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## Overview and History

*The law must be stable and yet it must not stand still.*

—Roscoe Pound

*There are two levers for moving men—interest and fear.*

—Napoleon Bonaparte

### THE FEDERAL OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

Before the Federal Occupational Safety and Health Act (OSH Act) of 1970 was enacted,<sup>1</sup> safety and health issues were limited to safety and health laws for specific industries and laws that governed federal contractors. It was during this period, prior to the enactment of the OSH Act in 1970, that Congress gradually began to regulate specific areas of safety and health in the American workplace through such laws as the Walsh–Healey Public Contracts Act of 1936, the Labor Management Relations Act (Taft–Hartley Act) of 1947, the Coal Mine Safety Act of 1952, and the McNamara–O’Hara Public Service Contract Act of 1965.

With the passage of the then controversial OSH Act in 1970, federal and state government agencies became actively involved in managing health and safety in the private sector workplace. Employers were placed on notice that unsafe and unhealthful conditions and acts would no longer be permitted to endanger the health, and often the lives, of American workers. In many circles, the Occupational Safety and Health Administration (OSHA) became synonymous with the “safety police,”

and employers were often forced, under penalty of law, to address safety and health issues in their workplaces.

Today, the OSH Act itself is virtually unchanged since its 1970 roots. The basic methods for enforcement, standards development and promulgation, as well as adjudication, remain intact. In approximately the past 40 years, OSHA has, however, added many new standards that are based primarily on the research conducted by the National Institute for Occupational Safety and Health (NIOSH) and recommendations from labor and industry. In addition, OSHA has revisited several of the original standards in order to update or modify the particular standard. The Occupational Safety and Health Review Commission (OSHRC) and the courts have been very active in resolving many disputed issues and clarifying the law as it stands.

There is a trend within Congress, industry, and labor to believe that, in order to achieve the ultimate goal of reducing workplace injuries, illnesses, and fatalities, additional changes to the OSH Act and the structure of OSHA are needed. OSHA has taken up the challenge and has moved toward performance-based standards. OSHA also has attempted to address many of the new hazards created by our technological advances

and the changing workplace. Professionals working in safety and loss prevention should study the past in order to plan and set their course for the future. Change is inevitable; however, we can anticipate that new standards will be based on the knowledge obtained from past victories and mistakes. Change is necessary in order to achieve our ultimate goal—a safe and healthful workplace for all.

## LEGISLATIVE HISTORY

Throughout the history of the United States, the potential for the American worker to be injured or killed on the job has been a brutal reality. Many disasters, such as that at Gauley Bridge, West Virginia,<sup>2</sup> fueled the call for laws and regulations to protect the American worker. As early as the 1920s, many states recognized the safety and health needs of the industrial worker and began to enact worker's compensation and industrial safety laws. The first significant federal legislation was the Walsh–Healey Public Contracts Act of 1936, which limited working hours and the use of child and convict labor. This law also required that contracts entered into by any federal agency for more than \$10,000 contain the stipulation that the contractor would not permit conditions that were unsanitary, hazardous, or dangerous to employees' health or safety.

In the 1940s, the federally enacted Labor Management Relations Act (Taft–Hartley Act) provided workers with the right to walk off a job if it was “abnormally dangerous.” Additionally, in 1947, President Harry S. Truman created the first Presidential Conference on Industrial Safety.

In the 1950s and 1960s, the federal government continued to enact specialized safety and health laws to address particular circumstances. The Coal Mine Safety Act of 1952, the Maritime Safety Act, the McNamara–O'Hara Public Service Contract Act (protecting employees of contractors performing maintenance work for federal agencies), and the National Foundation on the Arts and Humanities Act (requiring recipients of federal grants to maintain safe and healthful working conditions) were passed during this time.

The federal government's first significant step in developing coverage for workplace safety and health was the passage of the Metal and Nonmetallic Mine Safety Act of 1966. Following the passage of this Act, President Lyndon B. Johnson, in 1968, called for the first comprehensive occupational safety and health program as part of his Great Society program. Although this proposed

plan never made it to a vote in Congress, the seed was planted for future legislation.

One particular incident shocked the American public and federal government into action. In 1968, a coal mine fire and explosion in Farmington, West Virginia, killed 78 miners. Congress reacted swiftly by passing a number of safety and health laws, including the Coal Mine Health and Safety Act of 1969, the Contract Work Hours and Safety Standards Act of 1969 (also known as the Construction Safety Act), and the Federal Railway Safety Act.

In 1970, fueled by the new interest in workplace health and safety, Congress pushed for more comprehensive laws to regulate the conditions of the American workplace. To this end, Congress passed the OSH Act of 1970<sup>3</sup> and it became effective April 28, 1971. The overriding purpose and intent of the OSH Act was “to assure so far as possible every working man and woman in the nation safe and healthful working conditions and to preserve our human resources.”<sup>4</sup>

## COVERAGE AND JURISDICTION OF THE OSH ACT

The OSH Act covers virtually every American workplace that employs one or more employees and engages in a business that affects interstate commerce in any way.<sup>5</sup> The OSH Act covers employment in every state, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, American Samoa, and the Trust Territory of the Pacific Islands.<sup>6</sup> The OSH Act does not, however, cover employees in situations in which other state or federal agencies have jurisdiction that requires the agencies to prescribe or enforce their own safety and health regulations.<sup>7</sup> Additionally, the OSH Act exempts residential owners who employ people for ordinary domestic tasks, such as cooking, cleaning, and child care.<sup>8</sup> It also does not cover federal,<sup>9</sup> state, and local governments<sup>10</sup> or Native American reservations.<sup>11</sup>

The OSH Act requires that every employer engaged in interstate commerce furnish employees “a place of employment . . . free from recognized hazards that are causing, or are likely to cause, death or serious harm.”<sup>12</sup> To help employers create and maintain safe working environments and to enforce laws and regulations that ensure safe and healthful work environments, Congress created OSHA, a new agency under the direction of the Department of Labor.

Today, OSHA is one of the most widely known and powerful enforcement agencies within the federal

government structure. OSHA has been granted broad regulatory powers to promulgate regulations and standards, investigate and inspect workplaces, issue citations, and propose penalties for safety violations in the workplace.

The OSH Act also established an independent agency, the Occupational Safety and Health Review Commission (OSHRC), to review OSHA citations and decisions. The OSHRC is a quasi-judicial and independent administrative agency composed of three commissioners, appointed by the president, who serve staggered six-year terms. The OSHRC has the power to issue orders; uphold, vacate, or modify OSHA citations and penalties; and direct other appropriate relief and penalties.

The education arm of the OSH Act is the National Institute for Occupational Safety and Health (NIOSH), which was created as a specialized education agency of the existing National Institutes of Health. NIOSH conducts occupational safety and health research and develops criteria for new OSHA standards. NIOSH may conduct workplace inspections, issue subpoenas, and question employees and employers, but it does not have the power to issue citations or penalties.

