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EMPLOYER LIABILITY UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT

Brennan v. OSHRC (Dic-Underhill)

The Occupational Safety and Health Act of 1970 (OSHA) represents the result of numerous congressional attempts to establish a comprehensive plan designed to maintain a hazard-free environment for employees. Despite exhaustive debates in Congress, the language employed in various sections of the Act is ambiguous, rendering much of the Act's effectiveness dependent upon judicial interpretation. One of the most critical issues yet to be resolved is the extent of an employer's responsibility in a multiemployer project. Recently, the Second Circuit, in Brennan v. OSHRC (Dic-Underhill), extended the potential liability of employers in such situations in two significant respects. The court held that an employer who controls a construction area in which a proscribed safety hazard exists can be held to be in violation of a safety


2 According to Senator Yarborough, one of the sponsors of the legislation, “this national industrial safety act is long overdue; for 30 years it has been advocated and urged.” 116 CONG. REC. 41,763 (1970). For a discussion of the legislative history of the OSHA and previously proposed health and safety legislation, see White, Occupational Safety and Health Background Prior to the Act of 1970, in OSHA § 1.10-.11 (111. Inst. for Cont. Leg. Educ. ed. 1974).

3 As stated in the Act itself, the congressional purpose and policy of the legislation is “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . . .” OSHA § 2(b), 29 U.S.C. § 651 (1970). The Act has been described as “one of the truly great landmark pieces of social legislation in the history of this country.” SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 1ST Sess., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 142 (Comm. Print 1971) (remarks of Senator Yarborough) [hereinafter cited as LEGISLATIVE HISTORY].

4 See, e.g., 116 CONG. REC. 38,378-94 (1970) (discussion of two competing safety bills); id. at 37,805-13 (debate on creation of Occupational Safety and Health Review Commission (OSHRC)); id. at 37,601-05 (discussion on granting power to Secretary of Labor to close down businesses where hazard poses “imminent danger”). As Senator Javits observed, “despite the substantial agreement which exists as to the objective of this legislation, the most bitter labor-management political fight in years has erupted over the means to achieve that objective.” S. REP. No. 1282, 91st Cong., 2d Sess. 54 (1970) (Individual Views of Mr. Javits).

5 One commentator has remarked that the Act “has been viewed by many as a 'lawyer's' law since it presents many opportunities for interpretation by the legal profession.” Moore, The Federal Occupational Safety and Health Act of 1970, 45 WIS. B. BULL. 46 (1972).


7 513 F.2d 1032 (2d Cir. 1975). To avoid the confusion of citing to a number of cases all of which are entitled Brennan v. OSHRC, the name of the employer has been added after OSHRC.
standard even though the endangered employee is in the employ of another employer engaged in the multiemployer project.\textsuperscript{8} Moreover, mere access of an employee to the hazard was found to be sufficient to subject an employer to the sanctions imposed by the Act.\textsuperscript{9}

Dic-Underhill, a joint venture composed of Underhill Construction Corp. and Dic Concrete Corp., was engaged as a subcontractor in the construction of four high-rise buildings in the Harlem River Park Housing Project. In November 1972, an OSHA compliance officer, while conducting a routine inspection of the partially constructed buildings, found violations of two regulations setting forth standards promulgated by the Secretary of Labor.\textsuperscript{10} As a result, in January 1973, the Secretary cited Dic-Underhill for "serious"\textsuperscript{11} and "non-serious"\textsuperscript{12} violations of the regulations.

Upon Dic-Underhill's timely contest of the citation, the Secretary issued a formal complaint before the Occupational Safety and Health Review Commission (OSHRC), the adjudicatory body established by the Act, and in April 1973, the case was heard by an administrative law judge appointed by the Commission.\textsuperscript{13} Based

\begin{itemize}
  \item \textsuperscript{8} Id. at 1038. Although the court's holding appears to indicate that a finding of control is sufficient to impose liability, the facts in \textit{Dic-Underhill} involved an employer who both controlled and \textit{created} the safety violation. Consequently, in the future, courts may interpret \textit{Dic-Underhill} as imposing creation as an added requirement.
  \item \textsuperscript{9} Id.
  \item \textsuperscript{10} Section 6(b) of the OSHA empowers the Secretary of Labor to promulgate safety standards in furtherance of the purpose of the Act and prescribes the procedure by which this is to be done. OSHA § 6(b), 29 U.S.C. § 655(b) (1970).
  
  The first citation issued to Dic-Underhill was for a violation of 29 C.F.R. § 1926.500(b)(1) (1975). This regulation provides that "[m]aterial stored inside buildings under construction shall not be placed within 6 feet of any hoistway or inside floor openings, nor within 10 feet of an exterior wall which does not extend above the top of the material stored." Id. In two separate locations in the partially completed project, Dic-Underhill had stacked material 3 to 5 feet in height, extending approximately 1 foot over the edge of a floor which had neither an exterior wall nor a perimeter guard. Employees, although apparently not those of Dic-Underhill, were seen working directly under the overhanging material. 513 F.2d at 1034.
  
