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Comment
OSHA Liability
on the
Multiemployer Worksite

John O. Swendseid†

The Occupational Safety and Health Act does not expressly prescribe a rule for liability where, on a multiemployer worksite, one employer creates a hazard, but another employer's employees are exposed to it. The author discusses the initial position of the Occupational Safety and Health Review Commission that employers should be liable for hazards to which their employees are exposed, whether or not such employers created or controlled the hazards. He then analyzes the judicial responses to the Review Commission's position and subsequent modifications by the Commission. He concludes that imposing liability on both "controlling" employers and "exposing" employers would least complicate enforcement as well as best serve the purposes of the Act.

I
INTRODUCTION

A. A Brief Overview of the Act

In 1970 Congress enacted the Occupational Safety and Health Act¹ in response to the rising toll of industrial accidents which placed a substantial burden on interstate commerce "... in terms of lost production, wage loss, medical expense, and disability compensation payments."² The purpose of the Act is "... to assure as far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."³

Although the Act places duties on both employers and employees,⁴ the

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1. 29 U.S.C. §§ 651-678 (1970) [hereinafter referred to as the Act or OSHA].
enforcement machinery applies only to employers.\textsuperscript{5} Section 5(a) of the Act defines the employer's duties:

Each Employer—

(1) shall 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;

(2) shall comply with occupational safety and health standards promulgated under this chapter.\textsuperscript{6}

Section 6 of the Act authorizes the Secretary of Labor to establish safety and health standards and delineates the procedures to be followed in establishing such standards.\textsuperscript{7} Section 9 authorizes the Secretary of Labor to make inspections and to issue citations for the violation of section 5 duties;\textsuperscript{8} section 10 authorizes enforcement proceedings;\textsuperscript{9} and section 17 lists possible penalties for failure to abide by the provisions of the Act.\textsuperscript{10}

The Department of Labor's Occupational Safety and Health Administration enforces the Act. OSH Administration compliance officers inspect worksites\textsuperscript{11} and may issue a citation to an employer if he or she finds any violations of the Act or regulations promulgated under it.\textsuperscript{12} The citation must state the nature of the violation, refer to the standard violated, and set a deadline for abatement of the violation.\textsuperscript{13} The cited employer must be sent a notice of any proposed penalty.\textsuperscript{14} If the employer wishes to contest the citation, it must give notice within fifteen days after receiving notice of the proposed penalty.\textsuperscript{15} If it does not give notice, the citation and the proposed penalty become final.\textsuperscript{16}

The Occupational Safety and Health Review Commission,\textsuperscript{17} an agency independent of the Department of Labor, decides contests under the Act.\textsuperscript{18} Once notice of contest is filed, the matter is set for a hearing before an OSHRC administrative law judge.\textsuperscript{19} The judge's decision becomes final unless one of the three members of the Commission directs the case for review.\textsuperscript{20} Review is discretionary\textsuperscript{21} and may be given whether or not one of

\begin{itemize}
\item \textsuperscript{5} 29 U.S.C. § 658 (1970).
\item \textsuperscript{6} 29 U.S.C. § 654(a) (1970). The first of these clauses is referred to as the "general duty clause."
\item \textsuperscript{7} 29 U.S.C. § 655 (1970).
\item \textsuperscript{8} 29 U.S.C. § 658 (1970).
\item \textsuperscript{9} 29 U.S.C. § 659 (1970).
\item \textsuperscript{10} 29 U.S.C. § 666 (1970).
\item \textsuperscript{11} 29 U.S.C. § 657 (1970).
\item \textsuperscript{12} 29 U.S.C. § 658 (1970).
\item \textsuperscript{13} \textit{Id.}
\item \textsuperscript{14} \textit{Id.}
\item \textsuperscript{15} \textit{Id.}
\item \textsuperscript{16} \textit{Id.}
\item \textsuperscript{17} Hereinafter referred to as "OSHRC," "Commission," or "Review Commission."
\item \textsuperscript{18} 29 U.S.C. § 661 (1970).
\item \textsuperscript{19} 29 U.S.C. § 661(i) (1970).
\item \textsuperscript{20} \textit{Id.}
\item \textsuperscript{21} \textit{Id.}
\end{itemize}
the parties petitions for review.\(^22\) If directed for review, the full Commission hears the case and it issues an opinion.\(^23\) The parties may obtain judicial review of a final decision in the circuit courts of appeals.\(^24\)

**B. The Problem of OSHA Liability in Multiemployer Situations**

Under the Act, citations are issued against employers because they have "primary control over the work environment and should therefore ensure that it is safe and healthful."\(^25\) This reasoning yields a clear rule of liability in a single-employer worksite where the employer has control over both the employees and worksite conditions. The employer must eliminate hazardous conditions or assign employees so that they are not endangered. In a multiemployer worksite, however, any single employer may control only a small aspect of the work environment. The employees of such an employer may be exposed to hazards over which their employer has no control and which it is unable to correct.

For example, in *Workinger Electric, Inc.*\(^26\), the electrical subcontractor's employees, working on the unwalled floors of a building, were exposed to improperly guarded perimeters in violation of OSHA safety standards.\(^27\) Although the violation endangered the subcontractor's employees, it could only have been corrected by the general contractor, who controlled the perimeters.\(^28\)

The facts in *Workinger* raise two issues: first, does an employer violate the Act merely by exposing his employees to a hazard if he has no control over the hazard and cannot correct or eliminate it? Second, does an employer violate the Act by creating a hazard which he can eliminate if none of his employees are exposed to it? Congress' failure to consider this problem in drafting the Act\(^29\) has produced a significant amount of litigation in the Review Commission\(^30\) and in the courts.\(^31\)

\(^{22}\) *Id.*

\(^{23}\) This is the normal procedure. In some cases, however, the Commission has vacated an order for review before actually hearing the case. *See* Francisco Tower Serv., Inc., 3 O.S.H. Cas. (BNA) 1952 (1976). At least one member of the Commission strongly disagrees with this disposition. *See id.* (Moran, Commissioner, dissenting).


\(^{25}\) Anning-Johnson Co. v. OSHRC, 516 F.2d 1081, 1088 (7th Cir. 1975) (citations omitted).


\(^{27}\) The improperly guarded perimeters violated 29 C.F.R. § 1926.500(d) (1976):

(d) Guarding of open-sided floors, platforms, and runways. (1) Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f) (1)(i) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a standard toe-board wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard.


\(^{29}\) *See* Anning-Johnson Co. v. OSHRC, 516 F.2d 1081, 1087 (7th Cir. 1975).

\(^{30}\) *See, e.g.*, cases cited note 127 infra.

\(^{31}\) *See, e.g.*, Anning-Johnson Co. v. OSHRC, 516 F.2d 1081 (7th Cir. 1975); Brennan v.
This Comment examines the Act, the policies behind it, and the decision of courts and administrative bodies in order to determine what the rule of liability should be in multiemployer worksite situations.

II
THE ACT AND REGULATIONS
A. The General Duty Clause

The Act imposes two duties on employers; violation of either gives rise to liability. One duty is set forth in section 5(a)(1), the "general duty clause": "[E]ach employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards...." This clause mandates an "exposure" test; i.e., the liability of an employer turns on whether its employees are exposed to any hazards. When this clause is applicable, an employer who allows its employees to be exposed to a hazard will be liable whether or not it has caused the hazard or can correct it. On the other hand, an employer whose employees are not exposed to a hazard will not be liable even though it caused the hazard and can correct it.

The general duty clause does not apply unless hazards are "recognized" and "are causing or are likely to cause death or serious physical harm." In addition, the general duty clause does not apply where specific

OSHRC (Underhill Constr. Co.) 513 F.2d 1032 (2d Cir. 1975); Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255 (4th Cir. 1974).

32. "Liable for an OSHA violation" means the employer is subject to an abatement order and penalty under the Act.


34. See text accompanying note 6 supra.


36. The exposure test was first interpreted to require proof of the employee's presence in the zone of danger caused by the violation. See, e.g., Ellison Elec., 1 O.S.A.H.R.C. 547 (1972). The test was later expanded to require only proof that the employees had access to the zone of danger caused by the violation. See, e.g., Gilles & Cotting, Inc., 3 O.S.H. Cas. (BNA) 2002, 2004 (1976). Unless otherwise indicated, the exposure test in this Comment refers to a test requiring only proof of employee access to the zone of danger.


39. 29 U.S.C. § 654(a)(1). For a definition of "recognized" as used in the general duty clause, see Brennan v. OSHRC (Vy Lactos Labs., Inc.), 494 F.2d 460 (8th Cir. 1974); National Realty Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973); House Debate on OSHA, 116 Cong. Rec. 38,377 (1970).

standards enforceable under section 5(a)(2)\textsuperscript{41} are applicable.\textsuperscript{42} On its face, the statute does not seem to demand such an interpretation since the general duty clause appears to apply to all situations. Congress, however, intended this clause to apply only when no specific standards covered the hazardous condition.\textsuperscript{43} The Department of Labor has adopted this principle by regulation.\textsuperscript{44}

**B. Specific Standards**

Section 5(a)(2) of the Act provides that “Each employer . . . shall comply with the occupational and health standards promulgated under this chapter.”\textsuperscript{45} Clearly, an employer which causes a hazard proscribed by the standards, has the ability to eliminate it, and exposes its employees to that hazard, violates section 5(a)(2). Unfortunately, however, section 5(a)(2) does not indicate how it should be applied in multiemployer situations.\textsuperscript{46}

The courts and the Commission might assign liability under section 5(a)(2) in multiemployer situations under any of four tests, all of which distinguish “exposing” and “controlling” employers. An “exposing” employer is one whose own employees are exposed to hazards. A “controlling” employer is one who causes, allows, or can abate a hazard.

The four methods of assigning liability are:

1. The “exposure test”: employers are liable for the hazards to which their employees are exposed.\textsuperscript{47} This is the test used by the general duty clause.

2. The “control test”: employers are liable for the hazards that they control.\textsuperscript{48}

\begin{itemize}
\item \textsuperscript{41} 29 U.S.C. § 654(a)(2) (1970).
\item \textsuperscript{43} See S. REP. NO. 1282, 91st Cong., 2d Sess. 9 reprinted in [1970] U.S. CODE CONG. AND AD. NEWS 5177, 5186: “The general duty clause in this bill would not be a general substitute for reliance on standards, but would simply enable the Secretary to insure the protection of employees who are working under special circumstances for which no standard has yet been adopted.”
\item \textsuperscript{44} 29 C.F.R. § 1910.5(c)(1) (1976) provides: “If a particular standard is specifically applicable to a condition, . . . it shall prevail over any different general standard which might otherwise be applicable to the condition . . . .” In Sun Shipbuilding & Drydock Co., 4 O.S.A.H.R.C. 1020 (1973), the Commission, citing this regulation, held that the general duty clause is inapplicable to conditions covered by specific standards. Id. at 1021. 29 C.F.R. § 1910.5(f) (1976), while not directly supporting the result in Sun Shipbuilding, also seems to indicate section 5(a)(1) and section 5(a)(2) are mutually exclusive: “An employer who is in compliance with any standard in this part shall be deemed to be in compliance with the requirement of section 5(a)(1) of the Act, but only to the extent of the condition . . . covered by the standard.”
\item \textsuperscript{46} Cf. the general duty clause, discussed supra at text accompanying notes 34-44, which indicates an exposure test should be used.
\item \textsuperscript{47} The Review Commission has used the exposure test extensively. See cases cited notes 55-75 infra. The degree of exposure required to give rise to liability under the exposure test has changed since it was first used. See note 36 supra.
\item \textsuperscript{48} Use of the control test has been suggested in some multiemployer cases. See cases
3. The "exposure-and-control test": an employer is only liable for hazards which it controls and to which it exposes its employees. 49

4. The "exposure-or-control test": an employer is liable if it controls a hazard or if it exposes its employees to a hazard. 50

Any employer who is liable under the exposure-and-control test must be guilty of violating section 5(a)(2), for such an employer would be guilty of a violation no matter which test is used. As will be seen, the Review Commission and courts have not reached a consensus on which of the four tests, if any should be applied under section 5(a)(2) to multiemployer situations.