## STATE SAFETY PLANS

Notwithstanding OSH Act enforcement through the previously noted federal agencies, OSHA encourages individual states to take responsibility for OSHA administration and enforcement within their respective boundaries. Each state possesses the ability to request and be granted the right to adopt state safety and health regulations and enforcement mechanisms. In section 18(b), the OSH Act provides that any state “which, at any time, desires to assume responsibility for development and the enforcement therein of occupational safety and health standards relating to any . . . issue with respect to which a federal standard has been promulgated . . . shall submit a state plan for the development of such standards and their enforcement.”<sup>13</sup> Before a state plan can be placed into effect, the state must develop and submit its proposed program to the secretary of labor for review and approval. The secretary must certify that the state plan’s standards are “at least as effective” as the federal standards and that the state will devote adequate resources to administering and enforcing its standards.<sup>14</sup>

In most state plans, the state agency has developed more stringent safety and health standards than OSHA<sup>15</sup> and has usually developed more stringent enforcement schemes.<sup>16</sup> The secretary of labor has no statutory authority to reject a state plan if the proposed standards or

enforcement scheme are more strict than the OSHA standards, but can reject the state plan if the standards are below the minimum limits set under OSHA standards.<sup>17</sup> These states are known as *state plan* states and territories.<sup>18</sup> By 2009, 24 states and two territories have approved functional state plan programs.<sup>19</sup> Employers in state plan states and territories must comply with their state’s regulations; federal OSHA plays virtually no role in direct enforcement.

OSHA does, however, possess an approval and oversight role regarding state plan programs. OSHA must approve all state plan proposals prior to their enactment. It also maintains oversight authority to “pull the ticket” of any state plan program at any time if the program is not achieving the identified prerequisites. Enforcement of this oversight authority was observed after a fire in 1991 that resulted in several workplace fatalities at the Imperial Foods facility in Hamlet, North Carolina. Following this incident, federal OSHA assumed jurisdiction and control over the state plan program in North Carolina and made significant modifications to this program before returning the program to state control.

Safety and loss prevention professionals need to ask the following questions when determining jurisdiction under the OSH Act:

1. Am I a covered employer under the OSH Act?
2. If I am a covered employer, what regulations must I follow to ensure compliance?

The answer to the first question is “yes” for virtually every class of private sector employers. Any employer in the United States that employs one or more persons and is engaged in a business that, in any way, affects interstate commerce is within the scope of the federal OSH Act.<sup>20</sup> The phrase *interstate commerce* has been broadly interpreted by the U.S. Supreme Court, stating that interstate commerce “goes well beyond persons who are themselves engaged in interstate or foreign commerce.”<sup>21</sup> In essence, anything that crosses state lines, whether it is a person, a material good, or a service, places the employer in interstate commerce. Although there are exceptions to this general statement,<sup>22</sup> interstate commerce has been “liberally construed to effectuate the congressional purpose” of the OSH Act.<sup>23</sup>

When identifying coverage under the OSH Act, an employer must distinguish between a state plan jurisdiction and federal OSH Act jurisdiction. If its facilities or operations are located within a state plan state, an

employer must comply with the regulations of its state. Safety and loss prevention professionals should contact each state's Department of Labor to acquire the pertinent regulations and standards. If facilities or operations are located in a federal OSHA state, the applicable standards and regulations can be acquired from any area OSHA office or the Code of Federal Regulations.<sup>24</sup>

A common jurisdictional mistake occurs when an employer operates multiple facilities in different locations.<sup>25</sup> Safety and loss prevention professionals should ascertain which state or federal agency has jurisdiction over each facility or operation and which regulations and standards apply.

## OSHA STANDARDS AND THE GENERAL DUTY CLAUSE

### Promulgation of Standards

The OSH Act requires that a covered employer must comply with specific occupational safety and health standards, as well as all rules, regulations, and orders pursuant to the OSH Act that apply to the workplace.<sup>26</sup> The OSH Act also requires that all standards be based on research, demonstration, experimentation, or other appropriate information.<sup>27</sup> The secretary of labor is authorized under the Act to “promulgate, modify, or revoke any occupational safety and health standard.”<sup>28</sup> The OSH Act also describes the procedures that the secretary must follow when establishing new occupational safety and health standards.<sup>29</sup>

The OSH Act authorizes three ways to promulgate new standards: (1) national consensus standards, (2) informal (standard) rulemaking, and (3) emergency temporary standards. From 1970 to 1973, the secretary of labor was authorized in section 6(a) of the Act<sup>30</sup> to adopt national consensus standards and establish federal safety and health standards without following lengthy rulemaking procedures. Many of the early OSHA standards were adapted from other areas of regulation, such as the National Electric Code and American National Standards Institute (ANSI) guidelines. However, this promulgation method is no longer in effect.

The usual method of issuing, modifying, or revoking a new or existing OSHA standard is described in section 6(b) of the OSH Act and is known as *informal rulemaking*. This method requires providing notice to interested parties, through subscription in the Federal Register, of the proposed regulation and standard, and allows parties the opportunity for comment in a nonad-

versarial, administrative hearing.<sup>31</sup> The proposed standard can also be advertised through magazine articles and other publications, thus informing interested parties of the proposed standard and regulation. This method differs from the requirements of most other administrative agencies that follow the Administrative Procedure Act<sup>32</sup> because the OSH Act provides interested persons the opportunity to request a public hearing with oral testimony. It also requires the secretary of labor to publish a notice of the time and place of such hearings in the Federal Register.

Although not required under the OSH Act, the secretary of labor has directed, by regulation, that OSHA follow a more rigorous procedure for comment and hearing than other administrative agencies.<sup>33</sup> When notice and request for a hearing are received, OSHA must provide a hearing examiner to listen to any oral testimony offered. All oral testimony is preserved in a verbatim transcript. Interested persons are provided an opportunity to cross-examine OSHA representatives or others on critical issues. The secretary must state the reasons for the action to be taken on the proposed standard, and the statement must be supported by substantial evidence in the record as a whole.

The secretary of labor has the authority to disallow oral hearings and to call for written comment only. Within 60 days after the period for written comment or oral hearings has expired, the secretary must decide whether to adopt, modify, or revoke the standard in question. The secretary may also decide not to adopt a new standard. The secretary must then publish a statement explaining the reasons for any decision in the Federal Register. OSHA regulations further mandate that the secretary provide a supplemental statement of significant issues in the decision. Safety and health professionals should be aware that the standard adopted and published in the Federal Register may be different from the proposed standard. The secretary is not required to reopen hearings when the adopted standard is a “logical outgrowth” of the proposed standard.<sup>34</sup>

The final method for promulgating new standards, which is most infrequently used, is the emergency temporary standard permitted under section 6(c).<sup>35</sup> The secretary of labor may immediately establish a standard if it is determined that employees are subject to grave danger from exposure to substances or agents known to be toxic or physically harmful and that an emergency standard would protect the employees from the danger. An emergency temporary standard becomes effective upon publication in the Federal Register and may remain in effect

for six months. During this six-month period, the secretary must adopt a new, permanent standard or abandon the emergency standard.

