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COMMENTS

OSHA: THE DEFINITION OF "REPEATEDLY" IN SECTION 666(a)

INTRODUCTION

The express purpose of the Occupational Safety and Health Act of 1970¹ (Act) is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions."² To insure that the promise is not an empty one, Congress equipped the Act with its own civil and criminal penalties,³ as well as the means of enforcing them.⁴ The penalty provision states at section 666(a): "Any employer who *willfully* or *repeatedly* violates the requirements of . . . this chapter, may be assessed a civil penalty of not more than \$10,000 for each violation."⁵ In comparison, violations of the Act classified only as "serious" or "non-serious" are punishable by civil penalties not to exceed \$1,000.⁶ The distinction in the size of the penalty demonstrates why employers will want to avoid having violations classified as "willful" or "repeated," and why they must know with some degree of certainty what violations can properly be cited under section 666(a).⁷

¹ 29 U.S.C. §§ 651-78 (1970).

² *Id.* § 651(b).

³ *Id.* § 666.

⁴ *Id.* §§ 657-60.

⁵ *Id.* § 666(a) (emphasis added).

⁶ *Id.* §§ 666(b), (c). A serious violation is defined in section 666(j) as one which creates a "substantial probability that death or serious physical harm could result." The Act does not define "non-serious," but it would presumably apply to a violation creating less risk of harm to the employee.

⁷ This comment deals exclusively with the problem in the interpretation of "repeatedly." A similar controversy exists with regard to the classification of violations as "willful." The issues raised by that debate are related to those involved in the following analysis:

The Third Circuit takes the position in *Irey v. OSHRC*, 519 F.2d 1200 (3d Cir. 1974), that a "willful" violation is one which is evidenced by a reckless defiance of the Act, a "flaunting" of the Act. Several circuits disagree and define "willful" as merely a conscious disregard of the requirements of the Act regardless of the motive. *See, e.g., Western Waterproofing, Inc. v. Marshall*, 576 F.2d 139 (8th Cir. 1977), *cert. denied*, 99 S. Ct. 452 (1978); *Intercounty Construction Co. v. OSHRC*, 522 F.2d 777 (4th Cir. 1977), *cert. denied*, 423 U.S. 1072 (1976); *U.S. v. Dye Construction Co.*, 510 F.2d 78

The present state of the law does not provide that certainty. The courts of appeals for the Third and Fourth Circuits disagree as to the definition of "repeatedly."⁸ The Review Commissioners⁹ have just recently reached agreement on the subject,¹⁰ but not in a very forceful or persuasive opinion. This uncertainty, coupled with the previous lack of uniformity in the decisions of the administrative law judges,¹¹ suggests the

(10th Cir. 1975). The matter is presently unresolved.

For a discussion of "willful," see Annot., 31 A.L.R. Fed. 551 (1977). See also note 12, *infra*.

* Compare *George Hyman Constr. Co. v. Occupational Safety and Health Review Comm'n*, 582 F.2d 834 (4th Cir. 1978), with *Bethlehem Steel Corp. v. Occupational Safety and Health Review Comm'n*, 540 F.2d 157 (3d Cir. 1976).

* At this point it is useful to detail the procedures for enforcement and judicial review provided in §§ 659-60 of the Act. When an employer is cited for a violation by the Secretary of Labor, a request for a contest action must be filed within fifteen days or the Secretary's order becomes final. If contested, the case is heard by an administrative law judge, referred to under the original Act as a Hearing Examiner. The judge's decision carries the same weight as that of the Commission. If either the employer or the Secretary of Labor wishes to appeal the decision of the judge, the Commission can request review by the vote of one of its three members. If either party desires to appeal that Commission decision, § 660(a) provides for appeal to a federal circuit court upon order of the Commission. The problem raised by § 660(a) is discussed in the text accompanying note 46 *infra*.