  The second violation was based upon 29 C.F.R. § 1926.500(d)(1) (1975) which provides in pertinent part that "[e]very open-sided floor . . . shall be guarded by a standard railing . . . except where there is entrance to a ramp, stairway, or fixed ladder." The citation for this violation was issued as the result of three separate incidents noted by the inspection officer. On the 15th floor of "Building D," the officer noticed two Dic-Underhill employees performing a task which required hanging over the outer edge of the floor. On the 17th and 18th floors of "Building B," he observed Dic-Underhill's employees approximately 10 to 15 feet from the edge of the floor. Although these floors were all open sided, there was no perimeter guard on any of them. 513 F.2d at 1035-36.
  
  \item \textsuperscript{11} The OSHA states that a "serious" violation exists when there is "a substantial probability that death or serious physical harm could result . . . ." OSHA § 17(k), 29 U.S.C. § 666(j) (1970).
  
  \item \textsuperscript{12} A "non-serious" violation occurs when the "violation is specifically determined not to be of a serious nature . . . ." Id. § 17(c), 29 U.S.C. § 666(c).
  
  \item \textsuperscript{13} Once a citation is issued to an employer, \textit{id.} § 9(a), 29 U.S.C. § 658(a), the employer
upon a finding that no Dic-Underhill employee had been exposed to the condition allegedly amounting to the non-serious violation, the judge held that this violation had not been established.\(^{14}\) The serious violation was upheld, however, on the ground that five of Dic-Underhill's employees had been exposed to a hazard created by their employer.\(^{15}\)

On review, the OSHRC summarily affirmed the administrative law judge's disposition of both violations.\(^{16}\) Chairman Moran vigorously dissented from the affirmation of the serious violation, contending that the evidence failed to demonstrate exposure of any Dic-Underhill employee to the hazard. He concluded, therefore, that an essential element of the violation, namely, actual presence within the zone of danger, was lacking.\(^{17}\) The Secretary of


\(^{15}\) Id. at 145, 1971-1973 CCH OSHD ¶ 16,276.

\(^{16}\) Id. at 134, 1973-1974 CCH OSHD ¶ 17,384, at 21,911-12.

\(^{17}\) Id. at 136-37, 1973-1974 CCH OSHD ¶ 17,384, at 21,912 (Chairman Moran, dissenting). With respect to the three employees who were working approximately 10 to 15 feet from the unguarded edge of the floor, Chairman Moran stated:

In this case, there is no evidence that the three workers were required to move closer than 10 feet from the floor perimeters in order to accomplish their work. The fact that they \textit{could} have moved closer is not controlling. \ldots

\ldots Occupational safety and health standards are not building codes. \ldots One can violate the Occupational Safety and Health Act by failing to comply with an occupational safety and health standard—but one cannot be in violation of a
Labor petitioned to the Second Circuit for review of the OSHRC's dismissal of the non-serious violation, and Dic-Underhill cross-petitioned for review of the Commission's affirmance of the serious violation.\footnote{18}

The Second Circuit, therefore, was required to resolve two issues. Initially, the court had to decide whether the sanctions under the Act may be imposed upon mere proof of employee access to a hazard or whether the employee's actual presence within the zone of danger is required. The second issue facing the court was whether a subcontractor who controls a work area in which a safety hazard exists can be held to have violated section 5(a)(2) of the OSHA, which obligates employers to comply with the Act's standards,\footnote{19} upon proof that the employees of a different employer "in a common undertaking" were exposed to the hazard.\footnote{20}

\textit{standard} unless his failure \ldots has thereby exposed one or more of his employees to hazard. In other words, the standards cannot stand alone.\footnote{Id. (emphasis in original).}

As to the employees leaning over the edge of the floor, Chairman Moran stated that there was unrebutted evidence that had there been perimeter guards the employees would not have been able to perform their work. Relying on Commission precedent, he stated that noncompliance with a regulation may be justified if necessary to perform one's job.\footnote{Id. at 135-36, 1973-1974 CCH OSHD \$ 17,384, at 21,912. For the reply of the Second Circuit on this point, see note 23 infra.}

Section 11(a) provides in pertinent part that "[a]ny person adversely affected or aggrieved by an order of the Commission \ldots may obtain a review of such order in [a] United States court of appeals \ldots." OSHA \$ 11(a), 29 U.S.C. \$ 660(a) (1970). Subdivision (b) of this section gives the same right to the Secretary of Labor.\footnote{Id. \$ 11(b), 29 U.S.C. \$ 660(b).}

Section 5(a)(2) states that "[e]ach employer \ldots shall comply with occupational safety and health standards promulgated under this chapter."\footnote{Section 5(a)(2) states that "[e]ach employer \ldots shall comply with occupational safety and health standards promulgated under this chapter." Id. \$ 5(a)(2), 29 U.S.C. \$ 654(a)(2). Section 5(a)(1) ("general duty" clause) presents another basis upon which liability may be imposed. This section states that "[e]ach employer \ldots shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." Id. \$ 5(a)(1), 29 U.S.C. \$ 654(a)(1). See generally Morey, supra note 6; White & Carney, OSHA Comes of Age: The Law of Work Place Environment, 28 Bus. LAW. 1309, 1311-13 (1973). The dispute over the potential liability of an employer in a multiemployer situation is, in part, a consequence of the controversy over the applicability of the term "his employees," found in \$ 5(a)(1), to \$ 5(a)(2). Read literally, \$ 5(a)(2) requires only the violation of a standard for imposition of liability. Reading the term "his employees" into \$ 5(a)(2) adds to this requirement the additional requirement that the exposed employees be the employer's own.}

