

Legal Implications of Compliance and Noncompliance with Standards and Internal Corporate Guidelines

The importance of compliance and noncompliance OSHA standards, national consensus standards, and internal corporate guidelines lies in the evidentiary use of the facts of such compliance or noncompliance to demonstrate that the defendant breached a legal duty owed the plaintiff.

Randel K. Johnson, National Assn. of Manufacturers, Washington, D.C. 20006

It is now well established that the Occupational Safety and Health (OSH) Act of 1970 does not provide a basis for a private cause of action. While the act imposes duties on employers for the benefit of employees, only the government is authorized to enforce those duties. Consequently, a court will always dismiss a private suit alleging only a violation of the act, or any rules, regulations or standards promulgated thereunder, as a basis for the complaint.

This does not mean, however, that evidence of compliance or noncompliance with OSHA standards does not play an important role in civil litigation. It does mean that counsel for the plaintiff must creatively search the common law, or statutes other than OSHA, for some legal duty existing between the plaintiff and the targeted defendant that will provide the basis for a cause of action. This duty might be found in the law of contracts, product liability, intentional torts, or, as is most often the case, negligence. Compliance or noncompliance with OSHA standards, and in some cases voluntary directives, is important because of its potential use as evidence bearing on the ultimate question of whether or not the defendant breached a legal duty owed to the plaintiff. But the legal duty itself must be found outside the OSH Act. A few cases illustrate these principals.

Identifying the legal duty

In *Horn v. C.L. Osborn Contracting*, 691 F.2d 318 (5th Cir. 1979), the employee of a subcontractor was injured when the trenches in which he was working collapsed due to the absence of OSHA-required shoring structures. A contract between the owner of the

work site and the general contractor provided that the general contractor would comply with OSHA regulations during construction. The court concluded that the worker had a cause of action against the general contractor based upon the contractor's apparent failure to comply with OSHA regulations *as required under the contract*. The legal duty forming the basis of the complaint arose out of the contractual obligations agreed to by the general contractor, not out of the OSHA regulations as such. Nevertheless, the OSHA shoring regulations were admitted by the court as bearing on the question of whether the general contractor breached its contractual duty to comply with OSHA standards.

In *Duncan v. Penning*, 283 N.W.2d 546 (SD 1978), an employee of a general contractor was injured when he bumped against a temporary guardrail, which gave way, and fell 22 ft to the ground. The guardrail failed to comply with the applicable OSHA standard. The architect managing the site had contractually agreed with the owner to ensure compliance with OSHA standards. It was held that the trial court had properly submitted to the jury the question of the architect's liability under the contract and was correct in allowing OSHA regulations to be introduced as *evidence* of the duty the architect agreed to perform under the contract.

Role of standards in negligence

The vast majority of cases, however, are grounded on allegations of negligence, that ever expanding concept of the common law by which today virtually everyone has a legal duty to act reasonably and pru-

dently towards everyone else. What "reasonably and prudently" means in any given case will vary widely depending on the relationships between the parties to the suit and the underlying circumstances.

The role of OSHA standards, voluntary consensus standards, and internal corporate guidelines in negligence suits lies in their importance in helping to define for the court and jury what, in the given factual circumstances of the case, is reasonable and prudent conduct. The standards and guidelines help define the criteria by which the defendant's conduct will be measured. The rationales underlying the use of these three categories of safety and health directives are, however, different.

The standard of reasonable and prudent conduct, by which the defendant's actions must be measured in a negligence case, is a community standard to be determined and applied by the jury to the circumstances in question. Concluding that legislatures and administrative bodies have the authority to define for the community what is reasonable and prudent conduct in given circumstances, courts have long recognized that governmental codes of conduct have an important, in many instances determinative, role in evaluating claims of negligence. The reasoning behind the relevancy of consensus standards and internal corporate guidelines is somewhat different. Consensus standards represent the opinion of an industry, or a large group of entities, covered by the standard concerning what procedures should be followed in certain situations. Therefore, quite logically, a consensus standard is extremely useful to a jury in helping it to determine what would be reasonable and prudent conduct in circumstances similar to those addressed by the standard. Of course, the standard cannot be determinative of negligence, as only the jury, weighing all the facts, can decide what the reasonable and prudent conduct is, but the standard can serve as "another window opened to shed light on the standard of care required." *Meehan v. Philadelphia Electric Co.*, 225 A2d 900, 905 (1967). To a lesser degree, the same can be said for internal employer guidelines. The rule indicates what one with knowledge of the situation has determined can and should be the course of conduct followed. Thus, the rule, logically, is some indication of what reasonable and prudent conduct would be under the circumstances.

The court in *McComish v. DeSoi*, 100 A2d 116, 121 (N.J. 1964) provided an excellent summation of these principles:

"The basic test as to the responsibility of (the defendant) here is whether reasonable care was exercised in the construction and assembly of the A sling. That is the standard to be used and departure or deviation therefrom is negligence. In applying the standard reasonable men recognize that what is usually done may be evidence of what ought to be done. And so the law permits the methods, practices or rules experienced men generally accept and follow to be shown as an aid to the jury in comparing the conduct of the alleged tortfeasor

with the required norm of reasonable prudence. It is not suggested that the safety practices are of themselves the absolute measure of due care. They are simply evidence of *how to* assemble the sling as commonly practiced by those who have experience in doing it. It is important that their limited function and probative force be appreciated."