¹⁰ Commissioner Moran had been the principal advocate of the *Bethlehem Steel* approach on the Commission (see note 26, *infra*) but he is no longer serving. His position was filled by Commissioner Cottine in May, 1978, and the first demonstration of his view on the matter is *Potlatch Corp.*, [1979] Occupational Safety and Health Review Decisions [hereinafter cited as OSHD] (CCH) ¶ 23,294 (January 29, 1979). In that case, Potlatch Corporation was cited for a repeated violation of a regulation dealing with electrical switches at its sawmill. The issue in that case involved the similarity between the violations which formed the basis for a finding of "repeatedness." The administrative law judge found enough difference between the violations to remove them from the "repeated" category. The Secretary of Labor filed the petition directing review which was granted by the Commission; Potlatch chose not to file a brief in opposition. The Commission found that for a violation to be "repeated," the second violation need only be substantially similar to the first and, "in light of the decisions of the Fourth and Ninth Circuits," one prior violation may support a finding of "repeated." Although the Commission's decision is finally unanimous on the issue, and will bring consistency to the administrative law judges who are bound to follow the Commission, the *Potlatch* opinion lacks any well-reasoned arguments in support of its position and also contains no refutation of the *Bethlehem Steel* approach. Until the Third Circuit argument is effectively refuted or withdrawn, the conflict still very much exists between the circuits.

¹¹ A search through the decisions of the various administrative law judges on the issue of "repeated" violations, which were widely divergent before *Potlatch*, see note 10 *supra*, reveals a marked change in results after the Third Circuit decided *Bethlehem Steel* in July, 1976. Most decisions before that date classified any second violation as

need for affirmative guidance.¹²

The conflict evidenced by two principal cases, *Bethlehem Steel Corp. v. Occupational Safety and Health Review Commission*¹³ and *George Hyman Construction Co. v. Occupational Safety and Health Review Commission*,¹⁴ will serve as the basis for an analysis of this problem as it presently exists under the Act.

I. THE CONFLICT

A. *Bethlehem Steel Corp. v. Occupational Safety and Health Review Commission*

Bethlehem Steel was cited for violating a general house-keeping regulation twice in the period of a few months.¹⁵ The second citation was classified as "repeated" and a \$60 penalty was proposed.¹⁶ The administrative law judge who heard *Bethlehem Steel* held that this was not the type of violation intended to be treated under section 666(a); rather, this violation should have been treated independently, taking the prior violations into consideration only in setting the penalty.¹⁷

"repeated;" see e.g., *Linbeck Construction Corp.*, [1975-1976] OSHD (CCH) ¶ 20,262 (December 31, 1975); but decisions since that time have tended to classify second violations as "repeated" only if the employer flaunted the Act. See e.g., *Seattle Sevedore Co.*, [1976-1977] OSHD (CCH) ¶ 21,128 (August 24, 1976).

In *General Electric Co.*, [1974-1975] OSHD (CCH) ¶ 19,567 (April 21, 1975), Commissioner Cleary advanced, for the first time, the argument that an employer must flaunt the Act to merit classification as a "repeat" violator. Since the Third Circuit adopted that idea, Cleary has abandoned it. See, e.g., *George Hyman Construction Co.*, [1977-1978] OSHD (CCH) ¶ 21,774 (April 26, 1977) (opinion by Cleary, Commissioner).

¹² It is doubtful that the Supreme Court will provide such guidance in light of the denial of certiorari in *Western Waterproofing Co., Inc. v. Marshall*, 576 F.2d 139 (8th Cir. 1977), cert. denied, 99 S. Ct. 452 (1978), which deals with a similar split among the circuits as to the definition of "willfully" under the Act.

¹³ 540 F.2d 157 (3d Cir. 1976).

¹⁴ 582 F.2d 834 (4th Cir. 1978).

¹⁵ The specific regulation is found at 29 C.F.R. § 1915.51(a) (1974). The actual regulation violated in each case is not significant to an understanding of the problem, however, since employers rarely contest the fact of the violation but only challenge the classification of the violation as "repeated." In *Bethlehem Steel*, the parties stipulated prior to the initial hearing that the violation had occurred but disagreed as to its characterization.

¹⁶ It is questionable whether so much controversy is warranted in light of the small size of the penalty. See note 34 *infra* for a discussion of this proposition.

¹⁷ [1974-1977] OSHD (CCH) ¶ 19,191 (Jan. 20, 1975).

Upon review by the Occupational Safety and Health Review Commission (Commission), that decision was reversed and the \$60 penalty reassessed.¹⁸ The Commission held that the mere recurrence of a previously cited violation is sufficient to constitute a "repeated" violation. The Third Circuit reversed the Commission in favor of the determination made by the administrative law judge.¹⁹ The court based its findings on a belief that Congress intended to deal only with the most flagrant violations under section 666(a). In support of this view, the court noted the severity of the possible penalties provided and the joining of the terms "willfully" and "repeatedly" in the same provision.²⁰ Further, it stressed that violations warranting citation and penalty, but not rising to the level of "willful" or "repeated," can be adequately handled under section 666(b) and section 666 (c).²¹ The court concluded that a violation can only be classified as "repeated" if it is preceded by at least two independent violations of the same standard *and* if the employer's conduct exhibits a "flaunting" of the requirements of the Act.²² One prior citation could never be the basis of a "repeated" violation.²³

¹⁸ [1975-1976] OSHD (CCH) ¶ 19,996 (Sept. 17, 1975).