The Second Circuit responded to Dic-Underhill's second contention, that the materials were not "stored" since they would shortly be used, by noting that "[a]ll construction materials are 'stored' until they are incorporated in the building \ldots."\footnote{513 F.2d at 1036. Dic-Underhill raised a number of other contentions contesting the applicability of 29 C.F.R. \$ 1926.250(b)(1) (1975), the regulation pertaining to storage of materials. The court quickly disposed of these arguments. First, Dic-Underhill contended that the regulation did not cover its activities. For the court's resolution of this issue see note 14 supra. The Second Circuit responded to Dic-Underhill's second contention, that the materials were not "stored" since they would shortly be used, by noting that "[a]ll construction materials are 'stored' until they are incorporated in the building \ldots." 513 F.2d at 1036. Finally Dic-Underhill argued that it could permissibly violate the standard because construction operations would otherwise be hindered. In countering this argument, the court cited the power granted the Secretary in OSHA \$ 6(a)-(b), 29 U.S.C. \$ 655(a)-(b) (1970), to promulgate standards and the administrative means provided by id. \$ 6(d), (f), 29 U.S.C. \$ 655(d), (f), to obtain variances from, or judicial review of, the standards. 513 F.2d at 1036. These procedures would have allowed Dic-Underhill the opportunity to either exclude itself for the employees.}
The court, in a unanimous opinion authored by Judge Oakes,\(^\text{21}\) affirmed the decision of the OSHRC as to the serious violation, holding that access to the zone of danger is sufficient to constitute proof of employee exposure.\(^\text{22}\) In rejecting Chairman from regulation or challenge the standard in court, thereby relieving itself of construction hindrances. These remedies, however, are only available prior to citation. Consequently, the Second Circuit concluded that the time for making such a claim had passed. For an informative discussion of variances under the OSHA, see Greenfield & Secaras, Variances, in OSHA § 6.2-.16 (Ill. Inst. for Cont. Leg. Educ. ed. 1974).

\(^{21}\) The Second Circuit panel consisted of Judges Oakes, Gurfein, and Medina.

\(^{22}\) 513 F.2d at 1038-39. It may be argued that the issue of access versus actual exposure was never reached by the Dict-Underhill court, or if the court did in fact reach the issue, that it did so only in an ambiguous manner. Any such uncertainty regarding the court’s holding primarily stems from the fact that throughout the opinion the issue of access versus actual exposure is treated in conjunction with the liability of an employer in a multiemployer project. For example, in stating the holding of the court, Judge Oakes said:

[T]o draw from this a general rule that standards under the Act can be violated only when a cited employer’s own employees are shown to be directly exposed to a violation of a standard seems to us to be wholly unwarranted.... [W]e hold that to prove a violation of OSHA the Secretary of Labor need only show that a hazard has been committed and that the area of the hazard was accessible to the employees of the cited employer or those of other employers engaged in a common undertaking.

\textit{Id.} at 1037-38 (emphasis added). Although the language of the court appears to acknowledge two distinct standards, \textit{viz}, direct exposure and access, the terms are never expressly defined.

Further support for the argument that the Dict-Underhill court did not in fact establish a standard of access may be gleaned from the facts of the case. It is unclear whether the Second Circuit actually found that Dict-Underhill’s employees were directly exposed to the violation in question. If the language of the court is interpreted as saying that the employees were directly exposed, the court’s discussion of the issue of access would of course be mere dictum.

Based on the totality of the circumstances and the opinion, however, it is submitted that the court did in fact hold that a finding of mere access to a hazard created by a violation is sufficient to impose liability on a cited employer. It certainly appears that the court intended to acknowledge two opposing standards. As the court stated, to conclude that the Act can be violated only when a cited employer’s own employees are shown to be directly exposed ... seems ... wholly unwarranted.... [W]e hold that to prove a violation of OSHA the Secretary of Labor need only show that a hazard has been committed and that the area of the hazard was accessible to the employees of the cited employer or those of other employers ....

\textit{Id.} at 1037-38 (emphasis added).

While the terms “direct exposure” and “access” are not expressly defined in the opinion, their definitions are not unascertainable. For a violation to be established, someone’s employee must be exposed to a hazard. The question then becomes what constitutes the definition of “exposure.” Use of the adjective “direct” with the term “exposure” can only mean that an employee must be in actual danger from the violation of a safety regulation. On the other hand, access, by definition, obviates any need for actual exposure. Furthermore, it is not until the court discusses the holding of Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255 (4th Cir. 1974), a case which specifically examined the issue of access versus actual (direct) exposure, that the Second Circuit begins to employ the term “access.” 513 F.2d at 1037. If the Second Circuit was not deciding this issue, then there would have been no need to quote what it termed the “cogent observations” of the Gilles & Cotting court concerning access versus actual exposure. \textit{Id.} at 1037 n.9. After presenting the distinction that the Fourth Circuit had developed between access and actual presence within the zone of danger, it is highly improbable that the court would then, without clarification, use the term “accessible” to mean something else.

