's interpretation of its own regulations merits even greater deference than its interpretation of the statute that it administers.[26] The Secretary's interpretation need not be the only reasonable interpretation for it to be sustained.[27] However, a court need not defer to the Secretary's interpretation when an alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time the regulation was promulgated.[28]

For instance, in one case the reasonableness of the Secretary's interpretation of an OSHA regulation specifying that "worn or frayed electric cables shall not be used"[29] was questioned. Longstanding industry practice was to restore worn or frayed cords to useful service by wrapping them with insulated tape covered by friction tape. In the industry's view, a properly repaired cable was no longer "worn or frayed" and therefore did not violate the regulation. The Secretary argued that worn or frayed cords could not be used under any circumstances, even if repaired. The Fifth Circuit held that the Secretary's interpretation was unreasonable in terms of safety and cost and was inconsistent with OSHA's overall regulatory scheme.[30]

In determining what level of deference is owed to the Secretary's interpretation of the OSH Act, a court considers whether or not a particular agency interpretation was promulgated in the exercise of the Secretary's rulemaking authority. An informal agency opinion does not receive full deference; it is entitled to respect, but only to the extent that it has the power to persuade. The court considers factors such as the agency's thoroughness, the validity of its reasoning, and the opinion's consistency with earlier and later pronouncements.[31]

Ninth Circuit: Chao v. Symms Fruit Ranch, Inc., 242 F.3d 894, 897 (9th Cir. 2001) (court may not substitute its own construction for agency's reasonable interpretation); Crown Pacific v. OSHRC, 197 F.3d 1036, 1038 (9th Cir. 1999).

District of Columbia Circuit: A. J. McNulty & Co. v. Secretary of Labor, 283 F.3d 328, 332 (D.C. Cir. 2002); Manganas Painting Co. v. Secretary of Labor, 273 F.3d 1131, 1134 (D.C. Cir. 2001); Shell Oil Co. v. United States Department of Labor, 106 F. Supp.2d 15, 20 (D.D.C. 2000).

[25] *First Circuit:* Beaver Plant Operations, Inc. v. Herman, 223 F.3d 25, 29-30 (1st Cir. 2000) (noting that there is no need to resort to industry standards for further insight).

Sixth Circuit: CMC Electric, Inc. v. OSHA, N. 24 *supra*, 221 F.3d at 865.

[26] Montgomery Kone, Inc. v. Secretary of Labor, 234 F.3d 720, 722 (D.C. Cir. 2000).

[27] Ohio Cast Products, Inc. v. OSHRC, 246 F.3d 791, 794 (6th Cir. 2001).

[28] *Fifth Circuit:* Albemarle Corp. v. Herman, 221 F.3d 782, 785 (5th Cir. 2000) (standard did not require employer to develop written safe-work practices).

Ninth Circuit: Crown Pacific v. OSHRC, 197 F.3d 1036, 1038 (9th Cir. 1999).

[29] 29 C.F.R. § 1915.132.

[30] Trinity Marine Nashville, Inc. v. OSHRC, 275 F.3d 423, 429 (5th Cir. 2001).

[31] Chao v. Russell P. Le Frois Builder, Inc., 291 F.3d 219, 227-228 (2d Cir. 2002). In this case, the Secretary's contention that OSH Act Section 10(a) does not give the Commission the power to excuse late filing of a notice of contest pursuant to Federal Rule of Civil Procedure 60(b) was expressed only as a position in litigation. The Second Circuit noted that courts are skeptical of agency positions set forth only in litigation, in the absence of regulations, rulings or administrative practice. Nonetheless, the court concluded that in this case, the Secretary's view merited deference, since Congress made enforcement of the OSH Act the exclusive prerogative of the Secretary.

An agency is bound by the regulations it has promulgated, and it cannot attempt to subvert the rulemaking process through an interpretation unsupported by the regulation's language.[32] Furthermore, OSHA's interpretation of its regulations must be expressed in a formal, authoritative manner.[33] A citation listing violations after an inspection may be an appropriate means for the Secretary to provide the initial publication of a previously unannounced interpretation of the regulations.[34] However, the Secretary's decision to use a citation as the initial means for announcing an interpretation may bear on the adequacy of notice to regulated parties, the quality of the Secretary's elaboration of pertinent policy considerations, and other factors relevant to the reasonableness of the Secretary's exercise of delegated lawmaking powers.[35]