¹⁹ *Bethlehem Steel Corp. v. Occupational Safety and Health Review Comm'n*, 540 F.2d 157 (3d Cir. 1976). The court thoroughly dissected the dictionary definition of "repeatedly" and concluded that the word in its adverbial form connotes constant or frequent repetition. This semantic analysis drew strong criticism from the Fourth Circuit in the *George Hyman* case; see text accompanying note 28 *infra*.

²⁰ 540 F.2d at 161. The current § 666 resulted from a compromise between the two houses of Congress. The Senate proposed only a criminal penalty for "willful" violations, whereas the House version provided for civil penalties much like those in the present § 666(a). Subsection (e) was added as a compromise, imposing criminal penalties only if death results from a "willful" violation. [1970] U.S. CODE CONG. & AD. NEWS 5177, 5237. Although both sides of this controversy claim support in the legislative history, what little history exists is generally inconclusive on the subject and legislative intent is merely a matter of conjecture.

²¹ These sections of the Act deal with serious and non-serious violations. For a discussion of such violations, see note 6 *supra*.

²² 540 F.2d at 162. This test is essentially the same one applied by the Third Circuit to the question of "willfulness" in *Frank Irey, Jr., Inc. v. Occupational Safety and Health Review Comm'n*, 519 F.2d 1200 (3d Cir. 1974), *aff'd en banc*, 519 F.2d 1215 (3d Cir. 1975). That test has met substantial opposition. See Annot., 31 A.L.R. Fed. 551 (1977), for a discussion of the problems in interpretation of "willful."

²³ 540 F.2d at 162 n.11.

B. *George Hyman Construction Co. v. Occupational Safety and Health Review Commission*

This question was more recently considered by the Fourth Circuit in *George Hyman Construction Co. v. Occupational Safety and Health Review Commission*.²⁴ The Hyman Company was cited for six violations of construction standards, four of which had been cited once previously and two of which had been cited twice previously. The administrative law judge affirmed the characterization of the citations as "repeated,"²⁵ but on review the three member Commission split three ways. Each commissioner proposed a different solution, resulting in an affirmation of the judge's decision.²⁶

The Fourth Circuit, in direct disagreement with the Third Circuit's decision in *Bethlehem Steel*, also affirmed. It adopted the view that the "common usage of the term connotes only that a single prior infraction need be proved to invoke the repeated violation sanction authorized by the Act."²⁷ The court criticized the *Bethlehem Steel* approach as resting on a "strained semantical argument."²⁸

In *Bethlehem Steel*, the Third Circuit placed great emphasis on the fact that "willfully" and "repeatedly" are combined together in section 666(a), evidencing congressional intent to treat the two similarly.²⁹ In contrast, the Fourth Circuit in *George Hyman* discerned that the intent of Congress was to differentiate between these two requirements, with "repeatedly" applying to recurrent violations that do not rise to the level of "willfulness."³⁰ Under this approach, any second

²⁴ 582 F.2d 834 (4th Cir. 1978).

²⁵ [1976-1977] OSHD (CCH) ¶ 20,721 (April 19, 1976). It is significant to note that the administrative law judge decided this case prior to the Third Circuit's opinion in *Bethlehem Steel*.

²⁶ [1976-1977] OSHD (CCH) ¶ 21,744 (April 26, 1977). Chairman Barnako agreed with the *Bethlehem Steel* decision that the "repeated" classification was designed to cover more flagrant violations, but he disagreed that a "repeated" violation must be preceded by at least two prior violations. He has since reversed his position; see note 10 *supra*. Commissioner Cleary's opinion is essentially the same as the Fourth Circuit's opinion in *George Hyman*, which requires only a second violation. Commissioner Moran agreed completely with the *Bethlehem Steel* approach.

²⁷ 582 F.2d at 839.

²⁸ *Id.* See note 19 *supra*, for a discussion of the semantic argument.

²⁹ 540 F.2d at 161.