Having established that the Second Circuit did intend to address the issue of access versus direct exposure, it must be further determined whether this was part of its holding or mere dictum. Admittedly, with respect to the non-serious violation, it was dictum, for the
Moran's contention that actual presence within the zone of danger is necessary to establish a violation,\(^{23}\) Judge Oakes relied upon both the legislative history of the OSHA and judicial precedent.\(^{24}\) Accordingly, he based his opinion on the belief that the "keystone of the Act . . . is preventability."\(^{25}\)

Apparent inconsistency permeates the OSHRC decisions on the question of what constitutes exposure to a hazard.\(^{26}\) In defining exposure, the Commission has vacillated between a standard of access to the zone of danger and a standard of actual presence within the zone of danger.\(^{27}\) Prior to Dic-Underhill, the only circuit

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**Second Circuit Note, 1974 Term**

Second Circuit found that Dic-Underhill's employees were "observed passing or working" directly below the hazard. \(\textit{Id.}\) at 1038. Nevertheless, the language of the court certainly appears to indicate that had there only been evidence of access the court still would have affirmed the violation: "[M]aterial overhanging a floor of a . . . building project creates a hazard to employees on the job site who work or may work below the material." \(\textit{Id.}\) (emphasis added).

With respect to the serious violation, both Chairman Moran, in his dissent, 7 OSAHRC at 134-37, 1973-1974 CCH OSHD ¶ 17,384, at 21,912 (Chairman Moran, dissenting), noted in Brennan v. OSHRC (Dic-Underhill), 513 F.2d 1032, 1038 n.7 (2d Cir. 1975), and Dic-Underhill in its brief, Brief for Dic-Underhill at 16-18, Brennan v. OSHRC (Dic-Underhill), 513 F.2d 1032 (2d Cir. 1975), raised the contention that the employees who were 10 to 15 feet from the edge of the open-sided floor perimeters were not directly exposed to a safety hazard. Additionally, the OSHRC has previously held that being 10 feet from the edge of an open-sided floor perimeter does not constitute direct exposure. A. Munder & Son, Inc., — OSAHRC —, 1971-1973 CCH OSHD ¶ 15,757 (Review Comm'n Judge 1973), \(\textit{review ordered,}\) 3 CCH EMP. SAFETY & HEALTH GUIDE (CCH OSHD) ¶ 7995, at 5923 (Comm'n 1975). Although Judge Oakes never discussed this issue, it is highly unlikely, especially in light of the positions mentioned above, that the court would now hold 10 to 15 feet to be direct exposure without explicitly so stating. Furthermore, the court emphasized the preventative nature of the Act, stating that "[t]he legislative history is supportive of the proposition that actual observed danger is unnecessary." 513 F.2d at 1039 (emphasis added).

\(^{23}\) 513 F.2d at 1039. The court also rejected Chairman Moran's contention that there was insufficient evidence to prove the violation with respect to the employees leaning over the edge of the floor. \(\textit{See note 17 supra.}\) It has been established that it is a defense to a violation if adherence to the regulation would create an impossibility of performance. \(\textit{See, e.g.,}\) DeLuca Constr. Co., 2 OSAHRC 435, 1971-1973 CCH OSHD ¶ 15,394 (Review Comm'n Judge 1973) (violations pertaining to unguarded elevator shaft and unguarded material hoists vacated where barricades removed so that work could be performed); La Sala Contracting Co., 2 OSAHRC 976, 1971-1973 CCH OSHD ¶ 15,492 (Review Comm'n Judge 1973) (citation for failure to guard elevator shaft vacated because barricade was removed to permit bricklayers to perform their work). However, citing to OSHA § 12(g), 29 U.S.C. § 661(f) (1970), and Fed. R. Civ. P. 8(c), the court noted that to show that the work could not otherwise have been done is "at most an affirmative defense" which Dic-Underhill had failed to establish. 513 F.2d at 1035, \(\textit{citing NLRB v. Mastro Plastics Corp., 354 F.2d 170 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966).}\)


\(^{25}\) \(\textit{See}\) Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1266 (4th Cir. 1974).

\(^{26}\) For example, in J.E. Roupp & Co., 7 OSAHRC 919, 1973-1974 CCH OSHD ¶ 17,660 (Comm'n 1974), the OSHRC summarily affirmed the administrative judge's decision that employees of a cited employer must actually be exposed to the hazards. Commissioner Cleary in partial dissent, however, criticized the majority for holding that "actual exposure is required before a violation will be found." \(\textit{Id.}\) at 923, 1973-1974 CCH OSHD ¶ 17,660, at 22,069 (Comm'r Cleary, dissenting). In Everhart Steel Constr. Co., 16 OSAHRC 700,
court which had directly addressed itself to this issue was the Fourth Circuit, in *Brennan v. Gilles & Cotting, Inc.*28 There, the administrative law judge, having found that Gilles & Cotting's employees had access to the zone of danger, held Gilles & Cotting liable for violations pertaining to the maintenance of scaffolding assemblies.29 In a two to one decision, the OSHRC reversed.30 The Commission majority, not expressly dealing with the issue of access as opposed to presence within the zone of danger, referred to it only obliquely, saying that "no employee of this Respondent [Gilles & Cotting] was affected by any alleged unsafe condition of the scaffold."31 Although a rejection of the access doctrine may be implied from this language, the term "affected" employed by the Commission is ambiguous and leaves room for doubt as to whether rejection was its intention.

