



## OSHA GENERAL DUTY CLAUSE

### When Is The Duty "General"

By Mark A. Lies II \*

#### INTRODUCTION

As employers are aware, OSHA enforces safety and health compliance through two methods, the use of:

1. written regulations that address specific hazards (e.g., 29 CFR 1910 (General Industry), 29 CFR 1926 (Construction), etc.) and
2. The General Duty Clause (Section 5(a) (1) of the Act).

Compliance with the General Duty Clause is challenging because it does not specify precisely what employers are required to do to comply. Recently, OSHA lost a decision involving a citation it issued under the General Duty Clause because it improperly attempted to expand the scope of the General Duty Clause and utilize certain general information in an equipment manufacturer's manual and an ANSI approved standard to create a "safety" or "hazard" warning where none existed.

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## **GENERAL DUTY CLAUSE REQUIREMENTS**

In order to prove a General Duty Clause violation, OSHA must establish the following elements:

1. a condition or activity in the workplace created a hazard,
2. the employer or its industry recognized the hazard,
3. the hazard was likely to cause death or serious physical harm, and
4. a feasible means existed to eliminate or materially reduce the hazard.

Unless the agency can establish each element, the citation cannot be supported.

In the recent case, *Secretary of Labor v. K.E.R. Enterprises, Inc., d/b/a Armadillo Underground*, OSHRC Docket No. 08-1225 (hereinafter "*Armadillo*"), the agency failed to meet this burden.

### **ARMADILLO DECISION**

The employer in *Armadillo* was an underground utility excavator contract working at a site in Naples, Florida. The Company was installing pipe and utilized a mechanical joint restraining gland that was manufactured by Sigma Corporation ("Sigma") to connect sections of the pipe. The process required employees to tighten certain bolts prior to a hydrostatic pressure test on the pipe. After tightening the bolts, the hydrostatic pressure test was performed and the pipe attached to the restraining gland exploded, injuring several employees.

### **CITATION**

OSHA issued a citation under the General Duty Clause for (1) failing to follow certain installation instructions in the Sigma manufacturer's manual for the restraining gland and (2) failing to install the restraining gland in accordance with an ANSI

approved, American Water Works Association (AWWA) standard relating to rubber gasket joints for ductile iron pressure pipe and fittings.

The Administrative Law Judge carefully reviewed the Sigma manufacturer's instructions and the AWWA standard and found that there were no specific safety hazards or warnings referenced in these materials regarding the installation of the bolts on the gland and that OSHA introduced no evidence that either Armadillo or its industry "recognized" any hazard relating to these manufacturer's instructions or ANSI standard. Thereafter, the Judge vacated the citation. On appeal to the OSHA Review Commission, the Judge's decision was affirmed.

### **ANALYSIS**

Based upon this decision, employers who receive General Duty Clause citations should carefully scrutinize the basis for the citation to determine if OSHA's specific underlying source of authority (in this case references to parts of a manufacturer's manual relating to the bolting process and an ANSI approved standard) contain any type of safety or hazard warnings that would put the employer on notice of an actual safety "warning" or "hazard." If not, OSHA will have difficulty establishing that the employer or its industry "recognized" the hazard.

### **GENERAL DUTY CLAUSE LIABILITY**

Employers cannot ignore potential General Duty Clause liability, while a Serious Violation contains a potential penalty of \$7,000, the General Duty Clause can also be utilized for Willful or Repeat citations which can carry penalties up to \$70,000 per violation.

## **RECOMMENDATIONS**

In order to avoid OSHA liability (and more importantly an accident with employee injury), the employer should consider the following recommendations:

- review manufacturer's manuals to identify specific safety or hazard warnings and incorporate them in employee safety policies and procedures
- review industry consensus safety standards applicable to the employer's industry and identify safety recommendations to be incorporated in employer safety policies and procedures
- once the policies and procedures are developed, conduct employee training, with documentation, and enforce compliance with discipline up to and including termination, again with documentation.