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DEFENDING AGAINST A "SPECULATIVE" OR "THEORETICAL" OSHA CITATION

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INTRODUCTION

As the pace of OSHA enforcement activity increases, many employers are receiving citations for alleged violations of OSHA regulations in which the employer cannot understand the basis of the citation because it appears to be founded upon "speculation" regarding whether an employee was actually exposed to a safety or health hazard at the workplace. This article discusses the elements of what is required to prove and OSHA violation and how to respond to a citation that does not appear to be based upon a reasonable analysis of employee exposure to a potential hazard.

OSHA BURDEN OF PROOF

The elements that OSHA must prove to establish a violation, by a preponderance of the evidence, are well established,

- the applicability of the standard to the hazard (fall, electrocution, confined space, etc.) in issue,
- the employer's non-compliance with the standard's terms,

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- employee access (or exposure) to the hazard or violative condition
- the employer knew, or with the exercise of reasonable diligence, could have known of the violative conditions.

It is critical that employers focus on the fact that if the agency cannot prove element **(3)**, that the employee's exposure was "reasonably preventable either by operational necessity or otherwise (including employee inadvertence), that employees have been, are, or will be in the zone of danger" then the citation cannot be upheld. OSHA has recently had several citations vacated because it could not establish such exposure. It cannot prove a violation by "speculation" that an employee might be exposed to the hazard under a theoretical scenario.

FAILURE TO PROVE EMPLOYEE EXPOSURE

As indicated, OSHA has failed to prove exposure in several recent cases which illustrate the analysis that an employer must undertake in defending a citation on the grounds that it is based on "speculation" or "theory":

- **Secretary of Labor v. Garden Ridge, OSHRC Docket No. 10-1082**

In this case, the employer was cited for a violation of OSHA general industry machine guarding standard (29 CFR 1910.212(a)(1)) when the employee stood outside of a trash compactor hatch door and pushed trash down the chute with a ten-foot long piece of 2x4 lumber. The hatch door was approximately 10 feet from the compactor chamber and hydraulic ram. The agency argued that an employee was in the "zone of danger" of the hydraulic ram as the employee pushed the trash with the ten-foot long 2x4 piece of lumber. To support its case, the compliance officer testified to his hypothetical scenario in which the employee would step up on the compactor chute to push the trash down and if the employee slipped he could slide down the chute into the area of the hydraulic ram.

The Administrative Law Judge vacated the citation on the grounds that the compliance officer's scenario of an exposure was "speculative" and did not represent the actual experience of the employees who operated the compactor. She further found that under normal operating conditions employee were not in the "zone of danger" of the hydraulic ram.

- **Secretary of Labor v. Nuprecon LP**
  OSHRC Docket No. 08-1037

In this case, the agency cited the employer under a construction standard (29 CFR 1926.501(b)(1)), relating to failure to provide fall protection for employees who are required to walk or work in vicinity to a fall hazard of more than six feet on the floor of a building being demolished. The alleged violation was premised, in part, on failure to provide such fall protection for an employee who was inside of and operating a Bobcat front end loader ("Bobcat") despite the fact that the Bobcat operator never got out of the Bobcat and never walked or worked on the floor in proximity to the fall hazard.

OSHA based its case on its belief that it was reasonably foreseeable that the Bobcat operator would get out of the Bobcat and then be exposed to the walking and working hazard. The Administrative Law Judge upheld the citation and found exposure but the Review Commission reversed the finding that OSHA had not proved exposure.

In ruling against OSHA, the Review Commission held that OSHA had introduced no evidence that it was "reasonably predictable" that the Bobcat operator would get out of the Bobcat to perform work and be exposed to the fall hazard and that it could not prove such exposure by showing it was "theoretically possible" that any employees had been, are, or will be in the zone of danger.

- **Secretary of Labor v. Shaw Arena Mox Services, LLC**
  OSHRC Docket No. 09-1284

In this case, OSHA cited the employer under a construction industry electrical standard, 29 CFR 1926.404(f)(6) for failure to ground an electrical adaptor and the plug of a fuel pump cord at a nuclear fuel conversion facility. The Administrative Law Judge

found an exposure to the hazard posed by the adaptor was reasonably predictable because it was available for use and an employee plugging ground-required equipment into it would have been exposed to an electric shock hazard and upheld the citation.

On appeal, the Review Commission vacated the citation finding that OSHA had failed to prove "exposure" because OSHA had not proved that grounding was required for all equipment that could be plugged into the adaptor. Since OSHA had not proved that it was "reasonably predictable" that equipment that is required to be grounded "might" be connected to the adaptor, it had not proved employee exposure to the hazard.

EMPLOYER ANALYTICAL PROCESS

The foregoing cases clearly illustrate that employers must not accept citations at face value as being factually or legally correct. In these cases, the employers argued that OSHA had failed to prove that any employee had been "exposed" to the hazard. OSHA was unable to establish that such exposure (based on the facts involved in the inspection) was "reasonably predictable". Further, the citations were vacated because they were based upon the compliance officer's "speculation" that the exposure was "theoretically possible." This simply is not sufficient evidence to establish the citation.

COLLATERAL RISK OF CITATIONS

Employers should carefully analyze and contest citations where there is no reasonable proof of employee exposure. If not, employers expose themselves to collateral risks of the unsupported citations they accept, including:

- Repeat citations for substantially similar violations within the five years after the citation becomes final with penalties up to $70,000 per citation
- Willful citations, with penalties up to $70,000 per citation, if OSHA considers the initial and subsequent violations to be evidence of willful non-compliance
- Enhanced future monetary penalties based on citation history

- Negative impact on future job opportunities based upon a history of OSHA violations and perception that the employer is non-compliant with the law and is therefore a liability risk as a service provider.

CONCLUSION

The prudent employer will carefully analyze all citations to determine if OSHA can meet its burden of proof, particularly whether there is any exposure to an alleged hazard.