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OSHA AND CONSTRUCTION

Address by Occupational Safety and Health Review Commission Chairman Moran at National Construction Industry Conference

When I accepted the kind invitation to address this conference which was extended to me several weeks ago by my staunch friend, John Church, I was unaware that its theme would be "Delays and Disputes in Building Construction." It's totally coincidental therefore that my remarks cover this subject area. That the Occupational Safety and Health Act of 1970 can lead to delays and disputes in building construction may not be readily apparent to persons not intimately connected with its development and application. I am unaware that it has actually done so up to this point. However, the potential is there. And though it has deeply concerned me for a long period of time I haven't yet been able to think of any judicial solution which is consistent with the law and would not lead to unintended and potentially adverse consequences.

Of course there is a practical solution. If every contractor, sub-contractor, and supplier — and each of his employees — complied with every job safety and health requirement, the law's adverse effect would not be felt in the construction industry. Until the millennium arrives, however, the problem, or at least its potential, will be there.

The Act was passed, as you are well aware, in order to ensure the safety and health of the American worker while on the job. A good,

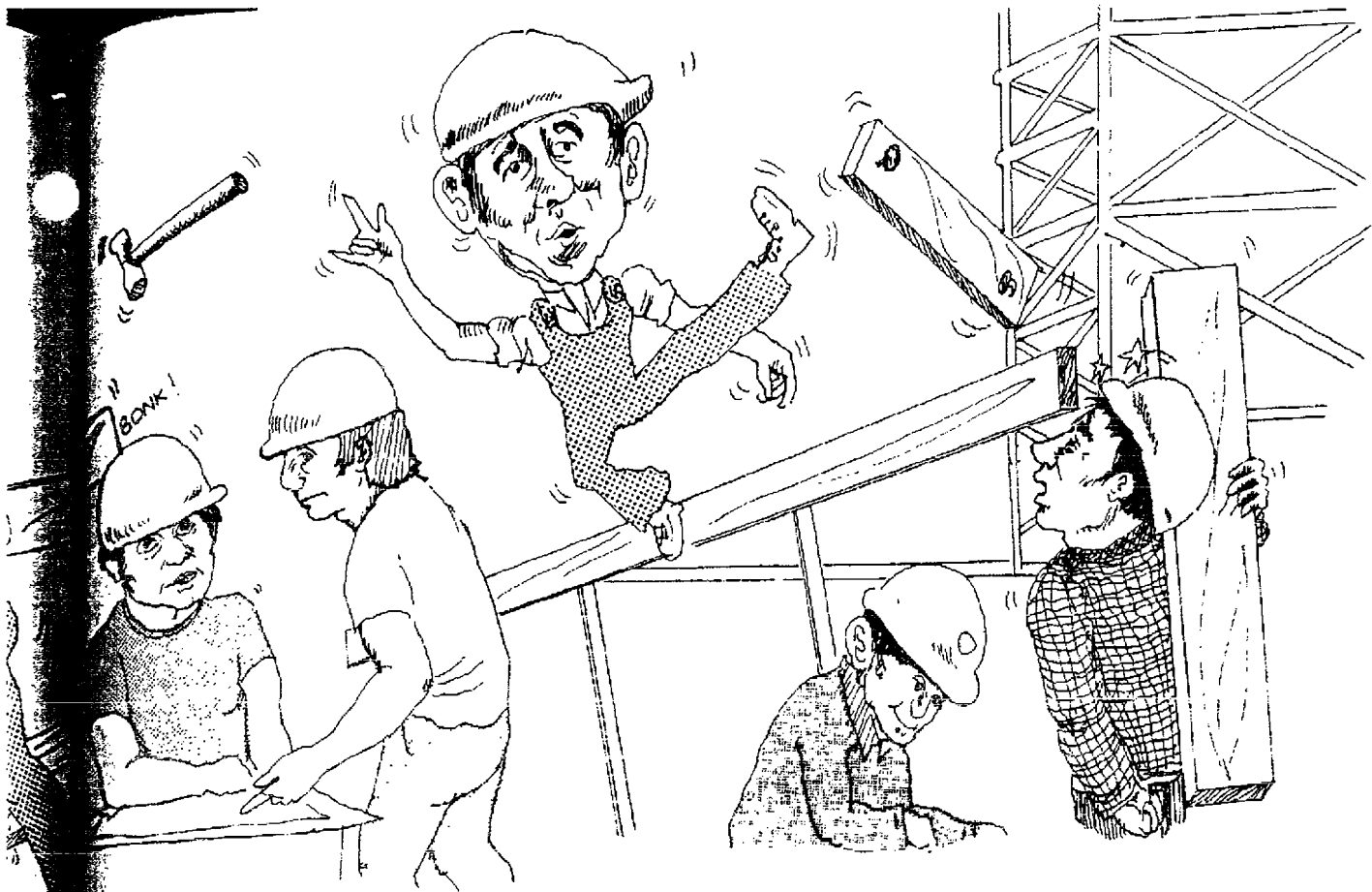
simple, easy to understand concept and purpose. But the means to this end which have developed to date, are showing themselves not to be so simple and in some cases, not even so good. In enacting this law, Congress apparently gave little thought to the unique relationship which arises when employees of a number of different employers work in and around the same job site and are subject to the hazards which may exist at that site — hazards which may or may not have been created by their own employer — or someone else's — or by some other employees of a totally unrelated and unknown employer.