Although an employer is entitled to fair warning as to what conduct is prohibited or required by a standard, "fair warning" is measured against what an employer familiar with the industry could reasonably be expected to know. The factors that determine whether notice was adequate include: (1) artful versus inartful drafting of a regulation; (2) common understanding and commercial practice; and (3) confirmation of industry practice by a pattern of administrative enforcement.[36]

In a Sixth Circuit case, an employer that was cited for failure to protect its workers against respirable dust containing silica argued that the Secretary's method of calculating actual silica exposure was an unreasonable interpretation of the applicable regulation,[37] and that the employer did not have fair notice of the Secretary's calculation method. The court pointed out that since 1971, the Secretary had consistently calculated actual silica exposure by using as the numerator in its formula the total weight of the entire respirable dust sample, rather than only the respirable silica dust weight. Furthermore, professional literature indicated that the industrial hygiene community recognized OSHA's calculation method. Although the employer argued that this method penalized it for its employees' exposure not only to respirable silica but also to all respirable dust collected, the court found that the Secretary's interpretation was reasonable, given the reality of workplace exposure to contaminants. The court stated: "If asked to create a regulatory scheme for crystalline quartz silica, this court might create one that set a PEL [permissible exposure limit] for silica exposure that was a

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[32] *Ohio Cast Products, Inc. v. OSHRC,* N. 27 *supra,* 246 F.3d at 794.

[33] Trinity Marine Nashville, Inc. v. OSHRC, 275 F.3d 423, 429 (5th Cir. 2001).

[34] *Fifth Circuit:* Trinity Marine Nashville, Inc. v. OSHRC, 275 F.3d 423, 430 (5th Cir. 2001).

Seventh Circuit: Globe Contractors, Inc. v. Herman, 132 F.3d 367, 372 (7th Cir. 1997). In this case, the employer's argument that it was not given adequate notice of the Secretary's interpretation was mooted by the fact that the Secretary had interpreted the same standard in an earlier case.

[35] Modern Continental/Obayashi v. OSHRC, 196 F.3d 274, 281 (1st Cir. 1999) (these considerations were countered in this case by employer's prior citation for violation of same regulation in same circumstances).

[36] *Ohio Cast Products, Inc. v. OSHRC,* N. 27 *supra,* 246 F.3d at 798-799.

[37] *Ohio Cast Products, Inc. v. OSHRC,* N. 27 *supra.* See 29 C.F.R. § 1910.1000(c).

function of solely silica dust. But this court has no power to second guess the Secretary. Our review is limited to whether the Secretary's interpretation of the regulation *as it exists* is reasonable."[38]

In a Fifth Circuit case, an employer was cited because the wood-framed electrical plug-in boxes that it used in its shipyard were not waterproof.[39] During a 1989 inspection, OSHA had cited the employer's predecessor for similar reasons, but withdrew the citation when the employer demonstrated that in the shipyard environment, metal-cased plug-in boxes were more hazardous than wood-framed boxes. Thereafter, it was the employer's understanding that the wood-framed boxes were satisfactory. OSHA never mentioned the employer's use of the boxes during any other compliance inspection until 1997, when it cited the employer for the same violation. OSHA pointed out that its officers never explicitly told the employer that the wood-framed boxes were acceptable. Nonetheless, the court found that the employer had a fair expectation that OSHA implicitly approved the electrical boxes when it withdrew its citation in 1989 and failed to warn the employer that the boxes did not conform to the regulation. After that, the employer was entitled to fair notice that OSHA considered the boxes unsafe.[40]

[4]—OSHA's Interpretation Versus Commission's Interpretation

A number of courts have been faced with the issue of whether deference should be accorded to interpretations by the adjudicatory agency (OSHRC) or to the agency which promulgates and enforces the standards (OSHA). It is a basic tenet of administrative law that courts allow agencies to interpret their own rules so long as their interpretations are reasonable.[41] The unique situation under the Act however, is that the adjudicatory role has been separated from the standards promulgation and enforcement role by the statutory assignment of these responsibilities to two independent agencies, OSHRC and OSHA, rather than the more traditional assignment of all administrative powers to one agency.

The circuits were split on the issue of whether deference is required to OSHRC or OSHA. Several circuits generally deferred to the Secretary, as long as the Secretary's interpretation was reasonable, even if the

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[38] *Ohio Cast Products, Inc. v. OSHRC*, N. 27 *supra*, 246 F.3d at 796. (Emphasis in original.)