The remainder of this Comment discusses which test is appropriate and concludes that the exposure-or-control test would best fit both the language of the Act and the policies behind it.

C. Regulations Under Section 5(a)(2)

The question of which test of liability to apply under section 5(a)(2) would be appropriately resolved by rulemaking. 51 This has not been attempted, although a few rules may address the problem. 52

49. Such a test would be analogous to the use of section 5(a)(2) in single employer worksites. The employer at such a worksite has control over any violation of OSHA standards and its employees would be the ones exposed to the hazard.

50. The exposure-or-control test would be the broadest of the four tests. Brennan v. OSHRC (Underhill Constr. Co.), 513 F.2d 1032 (2d Cir. 1975), apparently adopts this test. See note 95 infra and accompanying text.

51. But see Anning-Johnson Co. v. OSHRC, 516 F.2d 1081, 1088-89 (7th Cir. 1975), where the court held that the Department of Labor could not, by rulemaking, impose an exposure test with regard to non-serious violations. See text accompanying notes 100-80 infra.

52. 29 C.F.R. § 1910.5(d) (1976) indicates that standards are designed only to protect employees. The rule states: "In the event a standard protects on its face a class of persons larger than employees, the standard shall be applicable under this part only to employees and their places of employment." If this rule is read to mean only the cited employers' employees, then an exposure test is mandated, since a cited exposing employer's employees would be in the protected class and endangered by the violation. A cited controlling non-exposing employer's employees, by definition, would not have been endangered by the violation. Therefore, a citation against such a controlling employer would be invalid. See Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1260 (4th Cir. 1974). On the other hand, if the rule is read to cover any employees at their place of employment, at least a control test is mandated, since an employer who created a hazard at the workplace would have failed to protect "employees" at their place of employment, even though the employees exposed to the hazard were not his employees. See Brennan v. OSHRC (Underhill Constr. Co.), 513 F.2d 1032, 1038 n.10 (2d Cir. 1975). For a discussion of the two cases referred to in this note, see notes 78-99 infra and accompanying text.

29 C.F.R. § 1910.12(a) (1976) is likewise ambiguous. This rule applies to construction work, the most common multiemployer situation. The second sentence of the rule states: "Each employer shall protect the employment and places of employment of each of his employees engaged in construction work by complying with the appropriate standards prescribed in this paragraph."

The ambiguity comes from failure to define "appropriate." This term could mean that an
Although the regulations are unclear, the Department of Labor has issued definite guidelines to its compliance officers for dealing with multiemployer worksites:

(1) **Citations under the general duty clause and under standards will**

electrical subcontractor, for example, must comply with construction standards that are "appropriate" because they are relevant to electrical work (a control test); or it could mean that an electrical subcontractor must comply with standards that are appropriate because the violation of any one of them might endanger its employees (an exposure test).

At least one circuit court judge thinks a further examination of 29 C.F.R. § 1910.12 would be important in dealing with multiemployer worksites. See the concurring opinion of Judge Tone in Anning-Johnson Co. v. OSHRC, 516 F.2d 1081, 1091 (7th Cir. 1975). Judge Tone did not examine this regulation further in Anning-Johnson because the citation alleged violations of 29 C.F.R. § 1926.500(b)(1), (d)(1) and (e)(1), and not of 29 C.F.R. § 1910.12. See also 29 C.F.R. § 1926.20(b)(1) (1976), also discussed by Judge Tone.

One other regulation has caused confusion in multiemployer situations. 29 C.F.R. § 1926.16 (1976) states:

(a) The prime contractor and any subcontractors may make their own arrangements with respect to obligations which might be more appropriately treated on a jobsite basis rather than individually. Thus, for example, the prime contractor and his subcontractors may wish to make an express agreement that the prime contractor or one of the subcontractors will provide all required first-aid or toilet facilities, thus relieving the subcontractors from the actual, but not any legal, responsibility (or, as the case may be, relieving the other subcontractors from this responsibility). In no case shall the prime contractor be relieved of overall responsibility for compliance with the requirements of this part for all work to be performed under the contract.

(b) By contracting for full performance of a contract subject to section 107 of the Act, the prime contractor assumes all obligations prescribed as employer obligations under the standards contained in this part, whether or not he subcontracts any part of the work.

(c) To the extent that a subcontractor of any tier agrees to perform any part of the contract, he also assumes responsibility for complying with the standards in this part with respect to that part. Thus, the prime contractor assumes the entire responsibility under the contract and the subcontractor assumes responsibility with respect to his portion of the work. With respect to subcontracted work, the prime contractor and any subcontractor or subcontractors shall be deemed to have joint responsibility.

(d) Where joint responsibility exists, both the prime contractor and his subcontractor or subcontractors, regardless of tier, shall be considered subject to the enforcement provisions of the Act.

OSHA LIABILITY

be issued only against employers where their own employees are exposed or are potentially exposed to unsafe or unhealthful conditions.

(2) An employer may be cited if his own employees are exposed or potentially exposed to an unsafe or unhealthful condition—even if he did not create that condition.

(3) An employer has exposed or potentially exposed his employees to an unsafe or unhealthful condition if the [compliance officer] concludes: (1) that employees of that employer were exposed to that condition either at the time of the inspection or within the previous 6 months; or (2) that employees of that employer may reasonably be expected to be exposed to that condition in the future.

(4) An employer will not be cited if his employees are not exposed or potentially exposed to an unsafe or unhealthful condition—even if that employer created the condition.\(^5\)

These guidelines mandate an exposure test for citations for violations at multiemployer worksites. But because the statute and regulations are ambiguous with respect to liability for violations, the above guidelines have generated much litigation.\(^6\)

III
THE REVIEW COMMISSION’S INITIAL POSITION

A. The Exposing Employer

The Review Commission’s administrative law judges first encountered the multiemployer worksite problem in a general duty clause case. In FEC, Inc.,\(^5\) an exposing employer was held liable for violation of the general duty clause. The exposure test was quickly extended to violations of section 5(a)(2).\(^6\) Subsequent cases held that an employer must protect its employ-

53. U.S. DEP’T OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION FIELD OPERATIONS MANUAL, Ch. X, F(1)(b)(1)-(4) (rev. ed. 1975). It should be noted that the Department of Labor is considering revising these guidelines. See 41 Fed. Reg. 17,639-40 (1976); 41 Fed. Reg. 23,808 (1976). The proposed revision would authorize the Secretary to issue citations to an employer who (1) creates or causes a hazard to which his employees or employees of any other contractor or subcontractor engaged in activities on the multiemployer worksite are exposed; (2) has the ability to abate the hazardous condition regardless of whether he created the hazard in the first instance; or (3) permits his employees to be exposed to readily apparent hazardous conditions regardless of whether the employer created or has the power to abate the condition. 41 Fed. Reg. at 17,639-40.

54. See, e.g., cases cited note 127 infra.


56. In Ellison Elec., 1 O.S.A.H.R.C. 547 (1972), the Secretary of Labor failed to prove the cited employer’s employees were exposed to the hazard. The administrative law judge stated in dictum, however, that if exposure had been proven, the employer would have been liable, since its duty was to see that its employees were not exposed to the hazard.

ees from a hazard even if another employer had a contractual obligation to eliminate the hazard, or even if the employer lacked sufficient expertise or employees with proper craft jurisdiction to eliminate the hazard. Administrative law judges consistently applied the exposure test, as refined in these decisions, to later cases.

The exposure test first reached the Review Commission in *California Stevedore & Ballast Co.* The Commission held:

It is no defense that others created the violative condition, were responsible for its existence, or had control of the site or the equipment where such conditions exists. As both non-compliance with the requirements of the cited standard and employee exposure were established, we conclude that the trial Judge erred in vacating the citation.

Subsequent decisions by administrative law judges and by the Review inspection. Each employer was cited for a serious violation of 29 C.F.R. § 1926.500(d)(1), the regulation covering perimeter guards on open-sided floors. Fireproof and Tishman were charged with additional violations. In each case, the Secretary urged liability based on exposure of employees to the alleged violation. Two of the subcontractors argued that they should not be penalized because Tishman had the obligation to install the perimeter protection and thus eliminate the section 1926.500(d)(1) violation. The administrative law judge held:

This respondent, a subcontractor at the workplace involved, is not relieved of the legal responsibility to comply with the mandatory Regulation at issue by virtue of the general contractor's (Tishman, Docket No. 567) overall obligation to provide the required perimeter and platform protection. This Respondent had a choice, either to erect itself the required perimeter protection on the 24th floor or to prohibit its employees from working on this unguarded floor until such protection was provided by the general or prime contractor (29 C.F.R. 1926.16).

Jaffie Contracting Co., 2 O.S.A.H.R.C. 472-73 (1973). For virtually identical language, see Barnaby Concrete Corp., 9 O.S.A.H.R.C. 823, 830 (1974); and Fireproof Prods. Co., 2 O.S.A.H.R.C. 475, 481 (1973). The reliance on 29 C.F.R. § 1926.16 in the quoted section is incorrect, as Tishman Realty & Constr. Co., 3 O.S.A.H.R.C. 1221 (1973), indicated. However, *Tishman* also held that reliance on this rule was unnecessary—exposure alone was still held to be the proper test for liability. 3 O.S.A.H.R.C. at 1221.

57. Howard P. Foley Co., 3 O.S.A.H.R.C. 414 (1973). The judge stated that the subcontractor who exposes his employees to hazards may be liable under the Act regardless of who created the hazard or who is responsible for its elimination. An exposing subcontractor's defenses that it had neither the tools nor the expertise to abate were specifically rejected.

58. Charles S. Powell, 3 O.S.A.H.R.C. 1056 (1973). The judge concluded that any subcontractor who exposes his employees to hazards may be liable under the Act regardless of who created the hazard or who is responsible for its elimination. An exposing subcontractor's defenses that it had neither the tools nor the expertise to abate were specifically rejected.


62. Id. at 814.

Commission continued to find employers at multiemployer worksites who exposed their own employees to hazards, i.e., “exposing” employers, liable for violations of section 5(a)(2).