Only the secretary of labor can establish new OSHA standards; however, recommendations or requests for an OSHA standard can come from any interested person or organization, including employees, employers, labor unions, environmental groups, and others.<sup>36</sup> When the secretary receives a petition to adopt a new standard or to modify or revoke an existing standard, he or she usually forwards the request to NIOSH and the National Advisory Committee on Occupational Safety and Health (NACOSH).<sup>37</sup> Alternatively, the secretary may use a private organization such as ANSI for advice and review.

### **The General Duty Clause**

As previously stated, the OSH Act requires that an employer maintain a place of employment free from recognized hazards that are causing, or are likely to cause, death or serious physical harm, even if there is no specific OSHA standard addressing the circumstances. Under section 5(a)(1), the general duty clause, an employer may be cited for a violation of the OSH Act if the

condition causes harm or is likely to cause harm to employees, even if OSHA has not promulgated a standard specifically addressing the particular hazard. The general duty clause is a catchall standard encompassing all potential hazards that have not been specifically addressed in the OSHA standards. For example, if a company is cited for an ergonomic hazard and there is no ergonomic standard to apply, the hazard will be cited under the general duty clause.

Prudent safety and loss prevention professionals often take a proactive approach in maintaining their competency in this expanding area of OSHA regulations. As noted previously, notification of a new OSHA standard, modification of an existing standard, revocation of a standard, or establishment of an emergency standard must be published in the Federal Register. Safety and health professionals can use the Federal Register, or other professional publications that monitor this area, to track the progress of proposed standards. With this information, safety and health professionals can provide testimony to OSHA and, when necessary, prepare their organizations for acquiring resources and personnel necessary to achieve compliance and get a head start on developing compliance programs to meet requirements in a timely manner.



## SELECTED CASE STUDY

### *Secretary of Labor v. Dierzen-Kewanee Heavy Industries, Ltd.*

OSHRC Docket No. 07-0675 and 07-0676 (2009)

(Case selected from the OSHRC Web site and edited for the purposes of this text)

#### DECISION AND ORDER

Dierzen-Kewanee Heavy Industries, LTD (Dierzen), manufactures light curved-bed dump truck bodies. It operates out of space in a former boiler factory in Kewanee, Illinois. Dierzen began its operations in 2003 with three employees. Four and one-half years later, it employs thirty-six individuals (Tr. 11-12, 134).

The Peoria Area Office of the Occupational Safety and Health Administration (OSHA) has a difficult history with Dierzen. OSHA sought assurance that violations listed in previous OSHA citations had been corrected. When Dierzen ignored OSHA's requests for it to send in abatement information, OSHA scheduled Dierzen for a follow-up inspection in October 2006. As a result of that inspection, OSHA issued the instant citations on April 10, 2007. Categorizing the standards as primarily related to "safety" (Docket No. 07-0675) or to "health" (Docket No. 07-0676), OSHA issued serious, repeat, willful, and "other than serious" citations and penalties to Dierzen. Dierzen did not contest the existence of any of the violations, which thus became a final order "not subject to review by any court or agency" [29 U.S.C.659(a)]. Dierzen contested only the reasonableness of OSHA's proposed monetary penalties.

The parties participated in lengthy settlement judge proceedings, but were ultimately unable to reach a resolution on the appropriate penalties. The case was re-assigned to the undersigned judge to conduct the hearing and to issue a decision in the matter. A hearing was held on July 8, 2008, at which the parties presented evidence and argued their positions on the record. It is determined the proposed penalties should not be reduced based upon purported financial difficulties. For the reasons discussed below, the assessed penalties afford some reduction from OSHA's proposed penalties.

#### Background

OSHA's first inspection of Dierzen began on April 12, 2005. OSHA sent both a safety specialist and an industrial hygienist to conduct a safety and health inspection of the manufacturing facility. As a result of that inspection, on June 7, 2005, OSHA cited numerous violations, *i.e.*, ten safety violations (Exh. C-1) and thirty-six health violations (Exh. C-2, numbered 1 through 32). Dierzen contested the citations, and the case proceeded under Review Commission jurisdiction towards hearing. Shortly before the scheduled hearing, on April 28, 2006, the parties resolved the matter by stipulation and agreement (Exh. C-3). The settlement substantially reduced the penalties to \$10,000.00, which the company was to pay under an extended installment agreement. Dierzen agreed the violations had been or would be abated within the specified time frame. Dierzen paid only the first installment of the reduced penalty and refused to make further payments. Significantly for this case, Dierzen also refused to provide information verifying the violations had been corrected.

OSHA attempted to secure the abatement information through repeated requests by telephone and by letter. Dierzen did not respond. OSHA sought to secure the information by issuing a separate July 2006 citation to Dierzen, which asserted the company failed to provide OSHA with abatement information. Dierzen did not respond to that citation. OSHA then determined to conduct a "follow-up" inspection to check the status of abatement of the 2005 citations (Tr. 51).

OSHA's safety inspector William Hancock and its industrial hygienist Sue Ellen DeManche began the follow-up inspection on October 11, 2006. A follow-up inspection is limited to review of the earlier-cited items and to other apparent violations "in plain sight."

Following the inspection, on April 10, 2007, OSHA cited Dierzen with willfully violating four standards and with repeatedly violating one other in the “safety” case. In the “health” case, OSHA cited two serious, seven willful, fourteen repeat, and three “other” violations. Only the amount of the penalties is at issue.

### Discussion

Under § 17(j) of the Act, penalties are calculated with “due consideration” given to (1) the size of the employer’s business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. OSHA seeks to standardize penalties throughout the nation by providing guidance to its personnel in a Field Inspection Reference Manual (FIRM). The evidence established the Secretary considered these four statutory factors and followed OSHA’s FIRM to arrive at its proposed penalties (Tr. 23, 52-54, 65, 129). The Commission, however, is the final arbiter of penalties in all contested cases. *Secretary v. OSHRC and Interstate Glass Co.*, 487F.2d 438 (8th Cir. 1973). The Commission must determine a reasonable and appropriate penalty in light of § 17(j) of the Act and may arrive at a different formulation than the Secretary in assessing the statutory factors.