[39] Trinity Marine Nashville, Inc. v. OSHRC, 275 F.3d 423 (5th Cir. 2001) (employer was cited for violation of 29 C.F.R. § 1910.305(e)).

[40] *Id.*, 275 F.3d at 431.

[41] See, e.g.:

Third Circuit: E & R Erectors, Inc. v. Secretary of Labor, 107 F.3d 157, 160 (3d Cir. 1997) (Secretary's reasonable legal interpretation of OSH Act is entitled to deference).

Ninth Circuit: Industrial Truck Ass'n, Inc. v. Henry, 125 F.3d 1305, 1311 (9th Cir. 1997) (agency's interpretation of preemptive effect of its regulations is entitled to deference).

District of Columbia Circuit: S.G. Loewendick & Sons, Inc. v. Reich, 70 F.3d 1291 (D.C. Cir. 1995); American Bridge/Lashcon v. Reich, 70 F.3d 131 (D.C. Cir. 1995).

Commission's interpretation appeared to be as or more reasonable.[42] Other courts deferred to the Commission rather than the Secretary.[43] This issue has now been definitively decided by the Supreme Court in favor of deference to OSHA.[44] The rationale is that Congress delegated rulemaking and enforcement authority to the Secretary rather than OSHRC; therefore, courts owe substantial deference only to OSHA's interpretation.[45] However, such deference is warranted only if OSHA's interpretation is reasonable.[46] A court will treat OSHRC interpretations as equivalent to the decisions of a non-policymaking district court.[47]

In determining what OSHA's policy is on a particular issue, courts customarily defer only to the statements of the official policymaker, not to the opinions of other OSHA employees such as area directors or compliance officers.[48]

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[42] *First Circuit:* Donovan v. A. Amorello & Sons, Inc., 761 F.2d 61 (1st Cir. 1985).

Fifth Circuit: United Steelworkers of America v. Schuylkill Metals, 828 F.2d 314 (5th Cir. 1987).

Seventh Circuit: Brock v. Chicago Zoological Society, 820 F.2d 909 (7th Cir. 1987).

Eleventh Circuit: Brock v. Williams Enterprises, 832 F.2d 567 (11th Cir. 1987).

[43] *Second Circuit:* Marshall v. Western Electric, Inc., 565 F.2d 240 (2d Cir. 1977).

Fourth Circuit: Brennan v. OSHRC (Gilles & Cotting), 504 F.2d 1255 (4th Cir. 1974).

Sixth Circuit: Usery v. Hermitage Concrete Pipe Co., 584 F.2d 127 (6th Cir. 1978).

Ninth Circuit: McLaughlin v. ASARCO, Inc., 841 F.2d 1006 (9th Cir. 1986); Brock v. Bechtel Power Co., 803 F.2d 999 (9th Cir. 1986).

[44] Secretary of Labor v. OSHRC (CF&I Steel), 499 U.S. 144, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991). See also:

First Circuit: Empire Co. v. OSHRC, 136 F.3d 873, 875 (1st Cir. 1998) (when Secretary and Commission advance reasonable but differing interpretations of ambiguous regulation, Secretary's interpretation is to be given effect).

Seventh Circuit: CH2M Hill, Inc. v. Herman, 192 F.3d 711, 716 (7th Cir. 1999) (court owes deference to Secretary, not Commission, regarding questions of statutory or regulatory interpretation).

District of Columbia Circuit: Montgomery Kone, Inc. v. Secretary of Labor, N. 23 *supra*, 234 F.3d at 722 (court defers to Secretary's interpretation of OSHA regulations and OSHRC's fact-finding); S.G. Loewendick & Sons, Inc. v. Reich, 70 F.3d 1291 (D.C. Cir. 1995) (explaining the different roles and functions of the Commission and the Secretary).

[45] *Second Circuit:* Chao v. Russell P. Le Frois Builder, Inc., 291 F.3d 219, 227 (2d Cir. 2002).

District of Columbia Circuit: A. J. McNulty & Co. v. Secretary of Labor, 283 F.3d 328, 332 (D.C. Cir. 2002).

[46] Chao v. Symms Fruit Ranch, Inc., 242 F.3d 894, 897 (9th Cir. 2001).

[47] A. J. McNulty & Co. v. Secretary of Labor, 283 F.3d 328, 332 (D.C. Cir. 2002).

[48] *First Circuit:* Irving v. United States, 162 F.3d 154, 166 (1st Cir. 1998).