³⁰ 582 F.2d at 840. The court relied on the use of the disjunctive "or" as evidence

violation is per se "repeated."

The persuasiveness of the *Geoge Hyman* opinion³¹ is buttressed by the fact that, at the present time, the same view is taken by the Secretary of Labor in the Occupational Safety and Health Administration's Field Operations Manual.³² A "repeated" violation is defined therein as simply "another violation" of a "previously cited" standard.³³ The essential element under this definition as well as the definition employed by the Fourth Circuit is proof of a prior violation.³⁴

of "congressional intent to identify two distinct categories of violation," each to be treated differently. *Id.* at n.10.

³¹ The Ninth Circuit is the only other circuit which has considered this question. In *Todd Shipyards Corp. v. Secretary of Labor*, 566 F.2d 1327 (9th Cir. 1977), the citation classified as "repeated" was for a violation identical to one cited three months earlier. Although Todd Shipyards builds and repairs a large number of vessels, the two violations occurred on the same ship and the court apparently felt such circumstances constituted a serious violation. The court specifically declined to follow *Bethlehem Steel*. It gave no indication as to how it would define "repeatedly;" it merely affirmed the citations because of the small penalties assessed.

A strong dissent was filed, however, by Judge Kennedy, urging acceptance of the *Bethlehem Steel* approach. 566 F.2d at 1332 (Kennedy, J., dissenting).

³² Field Operations Manual, ch. VIII, (B)(4), 1 EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 4360.2. (This manual was first issued in May, 1974, to replace the Compliance Operations Manual. It is updated when necessary.)

³³ In the Field Operations Manual, a "repeated" violation is described as follows:

a. Violation of any standard regulation, rule, order, or the general duty clause may be cited as repeated under Section 17(a) [666(a)] where, upon reinspection, another violation of the *previously cited* section of a standard, regulation, rule, order or condition violating the general duty clause is found.

b. *Repeated violations differ from willful* violations in that they may result from an inadvertent, accidental or ordinarily negligent act. A willful violation need not be one for which the employer has been previously cited. Where a repeated violation also meets the criteria for willful, a citation for willful violation will be issued.

Id. (emphasis in original).

³⁴ This matter is further complicated by recent decisions which suggest there is no need to resolve this issue at all if the penalties are under \$1,000.00. Those decisions point out that, as long as the proposed penalty is less than \$1,000.00, the violation can be classified as "willful," "repeated," "serious," or "non-serious" and still be proper under the Act. Only those violations which are penalized in an amount greater than \$1,000 *must* be classified as "willful" or "repeated" to be appropriate. *See, e.g., Turner Construction Co.*, 3 EMPL. SAFETY & HEALTH GUIDE ¶ 22,774 (April 17, 1978), in which the administrative law judge simply affirmed penalties of \$420 and \$560 without determining whether the violations were "repeated," since such a determination is, as a practical matter, unnecessary when the monetary penalty is less than \$1,000.

II. ADVANTAGES OF THE *Bethlehem Steel* APPROACH

The penalty provisions of the Act carefully differentiate among several distinct types of violations.³⁵ The categories are quite broad, however, and leave much to the discretion of the Secretary of Labor and the Review Commission.³⁶ The passage of the Act in 1970 was accompanied by the usual legislative debate,³⁷ yet little of it is relevant to section 666. Interestingly, both sides read the compromise³⁸ that brought about the present section as supporting their own position. To do so, each side must inject many of its own beliefs and opinions into the determination of the often elusive "congressional intent." The *Bethlehem Steel* approach is advantageous then, not for its analysis of legislative history, but for the manner in which it treats section 666(a) in light of the whole Act.

Perhaps the most important provision of section 666 is subsection (i), which reads:

The commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violation.³⁹

Since the Commission can consider previous violations in establishing *all* monetary penalties, section 666(a) should not be invoked every time a second violation is involved. As one circuit judge explained, "[I]f every second offender were a repeated violator it would make no sense for the statute to direct that the history of violations be considered in assessing the relatively minor penalties for single violations."⁴⁰ Section

³⁵ 29 U.S.C. § 666 (1970).

³⁶ Citations for violations of the Act are issued by the Department of Labor through the Secretary and his inspectors. A proposed penalty is submitted along with the citation which the Commission may, in its discretion, accept or reject. 29 U.S.C. §§ 658-59 (1970).