B. The Controlling Employer

The Commission and its judges used the exposure test not only to find exposing employers liable; as a corollary they also vacated citations against “controlling” employers whose employees were not exposed to a hazard those employers had created. Thus in C.N. Harrison Construction Co. the administrative law judge held the general contractor not liable for a violation to which none of its employees were exposed, even though a subcontractor’s employees were exposed to the violation.

The Commission, with one member dissenting, took almost the same position in Gilles & Cotting, Inc. and in Humphreys & Harding, Inc. It held that even though the general contractor was contractually obliged to install guardrails around the open perimeters of a building as required by OSHA regulations, it could not be cited for the violation unless it exposed its own employees to the open perimeters. In Otis Elevator Co., the Commission reached a similar result. The respondent’s employees had been instructed to make sure that guards were installed around an open elevator shaft. Adequate guards were not installed, however, and the respondent was cited for a violation of 29 C.F.R. § 1926.500(c). Employees of other subcontractors were exposed to the hazard, but it was not shown that the respondent’s employees were. For this reason—failure to prove exposure—the Commission vacated the citation with one member dissenting.

neither party submitted briefs, and because the other Commission members felt the issues would be decided at another time, the administrative law judges’ decisions in Water Works and Electrical Contractors were affirmed, and the order for review in Pierce was vacated. Hence these decisions became final orders of the Commission.

67. Id.
68. 4 O.S.A.H.R.C. 1080 (1973), vacated and remanded, 504 F.2d 1255 (4th Cir. 1974).
70. 29 C.F.R. § 1926.500(d)(1) (1976).
71. In Humphreys & Harding, the Commission also held that the subcontractors’ employees (who were exposed to the violation) could not be attributed to the general contractor for the purpose of finding the general contractor guilty of a violation of the Act. 8 O.S.A.H.R.C. 304 (1974).
73. Id.
74. Id.
75. Id.
Thus the Commission applied the exposure test to define the potential liability of both exposing and controlling employers. In so doing, it embraced the Occupational Safety and Health Administration's Guidelines for its compliance officers with regard to multiemployer worksites. The exposure test did not, however, survive even its first tests in the circuit courts of appeals.

IV

THE COURTS

A. The Controlling Employer: GILLES & COTTING and UNDERHILL

Brennan v. Gilles & Cotting, Inc. and Brennan v. OSHRC (Underhill Construction Co.) both involved controlling, non-exposing employers. In each case the Commission vacated citations against employers because exposure was not proven, and the Secretary of Labor appealed.

In Gilles & Cotting, the Fourth Circuit sustained the Commission's insistence on proof of exposure. The court held that the Secretary of Labor's own rule, 29 C.F.R. § 1910.5(d), prevented him from requiring employers in a multiemployer industry to obey safety regulations promulgated for the protection of other employers' workers. The court reserved

77. See text accompanying note 53 supra. See also Geo. Note, supra note 33, at 1489-90.
78. 504 F.2d 1255 (4th Cir. 1974).
79. 513 F.2d 1032 (2d Cir. 1975).
80. The citation against Gilles & Cotting, Inc. was eventually affirmed on remand on the ground that the employer's employees were exposed to the hazard. See 3 O.S.H. Cas. (BNA) 2002 (1976), and note 82 infra.
81. 504 F.2d at 1257; 513 F.2d at 1035.
82. The Fourth Circuit dealt with two other aspects of the Commission's decision. First, the court agreed that the subcontractor's employees would not be treated as the general contractor's employees for the purpose of the Act. 504 F.2d at 1261-62. Other OSHA cases have presented this question of employee attribution. See Frohlick Crane Serv., Inc. v. OSHRC, 521 F.2d 628 (10th Cir. 1975); Home Supply Co., 7 O.S.A.H.R.C. 527 (1974); Union Boiler Co., 7 O.S.A.H.R.C. 218 (1974).
83. The court stated:

In this petition for review, we need decide only the issue of whether, in addition to a subcontractor, a general contractor should be responsible for safety violations hazardous to a subcontractor's workers. The case arises in the factual context of the construction industry in which, unlike the typical single-employer business, the
the question of whether the Secretary had statutory authority to make a
controlling employer responsible.84

In Underhill, however, the Second Circuit reversed the Commission's
application of a strict exposure test to controlling employers.85 The Second
Circuit disagreed with the Gilles & Cotting analysis of the effect of 29
C.F.R. § 1910.5(d) and held that the regulation only exempted employers
from injury to passersby and "third persons."86 It thus decided that no
regulation governed the question of whether a controlling employer could be
held responsible for a violation affecting another employer's employees.
The court then looked to the Act's language, its purposes and its legislative
history, and rejected the Gilles & Cotting position that, in the absence of
controlling regulation, the courts should defer to the adjudication of the
Commission.87

The court pointed out that the duty imposed by section 5(a)(2), "to
comply with occupational safety and health standards promulgated under the
Act," is "in no way limited to situations where a violation of a standard is
linked to exposure of his [the cited employer's] employees to the hazard."88
The court also noted that the purpose of the statute is to provide safe and
healthful working conditions by eliminating potential hazards. Since Under-
hill both created the hazard and retained control over it, the purposes of the

specialized workmen of a number of contractors customarily occupy the same work-
place. Since the Secretary has issued an interpretative regulation limiting the effect of
the safety regulations promulgated under § 5(a)(2) of the Act to the employment
relationship, see 29 C.F.R. § 1910.5(d), we do not reach the question of whether
Congress has granted the Secretary authority under § 5(a)(2) to require employers in
multiple-employer industries to obey safety regulations for the protection of other
employers' workmen, for in this enforcement proceeding the Secretary is bound by his
own rules. 504 F.2d at 1260 (citations omitted). For a discussion of 29 C.F.R. § 1910.5, see note 52 supra.
While section 1910.5 is more ambiguous on this question than the Fourth Circuit thought, the
Occupational Safety and Health Administration's Field Operations Manual, see note 53 supra,
clearly supports the Fourth Circuit's holding. However, it remains undecided whether the
guidelines in the Field Operations Manual preclude enforcement that does not comply with the
the Manual's guidelines are for the issuance of citations, not for a finding of liability under the

84. 504 F.2d at 1260. The court apparently never considered that the Act might mandate a
control test, notwithstanding any regulations the Secretary could issue. See text accompanying
notes 85-93 infra.
85. 513 F.2d at 1037.
86. "We note that the Fourth Circuit gave this regulation broader reading in Brennan v.
Gilles & Cotting Inc., . . . by holding that it did not "require employers in multiple-employer
industries to obey safety regulations for the protection of other employers' workmen . . . ."
We respectfully disagree with this interpretation." 513 F.2d at 1038 n.10 (citation omitted).
The Underhill court had its own interpretation of that regulation. "We take this as relating
to protection of employees as a class as opposed to say, passersby or unrelated third persons."
Thus, a control test would be consistent with the regulation because it means that an employer
is responsible for any workers at the place of employment, not just its own employees. Id.
87. For a discussion of deferral to administrative adjudication in the OSHA context, see
Va. Note, supra note 33, at 807-09 n.128.
89. Id. at 1038 (emphasis in original).
Act would be fulfilled only if Underhill were held liable. Accordingly the court held:

In a situation where, as here, an employer is in control of an area, and responsible for its maintenance, we hold that to prove a violation of OSHA the Secretary of Labor need only show that a hazard has been committed and that the area of the hazard was accessible to the employees of the cited employer or those of other employers engaged in a common undertaking.

The Second Circuit’s opinion is persuasive on both statutory and policy grounds. Section 5(a)(2), unlike section 5(a)(1), does not mandate exclusive use of an exposure test; it is sound policy to hold an employer liable if it both creates and maintains control over a hazard. The act or omission of such an employer endangers employees on the worksite, and such an employer is in the best position to eliminate the hazard.

The Second Circuit’s decision did, however, make the law more complex. According to Underhill two tests exist under the Act, an exposure test for violation of section 5(a)(1) and an exposure-or-control test for violation of section 5(a)(2). This probably will not make it more difficult for an employer to understand its duties under the Act. Nor would the new rule make a compliance officer’s job significantly more difficult. But since control is much more difficult to prove than exposure, the Underhill rule could burden the administrative process. Definitional problems aside, it may often be unclear who has “control” over a particular area. Were Underhill followed, litigation over who has “control” would add to the Review Commission’s already overcrowded docket.

B. The Exposing Employer: ANNING-JOHNSON

Strictly speaking, Underhill held only that a controlling employer is liable whether or not it exposed its employees to a hazard. Before long the Seventh Circuit was faced with the next difficult question: whether an exposing, but non-controlling employer may be held liable under OSHA.

90. Id. at 1038-39.
91. Id. at 1038.
92. See cases cited notes 186, 190, 191 & 200 infra; HARV. Note, supra note 33; VA. Note, supra note 33.
93. See HARV. Note, supra note 33, at 797.
95. For a definition of the exposure-or-control test, see note 50 supra and accompanying text. Underhill did not eliminate the exposure element as sufficient for liability. It merely added another basis of liability, control over the violation. See 513 F.2d at 1038.
97. See generally GEO. Note, supra note 33, at 1492.
98. See text accompanying notes 165-71 infra.
100. 513 F.2d at 1038.
Anning-Johnson Co. v. OSHRC\textsuperscript{101} thus represented a challenge to the well-established use of the exposure test by the Secretary of Labor and the Commission.\textsuperscript{102} The case was heard on appeal from an administrative law judge’s decision holding two exposing, non-controlling employers liable for non-serious violations of section 5(a)(2).\textsuperscript{103} The Seventh Circuit reversed and held that the Secretary of Labor could not, consistent with the Act, impose liability on exposing, non-controlling employers for non-serious violations.\textsuperscript{104}

1. Statutory Language

The Seventh Circuit first examined the statute to see whether section 5(a)(2) mandated an exposure test and concluded that it did not.\textsuperscript{105} The court stated that the words “shall comply” in section 5(a)(2)\textsuperscript{106} require “that one who is to be charged with absolute liability be realistically in a position to comply with the promulgated standards.”\textsuperscript{107} The court noted the differences in language between section 5(a)(2) on the one hand, and the general duty clause\textsuperscript{108} and section 107 of the Contract Work Hours and Safety Standards Act\textsuperscript{109} on the other, and reasoned that if Congress wanted an exposure test, it knew how to “select language to clearly accomplish that goal.”\textsuperscript{110}