#### 1. Size, Good Faith, and Past History

##### Size:

The employer’s size is the first of the mandated penalty considerations. Dierzen argues the statute’s phrase “size of the business” requires the judge to weigh its status as a newly formed business operation. Dierzen asserts it was promised start-up financing from the State which never materialized. If it had the promised money, it posits, it could have taken care of the facility’s safety and health dangers after OSHA pointed them out in the earlier citations. Dierzen suggests it did not have the resources to come into compliance with the safety and health requirements or to pay the OSHA penalties. It argues only a nominal penalty is appropriate.

The Secretary opposes such a formulation of “size” and contends it is generally inappropriate to consider an employer’s financial condition in penalty calculations under the Act. She asserts “size” refers only to the number of employees employed.

Even if the Secretary’s penalty formula does not result in penalties which are punitive in nature, a

penalty may be unduly burdensome or excessive in a specific case. The Commission has not finally determined whether an employer’s poor financial condition can properly weigh towards a penalty reduction. In rare occasions the Commission has stressed the impact of a total penalty on the viability of a business and reduced the penalty accordingly. *See Colonial Craft Reproductions*, 1 BNA OSHC 1063, 1065 (No. 881, 1972) (full adjustment of the penalty for size avoids “destructive penalties” where a safe and healthful workplace was secured); *Specialists of the South, Inc.*, 14 BNA OSHC 1910 (No. 89-2241, 1990) (smaller combined penalty approved for impressive, co-operative employer).

In such cases the employer has met prerequisites. First, the employer has actually proven its precarious financial condition. Dierzen provided no real evidence of a negative financial status. It offered no documentary evidence. Renee Goff, one of the earliest employees who is now “safety administrator,” testified Louie Dierzen instructed there was insufficient money for abatement with expensive equipment. This is hardly sufficient proof to document Dierzen’s financial data.

Of equal importance, an employer must establish it deserves to have its poor finances affect the penalty. In *Interstate Lead Company*, 15 BNA OSHC 1989, 2000 (No. 89-2088P, 89-3296, 1992), Judge James D. Burroughs succinctly summarized this concept (emphasis added):

As a practical matter, the financial condition in certain cases must be considered. OSHA and the Commission were not created to eliminate business activity, as some employers contend. OSHA was created to preserve the health and safety of working men and women of this nation. They constitute resources in which the nation has a vital interest in protecting. *Where an employer approaches its responsibility under the Act in good faith, has no detrimental history, and seeks to abate violations, it is only practical that some considerations be given to an employer’s negative financial condition and the effect of penalties assessed on the viability of the business.*

However, if the employer has not acted in good faith but uses a precarious financial condition as an excuse to ignore the safety and health of its employees, the extraordinary relief is not warranted.

Dierzen consistently demonstrated a cavalier attitude and a lack of cooperation towards achieving safety and health in its facility. It was unresponsive to the Act's ordinary enforcement mechanism of citation and penalty, and it simply ignored or stalled OSHA and reneged on its agreement to come into compliance and pay earlier penalties. Following the 2005 inspection Dierzen exerted minimal to no effort to correct the violations. During the follow-up inspection owner Louis Dierzen advised Hancock he was trying to correct things he could, but that he could not correct many of the violations because he did not have the money (Tr. 28-29). The facts do not bear out this assertion. Russ Spencer, an engineer who contracts with Dierzen, was Dierzen's designated representative during the inspection (Tr. 17). Spencer told Hancock he developed an abatement plan, together with some time frames to correct the violations. Owner Louie Dierzen told Spencer to send the plan to Dierzen's attorney, which Spencer did. He never heard or did anything further. Spencer understood from Louie Dierzen he would get no money to abate violations. Dierzen did not seek to abate those violations which required minimal expenditure, and it did not seek to protect employees in any alternate way.

No one relishes imposing the type of penalty which may jeopardize a small business, especially a small manufacturing concern. Yet the Act never contemplated employees should risk their health and safety simply because their employer is a poorly funded concern.

Under the FIRM OSHA reduced its initial penalty calculations by forty percent, because having thirty-six employees fits within a range corresponding to a "small" employer (Tr. 164). Looking at the specific number of employees, rather than the number in a range, convinces this judge to further reduce some penalties because Dierzen is a very small employer.

*Good Faith:*

OSHA is correct that Dierzen has not acted in good faith and is not entitled to a good faith credit.

*Past History:*

Dierzen's past history is negative. OSHA discussed the earlier violations in the 2005 closing conference. The violations were further explained in the written citations, which were litigated until the eve of trial. When

Dierzen settled the case on apparently favorable terms, it had a second chance to comply with the Act, which it ignored. No credit is warranted for past history.

*Classification of Violations of Willful or Repeat:*

Of most significance to the over-all penalty in this case is that many violations are willful or repeat. As the Act designates, these carry an enhanced penalty. The OSH Act sets a maximum of \$7,000.00 for each serious violation, but a \$70,000.00 maximum penalty for each willful or repeat violation [29 U.S.C. 666(a)]. Dierzen does not contest the characterizations of the individual violations. Even if it did, the facts establish the violations are properly classified. Dierzen acted with conscious disregard that the precise conditions found in 2005, and still existing in 2006, constituted violations of the safety and health standards. In numbers of employees, Dierzen grew by 1000 percent from 2003 to 2006. If Dierzen directed a portion of the effort necessary to achieve that remarkable feat towards the employees' safety and health, this case would not exist.

Following its procedures, OSHA properly proposed \$33,000.00 for each willful violation in both the safety and health cases. After consideration of the degree of willfulness, the gravity of each violation, and some mitigating efforts by certain Dierzen personnel, this judge arrives at a different assessment than OSHA proposed. This does not signify Dierzen's actions and omissions are viewed with less disfavor.

Many violations were also classified as repeat. With a significant effect of lessening the over-all penalty, OSHA considered violations repeat rather than willful. OSHA asserted the violation was repeat if Dierzen sought to address the violations in some way, even if the effort was not effective (Tr. 129). Dierzen is a small employer and was in repeat violation for the first time, meaning OSHA doubled its initial penalty calculation. For the repeat health violations, DeManche concluded there was less likelihood the violations would result in accidents since few employees were exposed over a relatively short duration of exposures (Tr. 129). The assessed penalties reflect that view.

*2. Gravity of Individual Violations and Assessed Penalties*

Of the four statutory penalty factors, the gravity of the violation is usually the most significant. *See e.g., Orion Constr., Inc.*, 18 BNA OSHC 1867, 1868 (No. 98-2014, 1999). Gravity addresses the setting and the



circumstances of the violations, *i.e.*, the degree to which the standard was violated and the harm anticipated. The specific considerations include such facts as the number of employees exposed to the conditions, the duration of exposure, the degree of probability that an accident would occur, or precautions taken against injury. *Agra Erectors Inc.*, 19 BNA OSHC 1063,1065 (Docket No.98-0866, 2000).