The Fourth Circuit, recognizing this ambiguity, was uncertain whether the OSHRC was rejecting the access approach, and if so, whether the Commission was necessarily establishing an actual presence requirement.32 Judge Winter, speaking for the court, espoused policy arguments with regard to both standards33 and

1973-1974 CCH OSHD ¶ 17,062 (Review Comm'n Judge 1973), aff'd, 16 OSAHRC 696, 3 CCH EMP. SAFETY & HEALTH GUIDE (CCH OSHD) ¶ 19,513 (Comm'n 1975), an electric drill not properly grounded was held to be a violation because it was accessible to employees. For further illustrations of the inconsistent views voiced by the OSHRC, see Arizona Pub. Serv. Co., 4 OSAHRC 1229, 1973-1974 CCH OSHD ¶ 16,800 (Comm'n 1973) (violation vacated since employee who stopped 3 feet away from lightning arrester could come within 2 feet before actual exposure to hazard), A. Munder & Son, Inc., — OSAHRC—, 1971-1973 CCH OSHD ¶ 15,757 (Review Comm'n Judge 1973), review ordered, 3 CCH EMP. SAFETY & HEALTH GUIDE (CCH OSHD) ¶ 7995, at 5928 (Comm'n 1975) (perimeter guards absent on open-sided floors not a violation because no employee within 10 feet of perimeter and therefore within zone of danger); Ellison Elec., I OSAHRC 547, 1971-1973 CCH OSHD ¶ 15,133 (Review Comm'n Judge 1972) (citation for stairways erected in violation of safety standard vacated because of failure to show actual use of stairways); and Allied Elec. Co., 1 OSAHRC 440, 451, 1971-1973 CCH OSHD ¶ 15,103 (Review Comm'n Judge 1972) (dictum) (access sufficient).

28 504 F.2d 1255 (4th Cir. 1974).
29 Gilles & Cotting, Inc., 4 OSAHRC 1084, 1094, 1971-1973 CCH OSHD ¶ 15,140, at 20,216 (Review Comm'n Judge 1972), rev'd, 4 OSAHRC 1080, 1973-1974 CCH OSHD ¶ 16,763 (Comm'n 1973), rev'd and remanded, 504 F.2d 1255 (4th Cir. 1974). Although it is debatable whether the judge found that the employees having access to the hazard were those of Gilles & Cotting or those of another employer on the site, the Fourth Circuit proceeded on the assumption that they were Gilles & Cotting's employees. 504 F.2d at 1263.
31 *Id.* at 1080, 1973-1974 CCH OSHD ¶ 16,763, at 21,512.
32 504 F.2d at 1264 & n.6.
33 The question . . . is important to enforcement of the Act. If access alone is sufficient to show a violation, the Secretary will often be able to make out a case solely on the basis of the testimony of the compliance officer. If, however, proof of employee presence in the zones of danger is required, then unless the compliance officer chances to see employees in a danger zone at the time of his inspection, the Secretary will have to depend on workers' willingness to testify against their employers under the anti-retribution umbrella of § 11(c)(1) of the Act. Recalcitrant
ultimately stated that the issue could "be answered either way consistent with the statutory purposes of the Act." Concluding that resolution of this issue should be entrusted to the OSHRC, the Fourth Circuit remanded the issue to the Commission for an "express decision of the issue of 'access' versus 'actual exposure.'"

In holding that access alone is sufficient, the Second Circuit accentuated the fact that a major emphasis of the Act is the prevention of safety hazards and, thereby, the protection of workers. Although the OSHA does not expressly address the issue, sections of the Act do indicate that potential exposure to a hazard is sufficient to establish a violation. Additionally, the legislative history of the OSHA lends support to the conclusion that access to the zone of danger is sufficient. Stating that the primary objective of the legislation is the prevention of death and disability, the House Labor Committee urged that adequate warning of possible hazards be guaranteed. Finally, there is case law at the Commission level which provides support for the Second Circuit's conclusion. In adopting a standard of access, it would appear that the Second Circuit has provided an interpretation which will better effectuate the purposes of the Act.

In determining Dic-Underhill's liability for the non-serious violation, the Second Circuit faced the question of whether an employer may be cited for a violation if the only employees exposed to a zone of danger are employees who have refused to correct safety violations disclosed by an inspection unless for each and every violation the Secretary is able to marshal employee testimony . . . .

*Id.* at 1263.

*Id.* at 1264. The court remanded for two reasons: (1) an administrative agency must explain why they rejected the holding of an administrative judge; and (2) the agency must give reasons to account for a change in "policies or rules apparently dispositive of a case." *Id.*

Section 5(a)(1) of the Act uses the phrase "likely to cause death or serious physical harm." OSHA § 5(a)(1), 29 U.S.C. § 654(a)(1) (1970) (emphasis added). Section 8(f) allows employees to request an inspection if they believe a hazard exists which threatens harm. *Id.* § 8(f), 29 U.S.C. § 657(f). Section 17(k) defines a "serious" violation as one which "could result" in serious harm. *Id.* § 17(k), 29 U.S.C. § 666(f) (emphasis added).