District of Columbia Circuit: Kaspar Wire Works, Inc. v. Secretary of Labor, 268 F.3d 1123, 1128 (D.C. Cir. 2001) (noting that OSHRC is not bound by representations or interpretations of OSHA compliance officers).

[5]—Preserving Issues for Judicial Review

Review by the Commission is a prerequisite to judicial review by the appellate court.[49] The OSH Act has been interpreted to preclude judicial review of objections not urged before OSHRC in order to give the Commission a chance to pass on issues before a court reviews the administrative process.[50] It is the proceedings before the Commission, rather than those before the administrative law judge, that form the predicate to judicial review. Merely raising an issue before the administrative law judge does not preserve it for review by the courts. Instead, the issue must subsequently be brought to OSHRC's attention, either in the aggrieved party's petition or by a Commissioner's unilateral act of directing review.[51] Thus, an aggrieved party desiring to preserve an issue for judicial review must (1) raise it before the administrative law judge, (2) articulate it clearly in its petition for discretionary review, and (3) offer a modicum of developed argumentation in support of it.[52]

An exception to this rule may arise if extraordinary circumstances excuse a party from raising an issue in its petition for discretionary review. Extraordinary circumstances include a substantive change in the law that occurs between the time the petition is filed and the time of the appeal.[53]

An issue may be preserved for review if it is raised in the employer's brief to the Commission, even though it is not specifically mentioned in the petition for review. In that situation, OSHRC would clearly be aware of the issue.[54] However, a party that cites a case for one proposition in a

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[49] *Fifth Circuit:* Trinity Industries, Inc. v. OSHRC, 206 F.3d 539, 542 (5th Cir. 2000).

Sixth Circuit: National Engineering & Contracting Co. v. Herman, 181 F.3d 715, 720 (6th Cir.), *cert. denied* 120 S.Ct. 578 (1999) (employer waived right to challenge applicability of standard on appeal by not raising issue before either ALJ or OSHRC).

Eighth Circuit: Dakota Underground, Inc. v. Secretary of Labor, 200 F.3d 564, 567 (8th Cir. 2000) (employer waived its argument concerning penalty assessed because it did not raise issue in its application to OSHRC).

[50] *Trinity Industries, Inc. v. OSHRC*, N. 49 *supra*, 206 F.3d at 542.

[51] *First Circuit:* P. Gioioso & Sons, Inc. v. OSHRC, 115 F.3d 100, 105-107 (1st Cir. 1997).

Fourth Circuit: L.R. Willson & Sons, Inc. v. OSHRC, 134 F.3d 1235, 1241 (4th Cir. 1998).

Seventh Circuit: Globe Contractors, Inc. v. Herman, 132 F.3d 367, 370 (7th Cir. 1997).

[52] P. Gioioso & Sons, Inc. v. OSHRC, 115 F.3d 100, 105-107 (1st Cir. 1997). See also, Modern Continental/Obayashi v. OSHRC, 196 F.3d 274, 283 (1st Cir. 1999) (employer waived argument that it used fall protection measures to extent feasible by not raising issue in its petition for discretionary review; objection is not "urged" in requisite sense unless petition for discretionary review conveys substance of objection in manner reasonably calculated to alert OSHRC to crux of problem).

[53] Globe Contractors, Inc. v. Herman, 132 F.3d 367, 370-371 (7th Cir. 1997).

[54] *Fifth Circuit: Trinity Industries, Inc. v. OSHRC*, N. 49 *supra*, 206 F.3d at 542.

District of Columbia Circuit: A. J. McNulty & Co. v. Secretary of Labor, 283 F.3d 328, 336 (D.C. Cir. 2002).

Commission brief cannot argue on appeal that the same case stands for another, unrelated proposition.[55]

A party may rely on any matter appearing in the record in support of the judgment below without filing a cross-appeal or cross-petition. Thus, a party may raise an argument on appeal that was not presented previously as long as the issue may be decided on the basis of the record developed below.[56]

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[55] A. J. McNulty & Co. v. Secretary of Labor, 283 F.3d 328, 333 (D.C. Cir. 2002).

[56] W. G. Fairfield Co. v. OSHRC, 285 F.3d 499, 504 (6th Cir. 2002) (rejecting employer's request that court not consider Secretary's argument concerning Manual on Uniform Traffic Control Devices, since manual was admitted without objection as exhibit during E-Z Trial and was part of record on appeal).