## OSHC DOCKET NO. 07-0675—

### The Safety Case

The April 10, 2007, safety citation asserted four willful and one repeat violations. The gravity and the assessed penalty are discussed below.

#### *Willful Citation No. 1, Items 1–4*

##### *Willful Item 1—§ 1910.23(c)(1)*

Dierzen willfully violated the fall protection standard of § 1910.23(c)(1) (item 1). Employees welded down onto truck bodies from an open-sided skeletal frame fixture 7 feet, 9 inches, above a concrete floor. At any given time five employees weld from atop the frame fixture for several hours a week. Dierzen did not provide fall protection. Falls from the frame would likely result in broken bones, concussions, or other serious injury. Spencer admitted Dierzen did not attempt to correct the violation. Nor did it make any modifications to lessen the hazard or to provide alternative fall protection (Tr. 21-22, 45, 48). Considering these facts and the statutory elements discussed above, a penalty of \$13,500.00 is assessed.

##### *Willful Item 2—§ 1910.147(c)(4)(i)*

Dierzen willfully violated the lockout/tagout (LOTO) requirements of § 1910.147(c)(4)(i) (item 2) by refusing to develop written LOTO procedures for hazardous energy sources, *i.e.*, the “computer numerically controlled” (CNC) lathe (used to turn down metal parts, and form and cut them into the desired sizes) and the CNC plasma cutter (used for cutting sheets of steel plate). Two maintenance workers serviced the equipment for several hours each day. Without specific written LOTO procedures to identify and control the energy sources, the machinery could unexpectedly start and crush, cut, or amputate the fingers or hands (Tr. 24-29). Considering these facts, the statutory elements, and the relationship between this and the following violation, a penalty of \$8,000.00 is assessed.

##### *Willful Item 3—§ 1910.147(c)(7)(i)*

In item 3, a violation of § 1910.147(c)(7)(i), Dierzen willfully failed to provide LOTO training. Dierzen should have trained the two maintenance employees and others on the shop floor to follow procedures on how to lock and tag out equipment. Although the Cincinnati shear was initially locked out for service, another employee bypassed the lock in order to operate the shear. Dierzen did not itself train anyone, but a maintenance employee learned about the procedures from another employer (Tr. 29-34). The duration of the exposure and the potential injuries are described above. Considering these facts and the statutory elements, a penalty of \$8,000.00 is assessed.

##### *Willful Item 4—§ 1910.212(a)(3)(ii)*

Dierzen willfully violated § 1910.212(a)(3)(ii) (item 4) when it failed to guard the points of operation of the Cincinnati 400-ton press brake and Cincinnati Model 1810 shear. The anticipated hazard for the operators, whose fingers could be as close as two inches from the die or knife blade of the shear, was amputation of the fingers or other parts of the hand. One operator used these pieces of equipment, and he was exposed to the hazard for approximately 4 hours a week (Tr. 34-37). Considering these facts and the statutory elements, a penalty of \$13,500.00 is assessed.

#### *Repeat Citation No. 2, Item 1*

A repeated violation also carries an increased monetary penalty. As a first repeat citation for an employer with 250 or fewer employees, OSHA doubled Dierzen’s recommended penalty.

##### *Repeat Item 1—§ 5(a)(1) of the OSH Act*

Dierzen violated the “general duty clause” of § 5(a)(1) of the Act when it failed to protect employees from the recognized hazard associated with failing to guard the foot treadle of the Cincinnati 400-ton press brake. If the foot treadle were accidentally hit or pressed, the machine could cycle while the operator’s hands were in the equipment, perhaps amputating the operator’s fingers or hands. The repeat classification is based on a previous § 5(a)(1) violation for the same condition, except that the equipment (a Cincinnati 225-ton press) differed. One employee was exposed to the hazard for 4 hours each week (Tr. 37-40).

Considering these facts and the statutory elements, a penalty of \$3,000.00 is assessed.

### **DOCKET NO. 07-0676—The Health Case**

At issue in the April 10, 2007, health citations are penalties for three serious, seven willful, and 14 repeat violations. Although a “follow-up” inspection, OSHA’s industrial hygienist Sue Ellen Demanche noted three violations which had not previously cited but were in plain sight as she checked for the follow-up items. These violations are classified as serious.

#### *Serious Citation No. 1, Items 1–3*

##### *Serious Item 1—§ 1910.107(g)(3)*

Dierzen failed to dispose of rags and waste saturated with paint finishing materials from the spraying room in violation of § 1910.107(g)(3). It could have used a closed metal waste container or other approved waste disposal methods. Instead, Dierzen left the solvent and paint-soaked paper and rags in an open plastic trash can. The readily combustible materials, piled together, could burst into flames from a random spark or they could accelerate or intensify a fire. The likely injury is severe burns and smoke inhalation. Two employees were exposed to the hazard for approximately 3 hours each workday (Tr. 63-64, 115). Considering these facts and the statutory elements, a penalty of \$900.00 is assessed.

##### *Serious Item 2—§ 1910.303(b)(2)*

Section 1910.303(b)(2) requires electrical equipment to be used and installed in accordance with the labeled instructions. In the welding area, Demanche stepped near an energized 240-volt metal “handy box” improperly used as an outlet device for the arc welder. Manufacturer’s instructions specify handy boxes must be mounted in a wall. When on the floor, the outlet is subject to being stepped on, tripped over, kicked, or knocked around, pulling on the energized conductors. Also, the employee would hold the handy box to plug in the arc welder. Coming into contact with any bare wires of the improperly protected conductors could cause shocks or burns. Twenty-two welders worked in the area for 8 hours each day (Tr. 65-67, 116). Considering these facts and the statutory elements, a penalty of \$1,200.00 is assessed.

##### *Serious Item 3—§ 1910.305(b)(1)*

Section 1910.305(b)(1) requires the unused openings in circuit breaker boxes to be effectively closed. A circuit breaker box contained open slots, exposing live wires, which an employee could inadvertently contact while accessing the box. The circuit breaker box was energized at 240 volts. Dierzen’s twenty-two welders could be exposed to severe shock if they made contact with the parts during their 8-hour workdays (Tr. 67-68, 117). Considering these facts and the statutory elements, a penalty of \$900.00 is assessed.