*Id.* at 451, 1971-1973 CCH OSHD at 15,103.
posed to the hazard are those of another employer in a multiemployer situation. One reason the OSHRC had dismissed the non-serious violation was because it had found that none of Dic-Underhill’s employees were exposed to the hazard. In reversing the dismissal, the Second Circuit agreed with the Secretary of Labor’s view that an employer in control of and thereby responsible for the maintenance of an area should be held liable for a violation of section 5(a)(2) despite the fact that none of his own employees were exposed.

Throughout its short history, the OSHRC has continually held that an employer will not be liable for a violation of the OSHA if his own employees are not exposed to the hazard. One of the earliest Commission decisions propounding this view is City Wide Tuckpointing Service Co. There, the administrative judge had held the company to be in violation of five occupational safety and health standards promulgated under the OSHA. The OSHRC upheld four of the violations, but reversed the holding of the judge on the fifth, finding that the respondent’s employees were not endangered by the safety violation. The Commission held that “[o]nly where employees of a cited employer are affected by non-compliance with an occupational safety and health standard can such employer be in violation of section 5(a)(2) of this Act.”

Section 5(a)(1), known as the “general duty” clause, provides that “[e]ach employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause . . . harm to his employees. Although the term “his employees” is not found in section 5(a)(2), the Commission in City Wide impliedly imposed this qualification in interpreting that section. Applying this limitation in conjunction with an interpretive regulation issued by the Secretary of Labor, Chairman Moran explained that to hold differently “on

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39 7 OSAHRC at 134, 1973-1974 CCH OSHD ¶ 17,384, at 21,911.
40 513 F.2d at 1037-38.
43 3 OSAHRC at 196, 1971-1973 CCH OSHD ¶ 15,193.
44 The Commission sat as a quorum of two consisting of Chairman Moran and Commissioner Van Namee. Commissioner Cleary was not present.
45 3 OSAHRC at 196, 1971-1973 CCH OSHD ¶ 15,769, at 21,051.
47 3 OSAHRC at 195, 1971-1973 CCH OSHD ¶ 15,769, at 21,051. The regulation issued
the basis of the facts in this case would be an expansion of the intent and purpose of the Act."⁴⁸

Approximately one year later, in *Hawkins Construction Co.*,⁴⁹ the Commission majority reiterated its position on this issue and further explained its rationale. Hawkins, the general contractor, had dug a large excavation without adhering to safeguards required by the OSHA. Consequently, an employee of a subcontractor was killed when the excavation caved in. The citation against Hawkins was vacated, however, because none of Hawkins' employees had been at the excavation site for weeks, and therefore, none were exposed to the noncomplying conditions. Chairman Moran, in presenting the majority view, maintained that the responsibility must fall upon the employer who had control over the exposed employees rather than on the employer who had created the hazardous condition.⁵⁰

Notwithstanding the Commission's purported recognition of the remedial nature of the Act,⁵¹ its interpretation of section 5(a)(2) seems to unduly constrict the intended operation of that section. By engraving upon section 5(a)(2) the section 5(a)(1) "his employees" limitation, the Commission has predicated section 5(a)(2) liability on the existence of an employee-employer relationship,⁵² thereby obfuscating the seemingly clear language of that section which solely obligates each employer to comply with standards promulgated under the Act. In addition to limiting the application of section 5(a)(2) to situations involving a direct employee-employer relationship, the Commission has further restricted the Act by adopting a narrow definition of that relationship. Although it has stated that the employment relationship should not be defined by the Secretary states that "[i]n the event a standard protects on its face a class of persons larger than employees, the standard shall be applicable under this part only to employees and their employment and places of employment." 29 C.F.R. § 1910.5(d) (1975). Chairman Moran felt that this regulation limited liability under the OSHA to the situation where an employee of the cited employer is exposed to a violation of a safety standard. 3 OSAHRC at 195, 1971-1973 CCH OSHD ¶ 15,769, at 21,051. The Second Circuit, however, did not believe the regulation should be construed so narrowly as to exclude from the protection of the Act, merely because their employer was not cited, employees whose safety was jeopardized. It took the position that the regulation protected all employees on a particular worksite, but excluded pedestrians or "unrelated third persons" who might be passing by or through the location. 513 F.2d at 1038 n.10.

⁴⁸ 3 OSAHRC at 195, 1971-1973 CCH OSHD ¶ 15,769, at 21,051.
⁵₀ Id. at 570-71, 1973-1974 CCH OSHD ¶ 17,851, at 22,196.
according to common law concepts, it appears that the Commission majority has adopted the common law definitions of "master" and "servant." While this may be suitable for tort law, it fails to effectuate the intent of the OSHA and does not take cognizance of judicial precedent requiring that in social legislation the definitions of employee and employer be determined in light of the legislation's purpose.

One alternative was suggested by Commissioner Cleary, in his dissent in *Hawkins*, when he stated that the "only meaningful approach" to this issue is to determine which employer has control over the worksite as well as control over the workers and therefore "the capacity and the legal obligation to prevent unsafe working conditions." The dissent forcefully asserted that for purposes of the Act a prime contractor should be considered the joint employer of a subcontractor's employees if he has the power to direct their activities. Sharply criticizing the Commission majority, Commis-

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54 Id. at 1082-83, 1973-1974 CCH OSHD ¶ 16,763, at 21,513.