These differences in language, according to the court, support the conclusion that Congress had not mandated an exposure test.\textsuperscript{111} They also yield, although the court does not say how, a distinction between serious and non-serious conditions. Only for non-serious violations would liability

\begin{itemize}
  \item \textsuperscript{101} 516 F.2d 1081 (7th Cir. 1975).
  \item \textsuperscript{102} See text accompanying notes 55-77 \textit{supra}.
  \item \textsuperscript{103} Workinger Elec., Inc., 7 O.S.A.H.R.C. 271 (1974). The administrative law judge, relying on the decisions of the Commission and other administrative law judges, found the respondents liable. The administrative judge pointed out that once the Secretary had, in his discretion, decided to enforce the Act against the respondents, their only remedy was with Congress. The judge also pointed out, however, that the Secretary had proposed only nominal penalties for the violations ($30-$60). He speculated that the Secretary might have recognized the respondents’ difficult position as non-controlling employers.
  \item \textsuperscript{104} Anning-Johnson Co. v. OSHRC, 516 F.2d 1081, 1091 (7th Cir. 1975).
  \item \textsuperscript{105} Id. at 1088. This conclusion, based solely on the language of the Act, can hardly be criticized. See text accompanying notes 45-50 \textit{supra}.
  \item \textsuperscript{107} 516 F.2d at 1086.
  \item \textsuperscript{109} “[N]o contractor or subcontractor . . . shall require any laborer . . . to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his health or safety as determined under construction safety and health standards . . . .” 40 U.S.C. § 333(a) (1970).
  \item \textsuperscript{110} 516 F.2d at 1086.
  \item \textsuperscript{111} Id. The court also drew some support from the legislative history of the Act. Congress placed primary responsibility on employers because they “have primary control of the work environment and should therefore insure that it is safe and healthful.” 516 F.2d at 1088 (citations omitted). The court stated that this rationale does not apply in many multiemployer situations because often a subcontractor does not have primary control or other control over many aspects of the work environment. Id. The court found that the two subcontractors involved in Anning-Johnson lacked “primary control.” Id.
\end{itemize}
be based upon control.\textsuperscript{112} This distinction might be sound if the court were distinguishing section 5(a)(1) from section 5(a)(2) violations rather than distinguishing serious from non-serious violations of section 5(a)(2).\textsuperscript{113} A comparison of the language of section 5(a)(2) and the language of section 5(a)(1) and section 107 of the Contract Work Hours and Safety Standards Act indicates that section 5(a)(2) stands on a different footing from section 5(a)(1), and not that non-serious violations of section 5(a)(2) stand on a different footing from other violations of section 5(a)(2).\textsuperscript{114}

Furthermore, there is no basis in the statute for distinguishing between serious and non-serious violations of section 5(a)(2) for the purpose of finding an OSHA violation.\textsuperscript{115} Section 5(a)(2) itself, in stating that "[e]ach employer . . . shall comply with occupational safety and health standards promulgated under this chapter,"\textsuperscript{116} makes no distinction between serious and non-serious violations. Instead, the section, on its face, mandates the same duty with respect to all violations. The distinction between serious and non-serious violations of regulations is significant only in assessing penalties.\textsuperscript{117}

A court, convinced that the exposure test is unfair, might be tempted to restrict its application to general duty clause violations alone. The Seventh Circuit rejected this option because it would result in better protection for workers under the general duty clause, when standards had not been enacted

\textsuperscript{112} Id. at 1087. "[T]he proposition [is] that exposure to non-serious violations of standards promulgated pursuant to 5(a)(2) do [sic] not stand on the same footing as exposure to conditions that are likely to cause serious physical harm or death." Id.

\textsuperscript{113} The court's holding embraces the latter distinction. Id. at 1091.

\textsuperscript{114} Two other commentators have recognized this defect in the court's reasoning. See Va. Note, supra note 33, at 799; Harv. Note, supra note 33, at 799.

\textsuperscript{115} See text accompanying notes 172-77 infra. See also Brennan v. OSHRC (Hendrix), 511 F.2d 1139, 1144 (9th Cir. 1975); Harv. Note, supra note 33, at 799; Va. Note, supra note 33, at 800.


\textsuperscript{117} Section 17(k) of the Act, 29 U.S.C. § 666(j) (1970), defines a serious violation:

For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

(emphasis added)

Section 17(b), 29 U.S.C. § 666(b) (1970), requires that a penalty be assessed for serious violations. Section 17(c), 29 U.S.C. § 666(c) (1970), however, does not require a penalty for other, non-serious violations; a penalty "may" be assessed for such violations.

Moreover, by using this definition as a standard of liability under section 5(a)(2), the court's holding seems to go beyond the express intended use of this definition: "for the purposes of this section," i.e., section 17. 29 U.S.C. § 666(j) (1970). In a case dealing with an aspect of the definition of a serious violation, the Ninth Circuit came to the same conclusion: the distinction between serious and non-serious violations exists solely for the purpose of penalties and not at all for the purpose of finding a violation. Brennan v. OSHRC (Hendrix), 511 F.2d 1139, 1144 (9th Cir. 1975). See also Harv. Note, supra note 33, at 799; Va. Note, supra note 33, at 800.
than when standards had been enacted. Since this anomaly was not intended by Congress, the court sought to avoid it by extending the distinction between serious and non-serious violations of section 5(a)(2), and then applying the exposure test to serious violations only. Although the court thinks it has found this distinction in section 5(a) of the Act, it is without support in the language of the section, and it has never been used by the agencies which administer OSHA.

2. Policy

The court, having decided that Congress did not mandate the exposure test for section 5(a)(2) violations, went on to decide that the Secretary of Labor does not have the discretion to adopt such a rule. "[T]he Secretary's rule [i.e. the exposure test] involves a policy choice of such magnitude and would lead to results under the Act, not intended by the Congress, that it may not be appropriately adopted without more direct statutory authorization." Then, by balancing the "equities" and analyzing the problems of the exposure test, the court concluded that the test should not be applied to non-serious violations.

118. "[W]e have not held that the Secretary's policy of imposing liability on employers for exposure to conditions that are serious violations of promulgated standards is invalid." 516 F.2d at 1091. Despite this statement, much of the court's reasoning applies to serious as well as non-serious violations. See text accompanying notes 172-77 infra. See also HARV. Note, supra note 33, at 799. Such a reading would be consistent with the court's analysis. See HARV Note, supra note 33, at 799. Such a result would force the Secretary to rely solely on the general duty clause, section 5(a)(1), to support an exposure test. Section 5(a)(1) would then be applied, for example, to an employer which exposed its employees to a section 5(a)(2) violation, but which had no control over it. (Of course, the other requirements of section 5(a)(1) would have to be met: the hazard must be "recognized" and must be causing or likely to cause death or serious bodily harm.) However, Congress did not intend section 5(a)(1) to apply to hazards that are proscribed by regulations under section 5(a)(2). See S. REP. No. 1282, 91st Cong., 2d Sess., reprinted in [1970] U.S. CODE CONG. & AD. NEWS 5177, 5185-86; Sun Shipbuilding & Drydock Co., 4 O.S.A.H.R.C. 1020 (1973); Brisk Waterproofing Co., 3 O.S.A.H.R.C. 1132 (1973). Such a result would also be bad policy. It would undercut the purpose of specific safety and health standards, since the Secretary would have to rely on the vague section 5(a)(1) "recognized hazards" language instead of on standards under section 5(a)(2). See generally, concerning the purposes and importance of these standards, Underhill Constr. Co., 513 F.2d 1032, 1038-39 (2d Cir. 1975). It would also render the Secretary's burden more difficult since proof of section 5(a)(1) violations requires more than mere exposure. See text accompanying notes 34-44 supra.


120. 516 F.2d at 1091.

121. The court's statements with regard to serious violations are dicta, since Anning-Johnson involved only non-serious violations.

122. The court can also be criticized for not giving any weight to the construction of the statute by the agencies involved in its administration, i.e., the Department of Labor and the Review Commission. See Cutie, OSHA, 1 AM. B. FOUNDATION RESEARCH J. 1107, 1146; HARV. Note, supra note 33, at 798-99.

123. 516 F.2d at 1088.

124. Id. at 1088-89. The court fails to explain why it thinks the "Secretary's rule" involves a large policy shift for non-serious violations, but does not involve a large policy shift for serious violations.
a. Identification of Hazards

The Anning-Johnson court attacked the exposure test because it requires that every employer be able to identify all violations of the OSHA standards to which its employees are exposed, even those not created by the employer and those outside the employer's area of expertise. "This requires electricians and plumbers for example to be familiar with the standards for general carpentry work and in reverse, that carpenters be familiar with standards bearing on the work of more technical specialists."125

No evidence supports the court's argument that it would be an unreasonably heavy burden on subcontractors to require them to identify OSHA violations. Almost all of the multiemployer worksite cases, including Anning-Johnson itself, involve a citation for violation of the regulation covering guardrails, handrails, and covers.127 Since the regulation is heavily litigated, it would be surprising if subcontractors were not aware of what it requires.128 In this case, for example, Anning-Johnson's supervisors knew about the conditions alleged to be a violation and knew about the regulation in question.129

Even with regulations that are outside the expertise of the subcontractors, it would be surprising if subcontractors were not aware of what the regulation requires.126

125. Id. at 1089.
126. Id. at 1083.
127. 29 C.F.R. § 1926.500.
128. The regulation is hardly new. It has been part of the regulations issued under the Contract Work Hours and Safety Standards Act, 40 U.S.C. §§ 327-333 (1970), and is based on the American Standards Institute standards, which are "common knowledge in the construction industry." Workinger Elec., Inc., 7 O.S.A.H.R.C. 271, 280 (1974). At any rate, subcontractors could easily become familiar with this regulation, even if they are not already familiar with it.

It should be noted that the court's own holding will not serve to alleviate significantly any problems stemming from the employer's lack of sufficient expertise to identify violations. The employer is still required to identify all serious violations even though outside his area of expertise. The serious/non-serious line is quite vague and requiring that employers be able to identify serious violations and to ascertain that such violations are "serious" may exacerbate any identification problem. See text accompanying notes 174-77 infra.
tor, it is sound policy to hold the subcontractors liable. Such liability would provide the employer with an incentive to learn about hazards that affect the safety and health of its employees. That incentive would no doubt increase employers' ability to engage in the "self-policing" that Congress thought was necessary to achieve effective occupational safety. Any possible harshness in assessment of penalties could be mitigated by the Secretary's discretion to take lack of expertise into consideration when deciding the amount.

The court also found the exposure test "economically wasteful" because it "requires multiple expenditures in the discovery of violations." Again, this argument is open to question on empirical grounds. At least in the case of guardrails, a reading of the regulation and a visual inspection of the workplace would disclose most potential multiemployer worksite violations. The court provides no reason to believe that the multiple expenditure would be significant. At any rate, encouraging this expenditure will increase employer self-policing, furthering Congress' goal "to assure as possible every working man and woman in the Nation safe and healthful working conditions. . . ."  

b. Abatement of Hazards

In the court's view, abatement under the exposure test presents several difficulties. First, the exposure test may cause confusion over which employer should abate, since all exposing employers will be cited and given an abatement order. Second, the exposure test requires an employer to abate even when it does not have the necessary expertise or the appropriate craft jurisdiction. Consequently, economic waste and subversion of union craft
jurisdiction may result. Third, under the exposure test, duplicate expenditures in the abatement of hazards might be made. Fourth, the alternative to abatement, withdrawal of employees from exposure to the hazard, would be unfair to the relatively innocent subcontractor and contrary to the policies of the Act.