³⁷ [1970] U.S. CODE CONG. & AD. NEWS 5177.

³⁸ See note 20, *supra* for a discussion of this compromise.

³⁹ 29 U.S.C. § 666(i) (1970).

⁴⁰ *Todd Shipyards Corp. v. Secretary of Labor*, 566 F.2d 1327, 1332 (9th Cir. 1977) (Kennedy, J., dissenting). See also *George Hyman Construction Co.*, [1977-1978] OSHD (CCH) ¶ 21,774 (April 26, 1977) (opinion of Barnako, Chairman).

666(i) thus provides the means to assess a higher penalty for a second violation without classifying the violation as "repeated" for purposes of section 666(a).

The *Bethlehem Steel* manner of handling "willfully" and "repeatedly" alike also seems to be more desirable. The possible penalty for such violations is ten times greater than the possible penalty for other violations.⁴¹ In *Irey v. OSHRC*,⁴² the Third Circuit expressed its belief that the possible severity of these penalties indicates that these types of violations are considered to be far worse than "serious" violations. Although *Irey* dealt only with violations classified as "willful," the *Bethlehem Steel* opinion makes it clear that the Third Circuit also feels the same about "repeated" violations. Since the penalty can be so much greater, the conduct warranting that penalty must be much more flagrant than is found in a "serious" violation. *George Hyman* placed "willful" violations on a level above "repeated" violations, based on the use of the disjunctive "or" in the statute and its own notion of congressional intent. Any such classification cannot be logically founded in light of the absence of actual legislative intent, since the possible penalties are clearly the same for "willful" and "repeated" violations.

The *Bethlehem Steel* approach also allows more flexibility to the Commission and the Secretary. Under *George Hyman*, the second violation of the same standard or regulation is per se "repeated," the only real proof requirement being whether it is the same standard or regulation, or whether the violation is substantially similar to the prior violation.⁴³ Under *Bethlehem Steel*, however, the basic element is a "flaunting" of the Act. Therefore, if an employer is found guilty of violating several different regulations over a period of time and has sufficiently "flaunted" the Act, the Secretary could cite him for "repeatedly" violating the general duty requirement of section 654 which is a fundamental purpose of the Act. All involved would benefit from such a means of ensuring safe working conditions.

⁴¹ See text accompanying notes 5 and 6 *supra*.

⁴² 519 F.2d 1200 (3d Cir. 1974). See note 7 *supra* for the status of the controversy over "willfully."

⁴³ See *Potlatch Corp.* [1979] OSHD (CCH) ¶ 23,294 (January 29, 1979), and note 10 *supra* for the most recent Commission action in this area.

The employer who is not deterred by several citations is the employer that section 666(a) was intended to treat as a repeated violator. The more sizeable penalty is intended to produce the permanent adoption of methods of operation acceptable under the Act, rather than promoting temporary compliance merely to avoid section 666(d), which provides for daily penalties for uncorrected violations.⁴⁴ The Fourth Circuit confused this notion in stating that "the crux of the repeated violation penalty is failure to correct safety hazards."⁴⁵ Such a reading of section 666(a) essentially renders subsection (i) and (d) superfluous.

A practical reason for preferring uniformity in the law in this area is the prevention of a type of forum shopping which is possible under the Act. Section 660 provides for appeal of a commission order to "any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia."⁴⁶ An employer with a multi-state operation will often have three options as to where to file the petition for review. Thus the need for consistency is obvious.

CONCLUSION

In an analysis of the Occupational Safety and Health Act, two goals must be considered. First is the maintenance of high levels of safety in accordance with the Act's primary purpose. Second, as in any statutory scheme, is the preservation of uniformity and logical interpretation of the various parts of the law. Although the *Bethlehem Steel* approach seems more employer oriented, there is no sacrifice of safety under the definition used therein. The Secretary of Labor retains discretion in issuing citations and proposing penalties which will serve as an effective safeguard to the maintenance of high safety standards. Section 666 contains a number of penalty provisions which the Secretary must match to the violation. The *Bethlehem Steel* approach provides for more equitable use of

⁴⁴ 29 U.S.C. § 666(d) (1970).

⁴⁵ 582 F.2d at 840.

⁴⁶ 29 U.S.C. § 660(a) (1970).

all such provisions. In view of the present state of the law in this area, adoption of the *Bethlehem Steel* definition of "repeatedly" would solve the problem by supplying consistency and predictability to situations arising under this part of the Act.

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