56 See NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944). Hearst contended that since Congress did not explicitly define the term "employee" it should be derived from common law standards. Id. at 119-120. The Supreme Court replied that the term "takes color from its surroundings" and derives meaning from the purpose to be achieved by the statute. Id. at 124, *quoting* United States v. American Trucking Ass'ns, 310 U.S. 534, 545 (1940); *accord*, United States v. Silk, 331 U.S. 704, 711-13 (1947) (definition of employees under Social Security Act); Walling v. Portland Terminal Co., 330 U.S. 148, 150-51 (1947) (definition of employees under Fair Labor Standards Act).

57 8 OSAHRC at 572, 1973-1974 CCH OSHD ¶ 17,851, at 22,197 (Comm'r Cleary, dissenting).

58 Id. While the position propounded by Commissioner Cleary in *Hawkins* would serve to eliminate obstacles to enforcement in a situation involving a general contractor and a subcontractor, it would be inapplicable in a *Dic-Underhill* situation where only two subcontractors are involved. It is submitted, however, that Commissioner Cleary's position in *Hawkins* was so restricted because of the facts of the case.

Interestingly, in Martin Iron Works, Inc., 9 OSAHRC 695, 1973-1974 CCH OSHD ¶ 18,164 (Comm'n 1974), Commissioner Cleary, again dissenting, argued to extend liability to a subcontractor who endangered another subcontractor's employees. Although indicating that § 5(a) might also support such an extension, he based the extension of liability on OSHA § 9(a), 29 U.S.C. § 658(a) (1970), asserting that § 9(a) is broader than § 5(a) and "permits a citation for violation of a standard even when there is no violation of section 5(a)." 9 OSAHRC at 697, 1973-1974 CCH OSHD ¶ 18,164, at 22,342 (Comm'r Cleary, dissenting). In so extending liability, Commissioner Cleary stated:

To find that respondent is an employer subject to citation under section 9(a), it is sufficient that respondent, a subcontractor on a construction site, removed the plate at the request of a second subcontractor at the site, creating a violation of a standard to which employees of a third subcontractor were exposed. Id. at 698, 1973-1974 CCH OSHD ¶ 18,164, at 22,342 (Comm'r Cleary, dissenting). To the extent that Commissioner Cleary's proposed expansion of the employee-employer relationship results in extended liability, it deserves credit. His logic, however, appears somewhat faulty. Section 9(a) is merely the section which grants to the Secretary of Labor the authority
sioner Cleary concluded that they ignored the "realities of the construction industry" and the "purpose of the Act."\[^{59}\]

In Gilles & Cotting, the Fourth Circuit, like the Commission in Hawkins, was faced with the issue of whether a general contractor could be held in violation of a safety standard when the only employees known to be exposed to the hazard were those of a subcontractor. In upholding the citations against Gilles & Cotting, the administrative judge rested his decision on the ground that all employees at the worksite had access to the hazard.\[^{60}\] In support of his conclusion the judge opined that "in an operation such as here involved in the construction of a building where subcontractors are also used it is logical and necessary that overall safety and accident prevention be the responsibility of the general contractor."\[^{61}\] The OSHRC reversed the administrative judge on the ground that no exposure of Gilles & Cotting's employees to the safety violations was proved\[^{62}\] and that the Act was not intended to impose liability on an employer if his employees were not exposed to the hazard.\[^{63}\]

The Fourth Circuit held that a regulation promulgated by the Secretary of Labor had narrowed the issue to whether or not general contractors are joint employers of a subcontractor's employees.\[^{64}\] Although disputing the basis upon which the OSHRC had rested its decision, the Fourth Circuit negatived the implications of this disagreement by holding that the issue could be decided either way consonant with the purposes of the OSHA.\[^{65}\] The court further stated that determination of the issue is properly within the agency's discretion.\[^{66}\] Rejecting the contention of the Secretary of Labor that the issue should be left to his discretion, the Fourth Circuit held that the concern here was "the power to adopt rules or policies in adjudication"\[^{67}\] and accordingly deferred to the Commission.

to issue citations, whereas § 5 establishes the duties that employers have under the Act. It is submitted that any extension of liability must therefore stem from § 5.

\[^{59}\] 8 OSAHRC at 572, 1973-1974 CCH OSHD ¶ 17,851, at 22,197 (Comm'r Cleary, dissenting).


\[^{61}\] Id., 1971-1973 CCH OSHD ¶ 15,140, at 20,216.


\[^{63}\] Id. at 1081-83, 1973-1974 CCH OSHD ¶ 16,763, at 21,512-13.

\[^{64}\] 504 F.2d at 1260 & n.2. In arriving at the conclusion that the issue to be resolved is whether general contractors should be considered the joint employers of a subcontractor's employees, the Fourth Circuit appears to have adopted an interpretation of the applicable regulation, 29 C.F.R. § 1910.5(d) (1975), similar to that propounded by the OSHRC. The Commission's interpretation of the regulation is set forth in note 47 supra.

\[^{65}\] 504 F.2d at 1261.

\[^{66}\] Id. at 1261-62.