#### *Willful Citation No 2, Items 1a–4b*

##### *Willful grouped Items 1a, 1b, and 1c— § 1910.106(d)(4)(iii), § 1910.107(c)(5), and § 1910.107(c)(6)*

For penalty purposes the Secretary grouped three willful violations related to multiple unapproved electrical wiring, outlets, and cords, located in and adjacent to the paint spraying area. Dierzen violated § 1910.106(b)(4)(iii) (item 1a) when it stored flammable liquids in a room with unapproved electrical equipment that was adjacent to the spray area. Dierzen violated § 1910.107(c)(5) (item 1b) when using unapproved electrical equipment in the spray area, which could have deposits of readily ignitable residues, explosive vapors, and solvents. Dierzen violated § 1910.107(c)(6) (item 1c) by using unapproved electrical wiring, installations, and flexible cords in this hazardous location. The grouped violations share the common hazard in the areas where flammable vapors collect a spark from unapproved electrical equipment could start a fire. Two employees wiped down the truck exteriors with solvents, mixed paints and solvents, and spray painted for 3 hours each workday. They used the electrical equipment frequently. A fire could expose employees to burns and smoke inhalation (Tr. 69-72, 118). Considering these facts and the statutory elements, a penalty of \$20,000.00 for the three grouped violations.

##### *Willful Item 2—§ 1910.134(i)(7)*

To remove paint and rust from the trucks, Dierzen’s abrasive blaster pressure-sprayed abrasive silica sand through the hose. The operator wears an air line respirator powered by an oil lubricated compressor. Dierzen had not utilized either a carbon monoxide or

a high-temperature alarm to monitor the air coming into the respirator in violation of § 1910.134(i)(7). If the compressor heated excessively or malfunctioned in other ways, carbon monoxide could be sent directly into the respirator without anyone becoming aware. One employee was exposed while blasting approximately 1½ hours a day, three times a week. Dierzen made no effort to correct the violation which could lead to carbon monoxide poisoning, even though abatement could have been quickly, easily, and inexpensively achieved (Tr. 72-74). Considering these facts and the statutory elements, a penalty of \$10,000.00 is assessed.

*Willful Item 3—§ 1910.244(b)*

In willful violation of § 1910.244(b) Dierzen failed to equip the operating valve of the abrasive blasting equipment with a “deadman’s switch.” The switch immediately deactivates the sprayer when the operator ceases to manually depress it. The potential hazard is that if the operator loses control of the hose, it could continue pressure spraying the operator or others with silica sand, leading to severe abrasions. The abrasive blaster was exposed to the hazard 1½ hours a day, 3 days a week. Placing the deadman’s switch to the nozzle is neither difficult nor expensive (Tr. 75-76). Considering these facts and the statutory elements, a penalty of \$10,000.00 is assessed.

*Willful Items 4a and 4b—§§ 1910.1000(c) and § 1910.1000(e)*

The two grouped violations of § 1910.1000(c) (item 4a) and § 1910.1000(e) (item 4b) concern over-exposure to silica dust. During the sampled period, the abrasive blaster was exposed to respirable silica over twice the permissible exposure limit (PEL). Despite the known silica hazard, Dierzen did not seek any feasible administrative or engineering controls to prevent the over-exposure. Exposure to respirable silica above the PEL leads to silicosis, decreased lung capacity, cancer, and potentially to death. The operator was exposed 1½ hours a day, 3 days a week. The only change in the cited conditions between 2005 to 2006 is that production and sand blasting increased. Dierzen considered splitting the work with another employee, but never did so. It considered no other controls (Tr. 76-79, 119, 127). Although not relevant to the existence of the violation, the fact that the blaster wore an airline

respirator lessens the gravity of the exposure. Considering these facts and the statutory elements, a penalty of \$20,500.00 is assessed.

*Repeat Citation No. 3, Items 1—12*

*Repeat Item 1—§ 1910.23(a)(5)*

In violation of § 1910.23(a)(5) Dierzen failed to guard a concrete pit in the spray paint room which existed at the time Dierzen purchased the facility. The pit was 21 inches wide by 110 inches long by 51 inches deep. Dierzen’s painter told OSHA Dierzen covered the pit with boards at one point, but the boards gradually disappeared. The pit was open during the inspection. The painter and helper were exposed to the hazard 3 hours a day, 5 days week, while they prepped and painted the trailers or cleaned the equipment and mixed paints. They spent much time walking and spraying in the area, looking upward. A 4-foot fall into the pit could result in broken bones (Tr. 79, 82, 120). Considering these facts and the statutory elements, a penalty of \$2,000.00 is assessed.

*Repeat Item 2—§ 1910.106(d)(4)(i)*

Dierzen used the room adjacent to and opening into the spray paint area to store flammable liquids in violation of § 1910.106(d)(4)(i). The storage room should have had a self-closing door between the two rooms, but the door was kept open. The purpose of the standard is to prevent flammable vapors from igniting. The spray painter and his helper were exposed to the hazard while they regularly secured materials from the storage room for the period stated above (Tr. 82- 84). Considering these facts and the statutory elements, a penalty of \$3,000.00 is assessed.

*Repeat Items 3a—3b, § 1910.134(c)(1) and 1910.134(c)(3)*

Repeat items 3a through 6 each relate to airborne respirable chemicals. Dierzen violated § 1910.134(c)(1) (item 3a) by failing to develop and implement a written respiratory protection program. It neither hired a trained administrator nor trained any of its employees to oversee the program and conduct evaluations, in violation of § 1910.134(c)(3) (item 3b). Dierzen utilized two types of respirators, an airline respirator for the abrasive blasting and a half-mask respirator for painting. The purpose of a program is to ensure the

respiratory protection requirements are met for the range of hazardous airborne contaminants in Dierzen's facility, *e.g.*, to ensure the proper use of respirator filters and cartridges, and that training, medical evaluations, and fit testing are completed. Without a program employees are less likely to control their exposure to airborne contaminants during their 1½ to 3 hours of exposure (Tr. 84–87, 121). Considering these facts and the statutory elements, a penalty of \$2,400.00 is assessed for the two grouped violations.

*Repeat Item 4—§ 1910.134(e)(1)*

In repeat violation of § 1910.134(e)(1) Dierzen did not provide medical evaluations for the painter and the helper to assure they were medically able to wear respirators. The anticipated hazard is that an employee with a medical condition affected by the respirator could suffer pulmonary stress, shortness of breath, or dizziness. Although Dierzen did not provide the abrasive blaster with a medical examination, he had the examination from a previous employer and learned he could wear the respirator. The frequency and duration of the exposure is described above (Tr. 87-89). Considering these facts and the statutory elements, a penalty of \$1,800.00 is assessed.

*Repeat Item 5—§ 1910.134(f)(1)*

In violation of § 1910.134(f)(1) Dierzen did not provide the painter or his helper with the quantitative or qualitative fit test to assure a correct size and a correct seal are optimal. Dierzen could have provided the “quantitative fit test” (where computerized equipment counts the particles inside and outside the employee's respirator) or the “qualitative fit test” (where employees identify when they smell an odor). Dierzen did neither. The resulting injury would most likely be a temporary dizziness or headaches. The frequency and duration of the exposure for the painter and helper is described above. Although Dierzen did not perform a fit test for the abrasive blaster, he had been fit tested by a previous employer (Tr. 90-93). Considering these facts and the statutory elements, a penalty of \$1,800.00 is assessed.