Congress seemed to be focusing its attention on the typical industrial or commercial workplace where a single employer has one or more employees engaged in furthering the employer's business purposes. They therefore framed the Act so as to place upon such an employer the duty of providing for the safety and health of his own employees.

That's exactly what the law says in section 5(a)(1): Each employer shall provide his employees with a hazard-free place of employment. The only other applicable enforcement provision requires that employers comply with occupational safety and health standards promulgated under the Act.



NICA OUTLOOK



propose. If the standards existed independent of the law, the problems arising out of an Act compelling an employer to watch out only for his own employees could possibly be avoided -- for many of the standards are written to cope with the situation actually existing on a building job site. Regrettably, that isn't the case at present. We have a law where the statutory duty runs from an employer to his own employees -- not to someone else's or to the general public. Cases which arise under the law, therefore, must apply it. This can only be done when both the standard and the law are read together. The former has no legal force or effect without the latter but, unfortunately there are many situations where the latter frustrates the purposes which the standards-writers had in mind when they framed the rules. One reason for this, of course, is that the construction safety standards were written long before December 29, 1970 when this law was enacted. Despite this, they were promulgated by the Secretary of Labor under this law without change.

You shouldn't get the idea from the foregoing that the law has gaps or loopholes in its intended effect of employee protection. It doesn't. It says an employer is in violation whenever his employees are exposed to a hazard covered by a standard. It says nothing about who created the

hazards. Simple enough. Every worker is taken care of, therefore, because every employer must safeguard his employees from all hazards, whatever the hazard's source might be.

O.K. That's fine. But now let's consider the case of a subcontractor on a job whose employees are exposed to a hazard which was created by a fellow subcontractor or by the prime contractor. Let me give you some examples of this through actual Review Commission cases. The Review Commission, I think you know, provides the court system for trial of actions under the Act.

In one case two masonry contractors were given the job of doing masonry work on three buildings. They formed an agreement whereby one firm would construct two buildings with loaned people from the other firm. This other firm would have charge of the third building with loaned employees for equivalent time from the first firm. Each paid the wages of its own employees. An OSHA inspector came to the first building and found men working on a faulty scaffolding device. Both firms were cited because both had employees working at the site who were exposed to the hazard, even though only one firm was in a work supervision position or was receiving money for the work. When this case came to the Commission the Judge said it didn't matter who was

excessive penalties; and, as applied to the subcontractors herein, is not appropriate in the circumstances of this particular case. The sole (violation) described above is to pull his men off the job and thereby risk future loss of business, boycott, or litigation. He cannot, because of union restrictions, correct violations outside of his particular field of operation. Conceding that the subcontractors involved here were technical violators it is nevertheless my view that "the penalty should fit the crime" and should not be determined by any hard and fast formula as promulgated in the (OSHA Compliance Operation's) manual . . .

Other problems arise when the parties have contracted with each other as to who takes the responsibility in complying with the Job Safety Act.

One employer, a carpentry firm, was subcontracted to provide "labor only" for the outside framing and trim work on an apartment complex. His men were found working on a scaffold, owned by the prime contractor, which was faulty. The subcontractor was charged and found in violation of the Act. The fact that he did not own the scaffold was rejected by the judge -- his primary determinant being that the sub's men were exposed to a serious hazard which only the sub could control, even if his only recourse was removing his men from the scaffold.

Should the prime contractor have been responsible because he owned the scaffold even though none of his employees were exposed to the hazard created by a faulty scaffold? The Commission has ruled negatively because the duty under the Act runs from an employer to his own employees -- not somebody else's. Indeed, if we fail to keep this in mind our decisions may eventually produce a National Building Code which certainly would be an unintended outgrowth of the Occupational Safety and Health Act.