As demonstrated below, the significance of these criticisms is dubious, especially in light of the exposure test's advantages. First, the court cites no cases to support its conclusion that ordering all exposing employers to abate causes confusion. In fact, "confusion" over which employer should abate has not been alleged in any OSHA case involving a multiemployer situation. On the contrary, in many multiemployer cases, one employer admitted responsibility for performing the work necessary to abate the violation. And where such confusion might exist following a citation of exposing employers, the confusion would probably have existed before the citation was issued; that is, none of the employers would know which is responsible for eliminating the hazard. If this were the case, the compliance officer, after inspecting the site and discovering the hazard, also would not know who should be cited. This confusion would extend to the review stage, where the Secretary of Labor must defend the compliance officer's conclusion and bear the burden of proving which employer had control over the hazard.

It would be more efficient to cite all exposing employers, forcing them to resolve the confusion among themselves.

Whatever the level of confusion may be, self-policing is also undermined by the court's analysis. The exposure test provides a greater incentive to the employers to resolve any confusion before an inspection, because they will have no reason to wait and see which one of them is cited under Anning-Johnson's control test. If no confusion exists and all employers know who should eliminate a hazard, the court's holding eliminates the incentive for exposing subcontractors to inform the controlling employer of the hazard and encourage that employer to eliminate it.

137. Id. at 1089-90.
138. Id. at 1089.
139. The court stated: "To the extent that the Secretary's policy will lead to the removal of workers from construction sites because of non-serious violations we find that policy inconsistent with the Act. Correcting the hazard, not shutting down construction sites, is the desired result." Id. at 1090.
141. See also Geo. Note, supra note 33, at 1492-93. For a discussion of the difficulty of determining control, see text accompanying notes 165-70 infra.
142. Congress specifically intended to encourage self-policing. See sources cited note 130, supra. To the extent the court's holding eliminates incentives to engage in self-policing, it conflicts with Congress' intent. See Geo. Note, supra note 33, at 1493.
143. Such an incentive no doubt exists under the exposure test. See, e.g., Pierce Assocs., 4
The court's distinction between serious and non-serious violations further weakens its analysis. If employers are confused about who is responsible for non-serious violations, they will be just as confused about serious violations; if the confusion makes abatement more difficult, it will do the same for serious violations. Yet the court limits its holding to non-serious violations. Furthermore, the serious/non-serious distinction itself will add to any confusion that now exists; if employers are confused about who should eliminate a hazard, a rule of liability that turns on the ambiguous question of whether or not the violation is serious will only increase the confusion.

The court's second concern, with ordering an employer to abate who has neither the expertise nor employees with the proper union jurisdiction, is also unfounded. When a compliance officer visits a site he or she would normally cite all exposing employers and perhaps, following Underhill, the controlling employer who has not exposed any of its employees. Usually, not just one but several employers are faced with an abatement order. The court assumes without foundation that the controlling employer, who has adequate expertise and proper union jurisdiction to abate, will not be the one who performs the work after discussions among all employers on the worksite. There is no reason to believe that the employers would not arrive at this reasonable solution among themselves. And even if the "controlling" employer is not cited, and none of its employees are exposed to the violation, the exposure test is still preferable. Under the Seventh Circuit's rule, the hazard will not be eliminated, and the non-controlling employers can endanger their employees with impunity. Under the exposure test, in contrast, at least the violation will be abated. This may be a hardship on the subcontractor who cannot persuade the controlling employer to abate, but it


144. See VA. Note, supra note 33, at 800.
145. 516 F.2d at 1091.
146. See text accompanying notes 172-77 infra.
147. See VA. Note, supra note 33, at 801.
148. For example, in Anning-Johnson, the general contractor and two subcontractors were cited for the violation. Workinger Elec., Inc., 7 O.S.A.H.R.C. 271, 272, 277 (1974).
149. See, e.g., Circle Indus. Corp., 4 O.S.H. Cas. (BNA) 1724 (1976); Anning-Johnson Co., 4 O.S.H. Cas (BNA) 1193, 1196 (1976); Peerless Elec. Co., 19 O.S.A.H.R.C. 706, 708 (1975); Alcap Elec. Corp., 18 O.S.A.H.R.C. 1 (1975); Laster & Fingeret, Inc., 15 O.S.A.H.R.C. 420 (1975); Bayside Pipe Coaters, Inc., 11 O.S.A.H.R.C. 751, 752 (1974); Valente Contracting Corp., 4 O.S.A.H.R.C. 148 (1973). In Anning-Johnson, the general contractor presumably did the necessary work. Since it did not contest the citation, abatement would not have been stayed as to it. 7 O.S.A.H.R.C. at 277. The general contractor had sufficient expertise and proper craft jurisdiction to accomplish the abatement. Id. at 276.
150. This would be the result if, for example, the rule in Gilles & Cotting, Inc., 504 F.2d 1255 (4th Cir. 1974), were followed. See text accompanying notes 78-93 supra.
151. Under the court's holding, exposing employers would not be cited; thus, if the controlling employer is not cited, no one is. This gap in coverage is discussed in the VA. Note, supra note 33, at 805.
would better achieve Congress' purpose than to allow the continued exposure.152

The court also fails to support its third concern that employers will make duplicate expenditures to abate violations. The court points to no instances in which such expenditures were made; in fact duplication of effort would be illogical. If one employer builds a proper guardrail around the perimeter of a building, it would be irrational for another employer to build a second. Even where responsibilities are not clear, employers have enough foresight and profit motivation to designate only one employer to perform the work after several of them receive abatement orders.

The court's fourth concern was with the removal of employees as an alternative to abatement.153 Prohibiting exposure of employees to non-serious violations of the Act arguably may not be worth requiring an exposing employer to withdraw his employees from the site, thus possibly shutting down the entire project.154 This argument should not be accepted, however, without evidence that employers actually do withdraw from a site when non-serious violations remain uncorrected. It does not seem logical that a general contractor faced with a threat of withdrawal by a subcontractor, with the attendant costs and delays, would actually refuse to abate a violation. Indeed, the court cites no instance of such a response. In addition, the subcontractor's threat of withdrawal could be an instrument of the self-policing Congress considered so important.155 The court's holding, however, would frustrate this mechanism.156

c. Indemnification

The court believed that the use of the exposure test would lead to the use of indemnification agreements157 to shift OSHA responsibility, and

152. A cited exposing employer may be able to abate the hazard by persuading the non-cited controlling employer to abate. In many cases, more than mere persuasion—the controlling employer's contractual obligation to perform the work—will be available. See, e.g., Workinger Elec. Inc., 7 O.S.A.H.R.C. 271, 276-77 (1974); see also, cases cited note 140 supra.

153. Pointing out that "correcting the hazard" is the desired result, the court found that removal of workers from the worksite because of non-serious violations is "inconsistent with the Act." 516 F.2d at 1090.

154. Id.

155. See sources cited note 130 supra.

156. See Va. Note, supra note 33, at 798.

157. An example of an indemnification clause can be found in the Association of General Contractors of California's "Standard Form Subcontract":

INDEMNITY CLAUSE RE SAFETY—SUBCONTRACTOR shall, at its own expense, conform to the basic safety policy of the CONTRACTOR, and comply with all specific safety requirements promulgated by any governmental authority, including, without limitation, the requirements of the Occupational Safety Health Act of 1970, the Construction Safety Act of 1969, the California Labor Code . . . and all standards and regulations which have been or shall be promulgated by the parties or agencies which administer said Acts. SUBCONTRACTOR shall have and exercise full responsibility for compliance hereunder by itself, its agents, employees, materialmen, and subcontractors with respect to its portion of the work on this Project; and shall directly receive, respond to, defend and be responsible for any citation, assessment, fine or penalty by reason of SUBCONTRACTOR'S failure or failure of SUBCON-
thereby create two further problems. First, it stated that the Secretary's policy will tend unnecessarily to favor general contractors who will have a strong bargaining position vis-a-vis subcontractors and who thus will be able to impose an indemnification clause most favorable to themselves. Second, the court stated that citing several employers that were parties to indemnification agreements would promote litigation among employers to assign liability. Forcing resort to the courts to affix responsibility for minor hazards, the court argued, would be wasteful and contrary to congressional intent.

The court's argument with regard to bargaining position makes theoretical sense, but the opinion offers no evidence that the general contractor would have an unfair advantage. It is at least as likely that the general contractor will allocate responsibility in the most efficient manner, i.e., to the party in the best position to take care of each safety problem. In several cases, the general contractor accepted responsibility for the violation, admitting that it was in the best position to abate.

The court’s concern about expensive legal battles to affix responsibility is largely unrealistic. The penalties for exposure to non-serious violations are generally small, therefore not a likely subject of expensive litigation. And even if court battles materialize, the Seventh Circuit position will not eliminate these disputes; a mere change of venue to the Review Commission will result. There, the Secretary and the parties will litigate the analogous question: who is the controlling employer? Thus the valuable

TRACTOR’S agents, employees, materialmen and subcontractors to so comply. SUBCONTRACTOR shall indemnify and hold harmless CONTRACTOR from and against any liability, loss, damage, cost, claims, awards, judgments, fines, expenses, including litigation expenses, reasonable attorneys' fees, claims or liability for harm to persons or property, expenses incurred pursuant to or attendant to any hearing or meeting and any other applicable cost which may be incurred by CONTRACTOR resulting from SUBCONTRACTOR’S failure to fulfill the covenants set forth in this paragraph.

158. 516 F.2d at 1089.
159. Id.
160. At least one commentator has questioned the existence of unfair advantage. See VA. Note, supra note 33, at 796.
162. For example, in Anning-Johnson, penalties of $30, $60, and $60 were assessed for the three violations. 7 O.S.A.H.R.C. at 279. The average penalty for a non-serious violation is $16. 4 OCC. SAFETY & HEALTH REP. (BNA) 395 (Sept. 12, 1974).
163. The court’s concern over court battles and bargaining position would be much more valid with regard to serious violations where the stakes are much higher ($648 average penalty, 4 OCC. SAFETY & HEALTH REP. (BNA) 395 (Sept. 12, 1974)). The holding is limited, however, to non-serious violations. 516 F.2d at 1091.
The control test is hard to apply because control is hard to define. For non-serious violations of section 5(a)(2), Anning-Johnson defined control as creating, causing or being otherwise responsible for a violation. This "definition," aside from its puzzling suggestion that creating and causing do not mean the same thing, begs the major definitional question—who is responsible for a violation? Apparently, one who has knowledge of a violation and does not inform the party in control is not "otherwise responsible for" a violation, since the facts of Anning-Johnson fit this example. In Anning-Johnson, however, the exposing employer probably could have protected its employees from the hazard by requiring them to wear safety belts. Was Anning-Johnson therefore "otherwise responsible for" the violation? And what about the general contractor who has no employees with expertise or union jurisdiction necessary to abate, yet who has the power to order one of his subcontractors to abate?  

164. See Geo. Note, supra note 33, at 1496 n.74. The author supports the use of indemnification arrangements in multiemployer situations, in part because it forces the difficult question of control on the parties instead of on the Commission. Id. at 1496-98. In view of the court's concern with the effects of indemnification agreements, it may be wisest to follow one commentary's suggestion to prohibit such agreements as contrary to public policy. See White & Carney, OSHA Comes of Age: The Law of the Workplace, 28 Bus. Law. 1039, 1317-18 (1973). First, such agreements reduce an exposing, non-controlling employer's incentive to encourage the controlling employer to correct the violation. Second, since the good faith and size of the indemnified employer would influence the amount of a fine paid by the indemnifying employer, 29 U.S.C. § 666(i), an irrational allocation of fines is the result.