\[^{67}\] Id. at 1262 (emphasis in original).
In contrast, the Dic-Underhill court refused to subordinate its views to that of the Commission.68 Although Judge Oakes conceded that the Commission's interpretation could find some support in section 5(a)(1) of the Act, he did not consider this finding dispositive.69 He noted that Dic-Underhill was cited under section 5(a)(2) and that the language of this section requires only that an employer fail to obey the safety standards promulgated under the Act.70 Again relying on congressional intent, the Second Circuit based its reversal of the Commission's dismissal of the non-serious violation on the ground that a broad interpretation of the Act is necessary to effectuate its remedial purpose.71

In deciding that control of employees should not be the sole criterion, the Second Circuit rejected the test of whose employee is endangered and instead established control over the work area as the determinative factor.72 It is submitted that in doing so the court

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68 The Second Circuit believed that it was applying a different scope of review than that applied by the Fourth Circuit:

We have taken the view, in contradistinction to that of the Fourth Circuit, that our role "is to decide whether the Commission's interpretation of the Regulation is unreasonable and inconsistent with its purpose, the normal standard for review of the interpretation of a regulation by the agency charged with its administration."

513 F.2d at 1038, quoting Brennan v. OSHRC (Gerosa, Inc.), 491 F.2d 1340, 1344 (2d Cir. 1974). It is submitted, however, that although the courts differed in their interpretation of the regulation, they applied the same standard of review. The Second Circuit found "the Commission's narrow interpretation of the construction regulations unreasonable," 513 F.2d at 1038, while the Fourth Circuit felt that "the question . . . [could] be answered either way . . . [and] the choice . . . [was] appropriately committed to [the Commission]." 504 F.2d at 1261-62.

69 513 F.2d at 1037.

70 Id. at 1037-38. It is submitted that § 5(a)(1) was created solely to supplement § 5(a)(2), not to limit its application.

The committee recognizes that precise standards to cover every conceivable situation will not always exist. This legislation would be seriously deficient if any employee were killed or seriously injured on the job simply because there was no specific standard applicable to a recognized hazard . . . . . . . Employers have primary control of the work environment and should insure that it is safe and healthful. Section 5(a)(1) . . . merely restates that each employer shall furnish this degree of care.

LEGISLATIVE HISTORY, supra note 3, at 149.

71 513 F.2d at 1038-39. The OSHA has unanimously been considered remedial legislation, see, e.g., Brennan v. OSHRC (Santa Fe Trail Transp. Co.), 505 F.2d 869, 872 (10th Cir. 1974); Brennan v. OSHRC (Gerosa, Inc.), 491 F.2d 1340, 1343 (2d Cir. 1974); 116 CONG. REc. 37,628-30 (1970) (remarks of Senator Cranston), and should therefore be broadly and liberally interpreted in accordance with its nature. See, e.g., Peyton v. Rowe, 391 U.S. 54, 65 (1968) (statute granting standing to petition for writ of habeas corpus construed broadly in keeping with remedial legislation); A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945) (exemption from remedial statute construed narrowly so as not to frustrate intent of Congress); F. McCaffrey, STATUTORY CONSTRUCTION § 70, at 140 (1953).

72 Although the Second Circuit was the first court to utilize the "control of the worksite" test, a similar approach had previously been suggested: "Any employer (prime or subcontractor) who creates a hazard which endangers employees (whether his own or those of another employer) will be cited." Brady, The New Occupational Safety and Health Act—Its Impact on Contractors and Sureties, 8 THE FORUM 114, 121 (1972), quoting Office of Com-
has rectified various anomalies which have arisen under the Commission's test. In *Hawkins*, the general contractor created a specifically proscribed hazard and yet was absolved from responsibility because his employees had subsequently left the jobsite to the subcontractors. Conversely, in other OSHRC cases, subcontractors whose employees were employed in an area where there was a violation were compelled to accept responsibility notwithstanding the fact that the general contractor who created the hazard was absolved.

The anomaly becomes especially apparent where, as in *Dic-Underhill*, a hazard which endangers another subcontractor's workers is actively maintained by the controlling subcontractor. In such situations the subcontractor is virtually remediless. Only infrequently will he be able to inspect the operations of the controlling employer, and even where he is cognizant of the hazard, he is not normally empowered to order the other party to abate the violation. To protect his employees, he must either withdraw them from the worksite and risk a civil suit or file a complaint with the Secretary of Labor in an attempt to obtain an official inspection of the construction area. In establishing a standard pursuant to which control over the workplace alone can give rise to liability, the Second Circuit has provided a general deterrent to exposing any employee on a worksite to safety hazards, rather than the limited deterrent to exposing only one's own employee.

To relieve employers from any liability when they have control over proscribed hazard is to undercut the purposes of the OSHA. The grudging approach taken by the OSHRC in prior decisions and acquiesced in by the Fourth Circuit in *Gilles & Cotting* fails to recognize the remedial intent of the Act. In contradistinction, *Dic-Underhill* represents an important judicial step forward in implementing the comprehensive type of safety legislation that Congress had desired when it passed the OSHA.

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75 Section 8(f)(1) provides in pertinent part that "[a]ny employees . . . who believe that a violation of a safety or health standard exists that threatens physical harm . . . may request an inspection by giving notice to the Secretary . . . ." OSHA § 8(f)(1), 29 U.S.C. § 657(f)(1) (1970).