On the other hand, if we don't recognize any liability on the prime contractor in such situations, the only remedy for the hazard is to require the subcontractor to prevent its people from entering the unsafe area and refusing to work until the party in control of the condition corrects it. And here we run head-on into union contract problems, possible work stoppages and who knows what. As you may imagine, the handling of this type of case requires the utmost delicacy in balancing all the conflicting fields of law and other legal inter-relationships. We're working on the problem but I would certainly welcome relevant suggestions or advice from people who

are skilled in resolving construction industry problems such as those in this audience.

Another thing that tends to complicate the prime-sub problem is found in a portion of the Construction Safety Standards, §1926.16(a) which reads:

...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.

In another part of the standards it says that this section is not an official "standard." The Commission has called this an "interpretive ruling" and concluded that it does not control the prime contractor's liability for safety on the job. I have participated in decisions which hold that the prime contractor is responsible under the law only for those hazards to which his own employees are exposed, and at this point in time anyway. That happens to be the rule of law. I therefore believe that OSHA should throw this provision out (along with some other standards while they are at it). Words such as those, when embodied in a group of standards which are supposed to be the law, can only cause confusion to both the prime and the sub. There is enough confusion without compounding it with unnecessary and misleading language.

Of course, as I indicated earlier, the construction safety standards were written for an earlier law -- the Contract Work Hours and Safety Standards Act. Many of them just don't seem to fit within the mandate and jurisdiction so specifically spelled out in the Occupational Safety and Health Act of 1970.

I think you can see why the Job Safety Act and the standards must be read together -- neither can generally stand alone. The Commission has rules that if no employees of a cited employer are exposed to a hazard then no violation can be charged against that employer even though that employer may have created a condition which is a variance with the safety standards. Many cases have been thrown out because the Department of Labor failed to show that any employees were exposed to a sub-standard condition. Consider, for example, an unshored trench which was excavated by machine and which no employee enters. The rule that employee exposure to the hazard must be demonstrated before a violation of the Act can be established is essential. Otherwise the problems of jurisdiction and control will snowball on ad infinitum and the responsibility for abating cited hazards may never be firmly fixed. As the Commission said in one recent

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...ion, a different rule would make
...an employer who subcontracts while
...aining control of the job site responsible for
...a safety and health of working men and
...omen who do not work for him, who are not
...subject to his direction and control, who are not
...in his payroll and who cannot be discharged by
...it imposes liability outside the employ-
...ent relationship.

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...his problem also came up in a slightly
...erent, but nonetheless similar kind of case, a
...e which asked the question -- what if an
...employer causes a hazard which does not affect
...own employees but does affect the public?
...The employer was charged with failure to
...vide a screen on a scaffold, a requirement of a
...struction safety standard which was developed
...the purpose of protecting people beneath the
...scaffold from getting hit by falling objects which
...men working on the scaffold might drop.
...It was admitted that the standards specify a
...reen and that this employer had none, but the
...earing produced no evidence that the respondent
...ad any employees working beneath the scaffold.
...he only people below it were passers-by on the
...street. Was there a failure to comply with the
...standard? Yes. A violation of the law? No.

...This law would not permit the employer to be
...ound liable for a job safety violation on these
...acts because the purpose of the Act, as well as
...he employer's duty pursuant thereto, is specif-
...ically and exclusively the protection of **employees**,
...not the general public. The courts will not permit a
...Government agency to overstep its jurisdictional
...mandate. And just as OSHA cannot enforce safety
...regulations in coal mines, it cannot legally adopt
...a national building code or enforce rules to
...protect the general public from hazards arising
...out of work situations. So the standard -- by itself
...is not the law. Can OSHA require an employer to
...properly guard a machine which has been out of

operation for 20 years and will remain so for the
next 20? A reading of the standard would give you
a clear affirmative answer -- but when the law and
the standard are read together, it's something
else.

There are some other unique provisions of this
law which are, I think, particularly important for
the construction industry and the employees who
work therein. One involves the amount of time
between the OSHA inspection and the issuance of
the citation. When this law was being debated in
Congress, the Senate enacted a bill which
contemplated that the inspector would issue the
citation at the conclusion of his inspection while
still on the employer's premises. The House
version was different. There was no such
provision and no time limitation between in-
spection and issuance of a citation.

I was a Labor Department official at this time
and we in the Department favored the House
version. We wanted to be allowed plenty of time
between inspection and citation so that the
inspector could return from his rounds, consult
with his supervisors on policy and, where
necessary, consult with the legal staff on the
issuance of the citation.