165. 516 F.2d at 1091. 166. Working Elec., Inc., 7 O.S.A.H.R.C. 271 (1974). See Va. Note, supra note 33, at 802-03. The author suggests that since ability to abate a violation is as important as creating or causing it, "responsible for" should be interpreted to cover any employer with the ability to abate a violation. Id. See also, A.J. McNulty & Co., 4 O.S.H. Cas. (BNA) 1105 (1976). 167. See Anning-Johnson Co., 4 O.S.H. Cas. (BNA) 1193, 1199 (1976). 168. See, e.g., Mid-Plains Constr. Co., 20 O.S.A.H.R.C. 42 (1975). 169. See Grossman Steel & Aluminum Co., 4 O.S.H. Cas. (BNA) 1185, 1188, (1976). Cf. The Department of Labor's proposed policy guidelines for citing employers at multiemployer sites, 41 Fed. Reg. 17,639, 17,640 (1976). The difficulty of defining and proving control is easily demonstrated. Suppose a general contractor subcontracts for crane work, and the crane comes in contact with an electric line, in violation of a regulation prohibiting the operation of cranes within six feet of a "live" wire. Who is "otherwise responsible for" this violation—the electrical subcontractor, for not turning off the electricity; the crane operator's employer, for allowing the operator to get too close to the line; or the general contractor, for not making sure that either the electricity was turned off or the crane did not get too close to the line? See, e.g., Cox Bros., 18 O.S.A.H.R.C. 522 (1975); Savannah Iron & Fence Corp., 10 O.S.A.H.R.C. 1 (1974); James F. Roberts Co., 7 O.S.A.H.R.C. 1005 (1974); FEC, Inc., 1 O.S.A.H.R.C. 389 (1972). Another problem arises when the creator of a hazard has finished its work or for some other reason leaves the worksite. Can anyone else be liable under Anning-Johnson? If not, who has any incentive to correct the violation? Cf. Seaport Manor Corp., 18 O.S.A.H.R.C. 123 (1975) (general contractor liable for violation caused by subcontractor who is no longer at jobsite). A similar problem arises when no employer on the worksite has control over a
Since control is hard to define and prove, it will increase the administrative burden, both on the Department of Labor, which as enforcing agency must gather sufficient evidence to prove "control," and on the Review Commission, as adjudicator. Moreover, the control test will reduce the chances of achieving voluntary compliance with the Act, because it removes the threat of liability from exposing employers and thus reduces incentives to self-police and to inform the controlling employer of any violations.

e. The Serious/Non-Serious Distinction

Anning-Johnson's criticisms of the exposure test, if valid, apply more forcefully when the violation is serious, because the larger penalty exacerbates any injustice. But the analysis excepts serious violations. Thus, the policy considerations marshalled against the exposure test and for the control test provide no support for the court's distinction between serious and non-serious violations.

Because liability turns on the distinction between serious and non-serious violations under Anning-Johnson, the definition of "serious" will be heavily litigated if the case is followed. The statutory definition of a serious violation has been subject to varying interpretations. The Department of Labor has issued standards defining serious violation, but they do not provide adequate guidelines. OSHRC cases involving alleged violation of 29 C.F.R. § 1926.500 (1976) in multiemployer situations also show a disturbingly inconsistent line between serious and non-serious violations of that regulation.

violation, such as when the violation is on adjacent property, yet many of the workers on the site are exposed to the hazard. See, e.g., H.B. Zachery Co., 3 O.S.H. Cas. (BNA) 1705 (1975).

170. See Geo. Note, supra note 33, at 1492. The Secretary of Labor has recognized this difficulty with the control test and uses it as a reason for continued use of the exposure test. See 41 Fed. Reg. 17,639, 17,640 (1976).

171. See text accompanying notes 130, 142 & 150-52 supra. See also Geo. Note, supra note 33, at 1493.

172. This argument is presented in Va. Note, supra note 33, at 800.

173. For a discussion of the statutory basis for the distinction, see text accompanying notes 105-20 supra.

174. See Va. Note, supra note 33, at 800.


176. See Va. Note, supra note 33, at 800 n.85, 801 n.86.

177. In the following cases, for example, a violation of 29 C.F.R. § 1926.500 was alleged because guards around the perimeter of unwalled floors, or around open holes in the floors, were completely absent. The distance of a potential fall and the designation of the violation as serious or non-serious is indicated in parentheses. Pierce Assocs., 4 O.S.H. Cas. (BNA) 1670 (1976) (88 ft.; serious); Anning-Johnson Co., 4 O.S.H. Cas. (BNA) 1193 (1976) (6 floors; non-serious); Grossman Steel & Aluminum Corp., 4 O.S.H. Cas. (BNA) 1185 (1976) (15 ft.; non-serious); Electrical Contractors Assocs., 3 O.S.H. Cas. (BNA) 2048 (1976) (48 ft.; non-serious); Parkway Plumbing & Heating Co., 20 O.S.A.H.R.C. 1 (1975) (10-20 ft.; serious); Empire Roofing & Insulation Co., 19 O.S.A.H.R.C. 779 (1975) (8 floors; non-serious); Peerless Elec. Co., 19 O.S.A.H.R.C. 706 (1975) (6 floors; serious); Acela Elec. Corp., 18 O.S.A.H.R.C. 1 (1975) (3 floors; serious); Robert E. Lee Plumbers, Inc., 17 O.S.A.H.R.C. 639 (1975) (4 floors;
3. **ANNING-JOHNSON: A summary**

The *Anning-Johnson* decision reduces incentives to correct unsafe conditions. The decision also makes the law more complex and confusing: for violations of section 5(a)(1) the exposure test applies; for serious violations of section 5(a)(2), the exposure test applies, or if *Underhill* is followed, the exposure-or-control test\(^\text{178}\) applies; for non-serious violations of section 5(a)(2), the exposure-and-control test\(^\text{179}\) applies, or if *Underhill* is followed, the control test applies. The introduction of so much more complexity into the law deserves criticism. Employers will be less likely to know their duties under the Act and to know what should be done in particular situations. The compliance officer's job is made much more difficult by the introduction of the serious/non-serious distinction and by the need to prove control; and finally it is likely that there will be a substantial increase in the number of citations that are contested.\(^\text{180}\)

### V

**The Review Commission Response**

*Anning-Johnson, Underhill, and Gilles & Cotting* did not affect the first cases to reach the Review Commission's administrative law judges after those circuit court decisions.\(^\text{181}\) In *Empire Roofing*,\(^\text{182}\) the first case to face and discuss *Anning-Johnson*, a non-serious violation of 29 C.F.R. §

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\(^\text{178}\) For a definition of the exposure-or-control test, see note 50 *supra* and accompanying text.

\(^\text{179}\) For a definition of the exposure-and-control test, see note 49 *supra* and accompanying text.

\(^\text{180}\) Both the serious/non-serious distinction and the possession of control over a violation will now become significant issues of litigation. As evident from the above discussion, both are sufficiently ambiguous in a given situation that a contest will be likely.

\(^\text{181}\) In Electrical Contractors Assocs., 3 O.S.H. Cas. (BNA) 2048, 2050 (1976) (the administrative law judge's decision in the case was earlier, on Aug. 11, 1975), and Pierce Assocs., 4 O.S.H. Cas. (BNA) 1670 (1976), the exposure test was applied to non-serious violations, contrary to, but without acknowledging, the *Anning-Johnson* decision. In *Electrical Contractors*, the employer appeared pro se, 3 O.S.H. Cas. (BNA) at 2049, and thus might not have been aware of the latest developments under the Act.

In the next decision to reach an administrative law judge, Peerless Elec. Co., 19 O.S.A.H.R.C. 706 (1975), a serious violation of the standard was alleged. The administrative law judge acknowledged that *Anning-Johnson* "emasculated the position of the Commission with respect to non-serious violations," *id.* at 71, but held that "since a serious violation was alleged and the evidence supports such a violation under Commission decisions, the Seventh Circuit's decision has no bearing on the case." *Id.* The judge neither approved nor disapproved of *Anning-Johnson. Id.* For a similar result, see Parkway Plumbing and Heating Co., 20 O.S.A.H.R.C. I (1975) (serious violation; held, *Anning-Johnson* does not apply).

1926.500(d)(1) was alleged against a subcontractor who did not have the expertise, the union jurisdiction, or the contractual authority to abate the violation. The administrative law judge held that, following Anning-Johnson, he would reverse his previous practice of applying the exposure test, and vacated the citation. Similarly, in Mosler Safe Co., Anning-Johnson was relied on to vacate citations for non-serious violations.

Seaport Manor involved several violations of the Act. The opinion describes one situation in which the cited employer “controlled and maintained” a hazard in violation of 29 C.F.R. § 1926.250(b)(1) to which none of its own employees were exposed. Because the employees of other employers on the site were exposed, however, the administrative law judge, citing Underhill, held the respondent liable for the violation.

In Grossman Steel & Aluminum Corp. and Anning-Johnson Co. (Anning-Johnson II), decided on the same day, the Commission was presented with the issue considered in Anning-Johnson. It took the opportunity to make a considerable amount of law.

In Grossman, the fact situation was indistinguishable from Anning-Johnson. Grossman, the subcontractor, was cited for a non-serious violation of 29 C.F.R. § 1926.500(d) (1976) because open-sided floors lacked

183. Id. at 779, 782-83.
184. Id. at 784. Since this case was not in the Seventh Circuit, but in the Tenth Circuit, the judge’s decision is open to question. Review Commission precedent merits greater weight than a circuit court decision from a different circuit. See Pierce Assocs., 4 O.S.H. Cas. (BNA) 1670 (1976); Grossman Steel & Aluminum Co., 4 O.S.H. Cas. (BNA) 1185, 1188 (1976).
187. Id. at 135.
188. 513 F.2d 1032 (2d Cir. 1975).
190. 4 O.S.H. Cas. (BNA) 1185 (1976).
191. 4 O.S.H. Cas. (BNA) 1193 (1976) [hereinafter referred to as Anning-Johnson II]. This is not a remand of Anning-Johnson Co. v. OSHRC, 516 F.2d 1081 (7th Cir. 1975), but arose from a different citation at a different worksite.
192. The Commission had declined its first opportunities to discuss the Anning-Johnson and Underhill decisions. In Elec. Contractors Assocs., 3 O.S.H. Cas. (BNA) 2048 (1976), Commissioner Moran directed the administrative law judge’s decision for review, but the Commission summarily affirmed. Commissioner Moran wrote a vehement dissent. See id. at 2049. In two other multiemployer cases, the Commission summarily let stand administrative law judge decisions based on the exposure test, but only over Commissioner Moran’s strong objections. See Pierce Assocs., 4 O.S.H. Cas. (BNA) 1670 (1976) (dismissing order for review); Water Works Installation Corp., 4 O.S.H. Cas. (BNA) 1339 (1976) (summary affirmance).