*Repeat Item 6—§ 1910.134(k)(3)*

Dierzen offered no respiratory protection training for employees required to wear respirators in violation of § 1910.134(k)(3). The three employees were exposed

to a variety of airborne contaminants which could lead to silicosis, lung scarring, carbon monoxide poisoning, dizziness, or shortness of breath. Without proper training on the use and care of the respirator, it may become useless to the employee. For example, one employee wore an ineffective organic vapor cartridge for silica and left the respirator in the open environment to collect dust and contaminants. An employee was wiping out the inside of his respirator with alcohol, which can degrade the plastic and interfere with seal. The blaster did not understand his potential for carbon monoxide poisoning. The frequency and duration of the exposure for the three employees is described above. Although Dierzen did not provide the training, one employee was trained by another employer (Tr. 93-96). Considering these facts and the statutory elements, a penalty of \$1,800.00 is assessed.

*Repeat Item 7—§ 1910.157(e)(3)*

Dierzen did not annually check the maintenance of at least eight fire extinguishers in violation of § 1910.157(e)(3). Throughout the facility the fire extinguishers had not been tested since either 2001 and 2002. A couple of the fire extinguishers were discharged and had not been refilled. Two or three extinguishers had been purchased since the 2005 inspection, but they remained in their boxes in the office. Few knew of their existence, and they were not available to employees on the floor. The anticipated injury is smoke and burns from a fire which was quickly extinguished. All thirty six employees were exposed to a potential fire during their 8-hour shifts. (Tr. 96-98). Considering these facts and the statutory elements, a penalty of \$1,800.00 is assessed.

*Repeat Items 8a and 8b—§§ 1910.178(l)(1)(i) and § 1910.178(l)(6)*

Items 8a through 10 concern operation of Dierzen's powered industrial trucks. Dierzen did not train employees on the proper operation of powered industrial trucks, in violation of § 1910.178(l)(1)(i) (item 8a). Because of the importance of forklift training to safety in a facility, § 1910.178(l)(6) (item 8b) also requires Dierzen to certify the training, which it did not do. Both the operator and other employees can be exposed to potential broken bones or other injuries or death when untrained operators can strike employees with the forklift or cause material to fall on the operator or



others. Ten employees operate forklifts 8 hours a day. Thirty six other employees worked around the untrained operators. Dierzen's Renee Goff developed a program to conduct training, but the program was never implemented (Tr. 98-101, 122). Considering these facts and the statutory elements, a penalty of \$1,800.00 is assessed for the two grouped violations.

*Repeat Items 9 and 10—§§ 1910.178(n)(4) and 1910.178(q)(1)*

OSHA observed the forklift which did not slow down at a blind intersection and did not sound its horn in violation of § 1910.178(n)(4) (item 9). Significant ambient noise was generated around the elevators and the shears, aggravating the hazard of forklifts speeding through blind intersections without sounding a horn. The potential is for a forklift-to-forklift or a forklift-pedestrian collision and resulting broken bones or other serious injury or death. Employees were exposed intermittently during their 8-hour workshifts. Considering these facts and the statutory elements, a penalty of \$2,400.00 is assessed for item 9.

Dierzen did not inspect the forklifts in violation of § 1910.178(q)(1) (item 10). On paper Dierzen began an inspection program where unsafe equipment was to be tagged out. However, at the time OSHA arrived, Dierzen had not begun to implement the program (Tr. 101-105, 123, 128). Considering these facts and the statutory elements discussed above, a penalty of \$1,800.00 is assessed for item 10.

*Repeat Items 11 and 12—§§ 1910.1200(e)(1) and § 1910.1200(h)(1)*

Dierzen violated two hazard communication standards when it failed to create or implement an adequate hazard communication program in violation of § 1910.1200(e)(1) (item 11). It did not train employees

on how to lessen the impact of the hazardous chemicals on their bodies in violation of § 1910.1200(h)(1) (item 12). Dierzen apparently began to compile some material safety data sheets (MSDSs), but it did secure all of them and did not train employees on how to find or use them. Employees are less likely to understand and protect themselves from the hazards associated with exposure to such substances as paint and solvent fumes, welding fumes, silica, and cylinder gas without access to information and training. Four employees were particularly affected by the failure to train because they worked directly in areas where they were exposed to the hazardous substances (Tr. 106-112, 124-125). Considering these facts, the statutory elements, and the existence of some overlap with other violations, a penalty of \$1,500.00 each is assessed for items 11 and 12.

## CONCLUSION

It is unescapable that Dierzen considered OSHA and requirements of the OSH Act to be a mere bother and that delays in compliance would work to its benefit. The Act established monetary penalties to counter such attitudes and to encourage employers to be proactive in addressing the safety and health hazards in their facilities.

## Findings of Fact and Conclusions of Law

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a), Fed. R. Civ.P.

## Order

Based on the foregoing decision, it is ORDERED:

**A total penalty of \$133,100.00** is assessed for Docket Nos. 07-0675 and 07-0676.

**DOCKET NO. 07-0675****Willful Citation No. 1**

<i>Item No.</i>	<i>Standard</i>	<i>Penalty</i>
1	29 C.F.R. § 1910.23(c)(1)	\$13,500.00
2	29 C.F.R. § 1910.147(c)(4)(i)	\$ 8,000.00
3	29 C.F.R. § 1910.147(c)(7)(i)	\$ 8,000.00
4	29 C.F.R. § 1910.212(a)(3)(ii)	\$13,500.00

**Repeat Citation No. 2**

<i>Item No.</i>	<i>Standard</i>	<i>Penalty</i>
1	Section 5(a)(1)	\$3,000.00

**DOCKET NO. 07-0676****Serious Citation No. 1**

<i>Item No.</i>	<i>Standard</i>	<i>Penalty</i>
1	29 C.F.R. § 1910.107(g)(3)	\$ 900.00
2	29 C.F.R. § 1910.303(b)(2)	\$1,200.00
3	29 C.F.R. § 1910.305(b)(1)	\$ 900.00

**Willful Citation No. 2**

<i>Item No.</i>	<i>Standard</i>	<i>Penalty</i>
1a	29 C.F.R. § 1910.106(d)(4)(iii)	\$20,000.00
1b	29 C.F.R. § 1910.107(c)(5)	
1c	29 C.F.R. § 1910.107(c)(6)	
2	29 C.F.R. § 1910.134(i)(7)	\$10,000.00
3	29 C.F.R. § 1910.244(b)	\$10,000.00
4a	29 C.F.R. § 1910.1000(c)	\$20,500.00
4b	29 C.F.R. § 1910.1000(e)	