When the two versions got into conference
committee, a compromise was struck. The
citation didn't have to be issued on the spot, the
conferees agreed, but it had to issue with
"reasonable promptness." The term was not
defined in the law but the conferees stated in their
report to the Congress that the term meant that
the citation had to be issued within 72 hours of
the completion of the inspection except where
there were unusual circumstances.

I believe there was ample justification for this
requirement. A violating employer is not in
jeopardy until cited. If the violation is an unshored
trench, a defective scaffold, or lack of perimeter
protection, for example, a delay of 4 to 6 weeks in
issuance of the citation may cost lives or serious
injuries or it may render the problem moot since
the trench may be filled-in or the work completed
by that time. Nevertheless that is the situation
which exists today. OSHA is not issuing its
citations with reasonable promptness and many
employers are raising this fact as a defense to the
action against them.

Now there are those who will say that it is no
help to employees when a cited employer is let off
the hook because OSHA didn't issue the citation
with reasonable promptness. Perhaps we
shouldn't let an indicted person go free when the
State's evidence was obtained by wiretapping

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either. However, the speedy abatement of hazardous conditions will never be accomplished, in my judgement, so long as OSHA is permitted to get away with defying such a clear Congressional mandate.

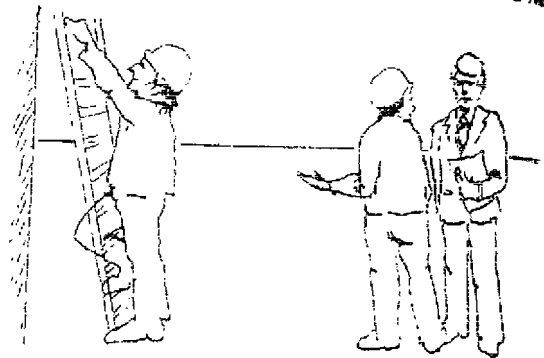
A collateral problem arises in many cases because the OSHA citation does not specify what the employer must do to correct the hazard. I recall one case where there were four pits in the ground in which the employer stored liquids of various kinds. Three of them were surrounded by 12 inch railings. The fourth had none. He was cited for not having standard guardrails to protect against accidental falls into the pits. Upon receiving the citation, he erected a guardrail around pit number four. Later, upon reinspection, he was again cited for failing to abate the condition initially cited. OSHA claimed that none of the pits had a standard guardrail.

What they meant (but what the citation did not specify) was a railing 24 inches high around all four pits. It seems the term "standard guardrail" is a term of art which is specifically defined in another section of the standards but to which this citation did not refer. Citations so worded may trap employers and pave the way for higher penalties, but they won't save many employees from injury or death.

One of the most innovative features of this law was the walkaround. It authorizes the employer and a representative of his employees to accompany an inspector on his rounds. The purpose behind it is to allow the employee representative to call the inspector's attention to potentially hazardous conditions and the employer to see what the inspector is concerned about so he can be in a position to explain it or correct it.

I think the walkaround is one of the better features of this law but I regret to say that we have been confronted with a number of cases where OSHA conducted inspections in the absence of employer or employee representatives.

Construction sites seem to be quite high on the list. There, of course, is some difficulty managing a legal inspection party when many contractors and many trade unions have men at work on a single job-site. The problems which arise when walkaround rights are not accorded are greater, however, for they often affect the very purpose for this law's existence. The contractor gets cited, for example, because the inspector thought the men on the unsafe scaffolding worked for the cement mason when they actually worked for the window installation contractor, or a pickup truck with improperly stored flammable liquids in the back is parked near the site. The prime contractor is cited but the offending trade owner was a supplier. These problems would have



been avoided if OSHA had accorded the parties their walkaround rights. Of course, you can't get a hazardous condition abated when you cite the wrong employer. And, if you aren't issuing citations with reasonable promptness, by the time you realize that you cited the wrong contractor, the problem may have become moot.

In my opinion the Occupational Safety and Health Act is a good law. Its purpose is laudatory and it created the mechanisms for achieving those purposes. Although some problems were not contemplated, the law was, in the main, drafted very soundly. All its provisions are interrelated and are dependent upon one another.

The problems which have arisen to date are principally the result of the failure of people to more carefully observe the law as written. Court opinions, more experience, and time itself will cure much of this. Laws don't make angels out of devils overnight but they can have a beneficial influence on our conduct. This law has already made people more careful and more conscious of the need for worker safety and health. All the problems it has created are little ones when they are compared with the overall reasons for the act -- reducing the appalling casualty toll that has been an unfortunate result of our industrial and commercial progress.

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