During this period the only case to reach the Commission involving the “controlling” employer situation of Underhill was Gilles & Cotting, Inc., 3 O.S.H. Cas. (BNA) 2002 (1976), on remand from the Fourth Circuit. For a discussion of the Fourth Circuit opinion, see text accompanying notes 78-93 supra. The Commission was asked to reconsider its previous holdings with regard to controlling, non-exposing employers in view of Underhill and Anning-Johnson. While indicating that review might otherwise be appropriate, the Commission declined to do so in this case because the Fourth Circuit’s determination was “the law of the case.”

193. 4 O.S.H. Cas. (BNA) at 1186.
perimeter guardrails. The general contractor on the site was contractually responsible for the erection of guardrails, and Grossman did not have the appropriate craft jurisdiction to erect them. The administrative law judge vacated the citation, citing Anning-Johnson.

The Commission reversed in an opinion written by Chairman Barnako. He outlined the history of the Commission’s decisions in multiemployer situations and discussed Underhill and Anning-Johnson. While agreeing with the administrative law judge that the facts were indistinguishable from Anning-Johnson, he pointed out that the Commission and its administrative law judges were not bound by the circuit court’s decision: “[T]he Occupational Safety and Health Act of 1970 is national in scope, and its orderly administration requires that administrative law judges follow precedents established by the Commission unless reversed by the Supreme Court.” Nonetheless, the Commission decided to reconsider its previous rulings in light of Underhill and Anning-Johnson. While “the Act can be most effectively enforced if each employer is held responsible for the safety of its own employees,” the Commission agreed with Anning-Johnson and Underhill that “on a construction site, the safety of all employees can best be achieved if each employer is responsible for assuring that its own conduct does not create hazards to any employees on the site. . . .”

The Commission announced that it would follow the holding in Underhill, that a controlling employer is liable whether or not its own employees are exposed to a hazard; and since the general contractor can effect abatement either through its own actions or through its supervisory role, it will also be liable.

The commission reasoned, however, that it would not serve the purposes of the Act to impose liability on an exposing, non-controlling employer, who could not “realistically be expected to detect a violation in the first place, or abate it once discovered, even though his own employees may be exposed.” The Commission nonetheless did not wish to permit a subcontractor to “close its eyes” to such a violation. It stated:

We therefore expect every employer to make a reasonable effort to

194. Id. at 1187.
195. Id. at 1186-87.
196. Id. at 1186.
197. Id. at 1188 (citation omitted).
198. Id.
199. Id.
200. Id. This is dictum, since the facts of the case involve an exposing employer, not a controlling one. Id. at 1188-89 n.6. This dictum has, however, governed subsequent cases involving controlling employers. See Knutson Constr. Co., 4 O.S.H. Cas. (BNA) 1759 (1976); Beatty Equip. Leasing, Inc., 4 O.S.H. Cas. (BNA) 1211 (1976).
201. 4 O.S.H. Cas. (BNA) at 1188.
202. Id. at 1189.
203. Id.
detect violations of standards not created by it but to which its employees have access and, when it detects such violations, to exert reasonable efforts to have them abated or take such other steps as the circumstances may dictate to protect its employees.\textsuperscript{204}

Chairman Barnako gave some examples of such reasonable steps:

It [the subcontractor] can, for example, attempt to have the general contractor correct the condition, attempt to persuade the employer responsible for the condition to correct it, instruct its employees to avoid the area where the hazard exists if this alternative is practical, or, in some instances, provide an alternative means of protection against the hazard.\textsuperscript{205}

An employer need not, however, remove its employees from a site if a hazard is not corrected.\textsuperscript{206}

Thus, in Grossman the Commission established that controlling employers and the general contractor should be cited for a given violation,\textsuperscript{207} and exposing employers also should be cited unless they “exert reasonable efforts” to have the violation abated or take other steps to protect their employees.\textsuperscript{208}

Commissioner Cleary wrote the opinion in Grossman’s companion case, Anning-Johnson II.\textsuperscript{209} As in Grossman, the administrative law judge vacated the citations because the case was factually indistinguishable from Anning-Johnson.\textsuperscript{210} Commissioner Cleary’s decision followed the basic lines of the Grossman opinion.\textsuperscript{211}

Anning-Johnson II holds that an exposing, non-controlling subcontractor must ‘do what is ‘realistic’ under the circumstances to protect its

\textsuperscript{204} Id. (emphasis added).

\textsuperscript{205} Id.

\textsuperscript{206} The Commission agreed with the Seventh Circuit in Anning-Johnson that removal was an unrealistic alternative. Id. at n.7.

\textsuperscript{207} The Commission decided to abandon the Seventh Circuit’s serious/non-serious distinction, pointing out that “[t]he duty imposed by Section 5(a)(2) to comply with the standards is not conditioned on the severity of the violation.” 4 O.S.H. Cas. (BNA) at 1189.

\textsuperscript{208} The Commission decided not to alter the Secretary of Labor’s burden of proof. Once the Secretary proves exposure to a violation of a standard, the exposing employer must prove, by way of an affirmative defense, that it took reasonable steps to protect its employees against hazards that the employer could be expected to detect. 4 O.S.H. Cas. (BNA) at 1190.

\textsuperscript{209} 4 O.S.H. Cas. (BNA) 1193 (1976).

\textsuperscript{210} The administrative law judge vacated the citations in part on the basis of his conclusion that an employer cannot be found to be in violation of section 5(a)(2) “‘when his employees are exposed to [violative] conditions which he did not create or control.’” Id. at 1195. This is the same situation considered in Anning-Johnson. As in Grossman, dictum in Commissioner Cleary’s decision endorses Underhill and purports to follow Anning-Johnson.

\textsuperscript{211} As in Grossman, Commissioner Cleary’s decision indicates that the general contractor will be held responsible for all violations on the site. Id. at 1199. Finally, as in Grossman, Anning-Johnson II seeks to ease the burden of the exposure test on non-controlling subcontractors. Although in both cases the Commission affirmed the citation, it indicated that it would remand either case if the respondent employer wished to present additional evidence concerning affirmative defenses. Moreover, in both decisions the Commission declined to assess a monetary penalty. Grossman, 4 O.S.H. Cas. (BNA) at 1190; Anning-Johnson II, 4 O.S.H. Cas. (BNA) at 1199-1200.
employees from a hazard to which a particular standard is addressed. . . ."\textsuperscript{212} This formulation, with its emphasis on "realistic protective measures," slightly differs from Chairman Barnako's analysis in \textit{Grossman}, which required an exposing employer who knew or should have known of the hazard to "exert reasonable efforts" to abate the violation or to take other steps to protect its employees.\textsuperscript{213}

Perhaps anticipating a law review article that would seize on the distinction between "realistic" and "reasonable," \textit{Anning-Johnson II} explains in a footnote that "realistic" measures are "those measures that would be taken by a reasonable employer seeking to protect his employees and faced with the same condition."\textsuperscript{214} Thus, both decisions admonish the employer to be "reasonable."\textsuperscript{215}

Anyone with faith in verbal formulations would expect both opinions to mean the same thing. But they do not. Under \textit{Grossman}, an exposing employer can prove it is reasonable by trying to persuade the controlling employer to abate the violation.\textsuperscript{216} Under \textit{Anning-Johnson II}, however, an exposing subcontractor who complains to the general contractor, and even invites an insurer to inspect the worksite to help convince the general contractor to abate,\textsuperscript{217} is not being reasonable, except "in certain minor situations...[where such complaint] may be an appropriate and realistic alternative measure."\textsuperscript{218}

\textit{Anning-Johnson II} leaves the definition of "minor situation" for another day.\textsuperscript{219} But this minor situation exception does not help explain the different analysis in \textit{Grossman}, since both cases involved "non-serious violations" of section 5(a)(2).\textsuperscript{220} Just as clearly, a minor situation is not the

\textsuperscript{212} 4 O.S.H. Cas. (BNA) 1193, 1199 (1976).

In defining this duty, Commissioner Cleary points out that exposure "of one's employees to a hazardous condition is the element that gives rise to an employer's duty under section 5(a) of the Act." \textit{Id.} at 1197. Moreover, in view of the underlying "social purpose [of the Act] of assuring 'so far as possible every working man and woman in the Nation safe and healthful working conditions,'" and in view of the need for "effective enforcement," the Commissioner refrained from altering the Secretary's burden of proof from that under the exposure test. \textit{Id.} at 1198. Thus, the Secretary will still need to prove only that the standard applies to the facts, that there was a failure to comply with the specific standard, and that employees of the cited employer had access to the hazard. \textit{Id.} at 1197. Commissioner Cleary's relief for the subcontractor, as in \textit{Grossman}, will therefore take the form of an affirmative defense.


\textsuperscript{214} \textit{Id.} at 1198 n.16.


\textsuperscript{216} 4 O.S.H. Cas. (BNA) at 1189.

\textsuperscript{217} 4 O.S.H. Cas. (BNA) at 1196.

\textsuperscript{218} \textit{Id.} at 1200 n.23. The \textit{Anning-Johnson II} decision provides a glimpse of the meaning of "realistic alternative measures." In one of the citations involved, the employer had provided his employees with safety belts to wear while working near the unguarded perimeter of the building. This was held to be an adequate alternative measure. \textit{Id.} at 1199.

\textsuperscript{219} \textit{Id.}

\textsuperscript{220} \textit{Anning-Johnson II}, 4 O.S.H. Cas. (BNA) 1193, 1202 (1976) (Moran, Commissioner.
same as a non-serious violation, since the violations in *Anning-Johnson II* were non-serious.\textsuperscript{221}

The Commission's inconsistent decisions in *Grossman* and *Anning Johnson II* introduce pointless confusion into the law. Neither employers nor compliance officers and administrative law judges can know whether an exposing employer who attempts to persuade a controlling employer to abate will be held blameless under section 5(a)(2). Certainly it will be better for employees if the Commission follows *Anning-Johnson II* and decides, at least as a general rule, that exposing employers must do more than merely complain to controlling employers. But even if that rule is clearly adopted, the *Anning-Johnson II* approach deserves criticism.

First, the minor situations exception serves no purpose, although it is apparently designed to protect exposing employers from inconvenience where OSHA violations are not just non-serious, but also trivial. For small, good faith violations, the Secretary and the Commission already have discretion to levy a small fine or no fine at all.\textsuperscript{222} The exception will encourage litigation over the least important violations and add to employer uncertainty about what their duties are.

Second, a reasonableness or realistic alternatives test in any form will confuse exposing employers about what their duties are under section 5(a)(2). It will encourage endless litigation over what would be a realistic alternative to securing strict compliance with each OSHA standard in an infinite variety of fact situations. *Grossman* holds that something short of withdrawing employees from the worksite is reasonable.\textsuperscript{223} This feature of the reasonableness test is designed to meet the Seventh Circuit's objections to holding exposing employers liable.\textsuperscript{224} But if *Anning-Johnson II* is followed and mere complaints to the controlling employer are not enough, it is unclear what an exposing employer should do when it cannot think of an alternative safety measure.\textsuperscript{225}

Third, the most pernicious effect of the test is to weaken the protection

\textsuperscript{221} 4 O.S.H. Cas. (BNA) 1185, 1187 (1976) with 4 O.S.H. Cas. (BNA) 1193, 1199-1200 (1976).