**Repeat Citation No. 3**

<i>Item No.</i>	<i>Standard</i>	<i>Penalty</i>
1	29 C.F.R. § 1910.23(a)(5)	\$2,000.00
2	29 C.F.R. § 1910.106(d)(4)(i)	\$3,000.00
3a	29 C.F.R. § 1910.134(c)(1)	\$2,400.00
3b	29 C.F.R. § 1910.134(c)(3)	
4	29 C.F.R. § 1900.134(e)(1)	\$1,800.00
5	29 C.F.R. § 1910.134(f)(1)	\$1,800.00
6	29 C.F.R. § 1910.134(k)(3)	\$1,800.00
7	29 C.F.R. § 1910.157(e)(3)	\$1,800.00

**DOCKET NO. 07-0676 (CONTINUED)****Repeat Citation No. 3 (continued)**

<i>Item No.</i>	<i>Standard</i>	<i>Penalty</i>
8a	29 C.F.R. § 1910.178(l)(1)(i)	\$1,800.00
8b	29 C.F.R. § 1910.178(l)(6)	
9	29 C.F.R. § 1910.178(n)(4)	\$2,400.00
10	29 C.F.R. § 1910.178(q)(1)	\$1,800.00
11	29 C.F.R. § 1910.1200(e)(1)	\$1,500.00
12	29 C.F.R. § 1910.1200(h)(1)	\$1,500.00

**Other Citation No. 4**

<i>Item No.</i>	<i>Standard</i>	<i>Penalty</i>
1	29 C.F.R. § 1910.1200(f)(5)(i)	None
2	29 C.F.R. § 1910.1200(f)(5)(ii)	None

## CHAPTER QUESTIONS

1. What year was the OSH Act enacted?
2. Which agency is primarily responsible for the enforcement of the OSH Act?
3. Which agency serves as the judicial arm under the OSH Act?
4. Does a state plan state operate under the same regulations as OSHA?
5. What is the function of NIOSH?
6. What is the general duty clause?

## NOTES

1. 29 U.S.C. § 63 et seq.
2. J. Page & M. O'Brien, *Bitter Wages* (1973). During the construction of a tunnel, from 1930 to 1931, 476 workers died and approximately 1,500 became disabled, primarily from silicosis.
3. 29 U.S.C. § 651 et seq.
4. 29 C.F.R. § 651(b).
5. *Id.* at § 1975.3(d).
6. *Id.* § 652(7).
7. *See, e.g.*, Atomic Energy Act of 1954, 42 U.S.C. § 2021.
8. 29 C.F.R. § 1975(6).
9. 29 U.S.C.A. § 652(5) (no coverage under OSH Act when U.S. government acts as employer).
10. *Id.*
11. *See, e.g.*, Navajo Forest Prods. Indus., 8 O.S.H. Cas. 2694 (OSH Rev. Comm'n 1980), *aff'd*, 692 F.2d 709, 10 O.S.H. Cas. 2159.
12. 29 U.S.C.A. § 654(a)(1).
13. *Id.*
14. *Id.* § 667(c). After an initial evaluation period of at least three years, during which OSHA retains concurrent authority, a state with an approved plan gains exclusive authority over standard settings, inspection procedures, and enforcement of health and safety issues covered under the state plan. *See also* Noonan v. Texaco, 713 P. 2d 160 (Wyo. 1986); Plans for the Development and Enforcement of State Standards, 29 C.F.R. § 667(f) (1982) and § 1902.42(c)(1986). Although the state plan is implemented by the individual state, OSHA continues to monitor the program and may revoke the state's authority if the state does not fulfill the conditions and assurances contained within the proposed plan.
15. Some states incorporate federal OSHA standards into their plans and add only a few of their own standards as a supplement. Other states, such as Michigan and California, have added a substantial number of separate and independently promulgated standards. *See generally* Employee Safety and Health Guide (CCH) §§ 5000–5840 (1987) (compiling all state plans). Some states also add their own penalty structures. For example, under Arizona's plan, employers may be fined up to \$150,000 and sentenced to one and one-half years in prison for knowing violations of state standards that cause death to an employee, and then may also have to pay \$25,000 in compensation to the victim's family. If the employer is a corporation, the maximum fine is \$1 million. *See* Ariz. Rev. Stat. Ann. §§ 13-701, 13-801, 23-4128, 23-418.01, 13-803 (Supp. 1986).
16. For example, under Kentucky's state plan regulations for controlling hazardous energy (i.e., lockout and tagout), locks would be required rather than locks or tags being optional as under the federal standard. Lockout and tagout are discussed in more detail in Chapter 7.
17. 29 U.S.C. § 667.
18. 29 U.S.C.A. § 667; 29 C.F.R. § 1902.
19. The states and territories operating state plan OSHA programs include Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina. Partial federal OSHA enforcement occurs in Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, and Wyoming.
20. M. Corn, *Policies, Objectives and Plans of OSHA*, 1976 ABA Nat'l Inst. on Occupational Safety & Health Law at 229.
21. *See, e.g.*, NLRB v. Fainblatt, 306 U.S. 601, 604–05 (1939). *See also* U.S. v. Ricciardi, 357 F.2d 91 (2d Cir.), *cert. denied*, 384 U.S. 942, 385 U.S. 814 (1966).
22. Sec'y v. Ray Morin, 2 O.S.H. Cas. 3285 (1975).
23. Whirlpool Corp. v. Marshall, 445 U.S. 1, 8 O.S.H. Cas. 1001 (1980).
24. 29 C.F.R. § 1910 et seq.
25. For example, consider a company with a corporate headquarters in Delaware and operations in Kentucky, Utah, California, and West Virginia. Facilities in Delaware and West Virginia are under federal OSHA jurisdiction, whereas the operations in Kentucky, Utah, and California are under state plan jurisdiction.
26. 29 U.S.C. § 655(b).
27. 29 U.S.C.A. § 655(b)(5).



28. 29 U.S.C. § 1910.
29. 29 C.F.R. § 1911.15. (By regulation, the secretary of labor has prescribed more detailed procedures than the OSH Act specifies to ensure participation in the process of setting new standards, 29 C.F.R. § 1911.15.)
30. 29 U.S.C. § 1910.
31. 29 U.S.C. § 655(b).
32. 29 U.S.C. § 553.
33. 29 C.F.R. § 1911.15.
34. *Taylor Diving & Salvage Co. v. Dep't of Labor*, 599 F.2d 622, 7 O.S.H. Cas. (BNA) 1507 (5th Cir. 1979).
35. 29 U.S.C. § 655(c).
36. *Id.* at § 655(b)(1).
37. *Id.* at § 656(a)(1). NACOSH was created by the OSH Act to “advise, consult with, and make recommendations . . . on matters relating to the administration of the Act.” Normally, for new standards, the secretary has established continuing and ad hoc committees to provide advice regarding particular problems or proposed standards.