\textsuperscript{222} 29 U.S.C. § 659(a) (1970); 29 U.S.C. § 661 (1970). Some of this discretion was temporarily taken away from the Secretary and Commission by Departments of Labor and Health, Education & Welfare Appropriations Act for Fiscal Year 1977, Pub. L. No. 94-439, 90 Stat. 1418 (1976), which prohibits use of funds to assess penalties against employers for non-serious violations when less than 10 violations are found at the employer's worksite.

\textsuperscript{223} 4 O.S.H. Cas. (BNA) 1185, 1189 n.7 (1976).

\textsuperscript{224} 4 O.S.H. Cas. (BNA) 1185, 1189 (1976).

\textsuperscript{225} See, e.g., Empire Roofing & Insulation Co., 19 O.S.A.H.R.C. 779, 782 (1975), Finding No. 9:

Respondent prior to September 19, 1973, was familiar with the regulation, had discussed with professional engineers ways and means of satisfying the regulation, researched the problems, and explored its implications within its own organization but had not found a way which it could employ to install perimeter guarding on a flat roof in compliance with the regulation.
that workers had under the exposure test. Even if "realistic alternatives" must be very effective, the Commission's holdings allow employers to expose their employees to recognized hazards which are the subject of specific standards. Unless a "realistic alternative" must be as effective as abatement (and there's no hint of that even in Anning-Johnson II), the new rule is a defeat for worker safety.

Fourth, the reasonableness test introduces an anomaly into the administration of OSHA which Congress could not have intended. It is the same anomaly which the Seventh Circuit successfully avoided in Anning-Johnson II through its dubious serious/non-serious distinction. A worker is now better protected from exposure to a serious hazard under section 5(a)(1), when no applicable standard has been enacted, than he would be were the same hazard covered by a specific standard. This results because the strict exposure test mandated by section 5(a)(1) provides better protection than the Anning-Johnson II test which allows employers to expose their employees to a hazard so long as they take "realistic alternative" safety measures.

The Commission's holdings in Grossman and Anning-Johnson II are contrary to congressional intent for another fundamental reason. By enacting OSHA, Congress intended to develop occupational safety and health standards which are uniformly applicable and can be objectively assessed. An amorphous "reasonable/realistic" test defeats this policy.

226. Before the Commission's decisions, OSHA was criticized as inadequate. See, e.g., Blumrosen, Injunctions for Occupational Hazards: The Right to Work under Safe Conditions, 1 Indus. Rel. L.J. 25, 38-40 (1976). If employers are permitted to expose employees to serious hazards without citation, such criticisms gain in force.

227. See notes 118-21 supra and accompanying text.

228. See note 36 supra and accompanying text.


231. Such "objective" regulations provide a clear guide for employers, facilitating identification and elimination of hazards. They also provide a clear guide for employees who, concerned with unsafe working conditions on the jobsite, can notify the local Occupational Safety and Health Administration office as Congress contemplated in enacting section 8(f) of the Act, 29 U.S.C. § 657(f) (1970). Objective regulations also promote uniformity in the degree of safety at the workplace. Consequently, as employers and employees become familiar with the regulations, employees can come to expect that certain safety measures will be taken for their protection.

These expectations may be particularly important for employees who attempt to exercise their rights under section 502 of the Labor Management Relations Act, 29 U.S.C. § 143 (1970). That section excludes from the definition of "strike" any walkouts by employees because of abnormally dangerous working conditions. The section effectively prohibits employers from discharging employees on account of such walkouts, even if there is a no-strike provision in the collective bargaining agreement. See Knight Moreley Corp., 116 N.L.R.B. 140 (1956), enforced, 251 F.2d 753 (6th Cir. 1957), cert. denied, 357 U.S. 927 (1958); R. Gorman, Labor Law: Unionization and Collective Bargaining 306-07 (1976). The Supreme Court has held that section 502 protection is available only if the employees can justify the walkout by presenting "ascertainable, objective evidence supporting the conclusion that an abnormally dangerous work condition exists." Gateway Coal Co. v. UMW, 414 U.S. 368, 386-87 (1974) (citation omitted). The OSHA regulations should help employees determine whether an abnormally
Furthermore, inasmuch as the Commission’s test gives an exposing employer an alternative to compliance with the regulations, it runs contrary to the congressionally mandated procedure for granting variances from the regulations, and to the policy behind that procedure.

Finally, the reasonable/realistic test is flatly inconsistent with the wording of section 5(a)(2) which requires that employers “comply with standards,” not that they use “reasonable” or “realistic alternative” means to protect employees from hazards proscribed by the standards.

VI

CONCLUSION: A PROPOSAL FOR ENFORCEMENT OF SAFETY REGULATIONS ON MULTIEmployER WORKSITES

The duty embodied in section 5(a)(2) of the Act, expressing the policy of Congress to provide safe and healthful working conditions, can best be enforced by the exposure-or-control test. An employer who exposes its employees to a violation of the standards would be liable even if it did not control the violation. An employer who controls a violation to which employees at the worksite are exposed would also be liable, even if that employer’s own employees are not exposed. This rule would minimize confusion and maximize safety incentive. The objections to this rule by Anning-Johnson, Grossman, and Anning-Johnson II could and should be taken into account only in determining the size of the penalty.

To clarify the law in this area, the Department of Labor should issue an interpretive regulation similar to the following:

dangerous condition exists. If “reasonable/realistic” alternatives are permitted, however, any clear guidance becomes impossible.

232. Section 6(d) of the Act, 29 U.S.C. § 655(d) (1970), requires, before a variance is allowed, application to the Secretary of Labor, an opportunity for inspection, notice to employees, a hearing at which employees are allowed to participate, and finally, a determination that the proposed variance will provide working conditions that are at least as safe as if the regulation were enforced. Id. Section 16 of the Act, 29 U.S.C. § 665 (1970) also provides for variances, but it applies only when the Secretary of Labor finds the variance necessary for the national defense. Id.

233. To allow an alternative to compliance with the regulations runs contrary to at least one policy embodied in the section 6(d) variance procedure. Section 6(d) requires a finding that the variance provides working conditions that are at least as safe as they would be under the regulation. The Commission’s holding requires no such finding. It requires only that “reasonable/realistic” measures be taken.

234. Perhaps the Commission is defining the word “comply” as used in section 5(a)(2), to mean that each employer should use reasonable/realistic means to protect employees from hazards proscribed by the regulations. This definition is not consistent with the stricter meaning of compliance as far as controlling employers are concerned. There is nothing in the language or history of section 5(a)(2) to indicate that the word “comply” has a different meaning when applied to exposing employers than it has when applied to controlling employers.

235. The Act already authorizes these factors to be taken into account in assessing a penalty. See section 17(j) of the Act, 29 U.S.C. § 666(i) (1970) (authorizing the Commission to take into account, inter alia, the gravity of the violation and the good faith of the employer in assessing a penalty).

Such adjustments would not significantly reduce safety incentives under the Act. Penalties are relatively small anyway—a maximum of $1000 in normal situations. Furthermore, the
Any employer whose employees, in the course of their employment, are exposed to a condition that does not satisfy a regulation promulgated under this chapter shall be guilty of a violation of that regulation.

Any employer who controls, causes by act or omission, or can abate, a condition that does not satisfy a regulation promulgated under this chapter to which employees of that employer or employees of another employer, in the course of their employment at a common worksite, are exposed, shall be guilty of a violation of that regulation.

This formulation of the exposure-or-control test would best achieve Congress' purpose in enacting OSHA, "to assure . . . every working man and woman in the Nation safe and healthful working conditions." It would give every employer at a multiemployer worksite an incentive to learn about hazards that affect the safety of its employees. It would provide the employer with an incentive to eliminate hazards over which it has control and to encourage other employers to eliminate hazards over which the employer has no control. The problems with the exposure test issuance of a citation to the employer teaches it that the condition for which it was cited was unsafe, was a violation of the Act, and should be corrected.

Rulemaking to resolve the multiemployer worksite problem has been suggested by other commentators. See Currie, OSHA, 1 AM. B. FOUNDATION RESEARCH J. 1107, 1146 (1976); VA. Note, supra note 33, at 810.

This proposed rule is cast as an interpretive regulation because the employer would then be cited for violation of the specific safety standard, rather than violation of a general rule prohibiting exposure. See Anning-Johnson, 516 F.2d 1081, 1091 (1975) (Tone, J., concurring). Basing the citation on a specific safety standard will better educate employers. It will also ease the compliance officer's job, since he or she need only cite for the specific standard.

This definition of control would cover situations like Seaport Manor Corp., 18 O.S.A.H.R.C. 123 (1975), in which the creating employer is no longer at the worksite, and another employer has replaced him. Under this definition, both the creating and the replacing employer would be guilty of a violation. The definition would also cover an employer who is under a contractual obligation to perform the work necessary to comply with the regulation. This control test should almost always cover the general contractor, since it normally has the power ("control") to have any violation abated, if not by its own employees, by ordering a subcontractor to perform the necessary work.

"Common worksite" refers to a worksite at which more than one employer's employees are engaged in work, regardless of whether they are present at the same time.

This proposal would incorporate the exposure-or-control test into the OSHA regulations. It would then be up to the Review Commission and the courts to enforce it. Under Grossman, Anning-Johnson, and Anning-Johnson II, neither the Review Commission nor the Seventh Circuit would uphold this regulation. All three cases hold that the Secretary of Labor does not have authority under the Act to impose a strict exposure test for certain violations, although the violations for which the Secretary lacks this authority are different in the three cases. Hence, the Review Commission and the Seventh Circuit will have to modify their decisions if the proposed regulation is to be applied. Such a modification would comport with the words and policies of the Act better than do the rules enunciated in these decisions.


See notes 125-34 supra and accompanying text.

See notes 90-93 supra and accompanying text.

See notes 130 & 142-43 supra and accompanying text.
are minor\textsuperscript{244} and are outweighed by the advantages discussed above.\textsuperscript{245} Moreover, the problems that the control test creates\textsuperscript{246} are largely solved by linking it to the exposure test.\textsuperscript{247} Of the tests discussed in this Comment, the exposure-or-control test would provide the best overall incentive to eliminate worksite safety hazards.

\textsuperscript{244} See notes 123-64 supra and accompanying text.
\textsuperscript{245} See notes 142-43, 150-52 & 155 supra and accompanying text.
\textsuperscript{246} See notes 165-71 supra and accompanying text.
\textsuperscript{247} Defining and proving control are not nearly as problematical when the control test is linked to an exposure test, because in most cases the controlling employer will also be an exposing employer. In fact, the Department of Labor proposes to continue to use the exposure test, in part because that test allows citations where "it is difficult to establish which subcontractor created or controlled the hazardous conditions ..." 41 Fed. Reg. 17,640 (1976).