As a general rule, the evidentiary weight accorded governmental standards will be greater than national consensus standards, which will in turn be greater than internal corporate guidelines. However, the result will vary depending on how closely the circumstances addressed by the standard or guideline in question parallel the circumstances under the jury's consideration. For example, in some situations a national consensus standard precisely covering the circumstances underlying the claim of negligence may have greater relevancy and thus evidentiary weight than a governmental standard that generally addresses similar, but not identical, circumstances.

Differing interpretations of negligence

It should be noted that the law with regard to the use of OSHA standards in negligence cases is unsettled, largely because of differing interpretations of the effect of Section 4(b)(4) of the OSH Act on civil litigation. Section 4(b)(4) provides:

"Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or alter in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries diseases or death of employers arising out of, or in the course of, employment."

The majority rule appears to be that, as long as the standard at least generally addresses the factual situation in question, it will be submitted to the jury, to be weighed with whatever other circumstances the jury deems relevant, as evidence bearing on the question of defendant's negligence. However, some cases have indicated that a violation of the standard will conclusively establish negligence, that is, negligence *per se*. A finding of negligence *per se* precludes the defendant from offering any evidence that it was not negligent. The issue is closed and decided against the defendant. Other cases state that OSH standards can only establish negligence *per se* if the defendant and plaintiff have an employer-employee relationship and that, where this relationship does not exist, standards can only be used as evidence of negligence. A few cases have excluded standards as evidence altogether.

As a practical matter, whether a standard is allowed to establish *per se* negligence or to be used simply as evidence thereof may not be an important issue. Generally, the latter will be enough (assuming

there is evidence that the standard was violated) to allow the case to go to the jury. Juries are traditionally not sympathetic to corporate defendants.

Negligence cases dealing with OSHA standards

In *Dunn v. Brimer*, 537 S.W.2d 164 (Ark. 1976), the employee of a general contractor was working on an unfastened, portable ladder owned and controlled by a subcontractor. The ladder shifted positions, throwing the worker to the ground. The worker sued the subcontractor on the basis of negligence. The court, rejecting the subcontractor's contention that OSHA regulations were completely irrelevant because the parties did not have an employer-employee relationship, found that certain OSHA regulations, providing that portable ladders shall be secured were properly admissible as evidence bearing on the question of the subcontractor's negligence. The regulations could be properly utilized by the jury to help decide whether or not a reasonable and prudent man would have fastened the ladder down.

In another trenching case, *Wendland v. Ridgefield Construction*, 439 A.2d 954 (S.Ct. Conn., 1981), a general contractor's employee sued a subcontractor for injuries sustained when the ditch in which he was working collapsed. The court held that, while a failure to comply with the applicable OSHA trenching regulations could not support a conclusion of *per se* negligence on the part of the subcontractor, the regulations were admissible as providing "helpful guidance to the jury in its deliberations" on the question of whether the subcontractor was negligent.

In a rather bizarre case, *Disabatino v. Baio*, 366 A.2d 508 (Del. 1976), which demonstrates the reach of the courts' approach, a housing inspector was injured when the car he was driving in a housing development struck a raised sewer-manhole cover constructed by, and under the control of, the defendant. The defendant was not the inspector's employer. The court held that OSHA regulations written to apply to factual circumstances similar to those under consideration by the jury were admissible "to assist the jury in determining the proper standard of care required of the defendant."

In *Melerine v. Avondale*, 659 F.2d 915 (5th Cir. 1981), an employee was injured while working with the crane operator of another employer. He contended that he was entitled to a determination of negligence *per se* against the other employer on the grounds that the crane had not been operated in conformity with certain OSHA and ANSI (American National Standards Institute) standards. The court concluded that a *per se* determination was properly denied by the lower court because the plaintiff was not the defendant's employee, but did recognize that the OSHA and ANSI standards could properly be considered as bearing on the question of negligence.

Negligence cases dealing with consensus standards

In *Alabama Power v. McIntosh*, 122 So. 677 (Ala. 1929), the defendant utilized a certain type of electrical floor connection that electrocuted the plaintiff's son. Use of that type of connection was expressly forbidden by the *National Electrical Code* for interior wiring. The court held that the code "being the expression of the matured judgment and experience of men in that business becomes evidence of correct appliances in such places" and was evidence of negligence.

In a more recent case, *Kelly v. Howard S. Wright Constr.*, 582 P.2d 500 (Wash. 1978), involving a fall by a worker who was not wearing safety belts and was not protected by a safety net, both the *Manuals of Accident Prevention and Construction of the Associated Contractors of America* and the *Manual for the Northwest Chapter of the Associated General Contractors of America* were deemed relevant to the issue of the standard of care and properly admitted for consideration by the jury.

Negligence cases involving internal company procedures

In *Current v. Columbia*, 383 S.W.2d 139 (Ky. 1964), defendant's employee connected a residential heater appliance to a gas line in a manner which allowed carbon monoxide fumes to be released into the residence, seriously injuring the inhabitants. The court concluded that the internal rules of the defendant gas company relating to how such appliances should be connected were properly admissible as evidence of how a reasonable and prudent man would have connected the heater.

In a case involving the death of a truck driver killed by a train at a railroad crossing, the jury was properly permitted to consider the defendant railroad's safety rules and regulations, in determining whether or not the defendant's actions in approaching the crossing were reasonable and prudent. See *New York Central Railroad v. Wyatt*, 1984 N.E. 2d 657 (Ind. 1962).

Most cases involve attempts by plaintiffs to introduce evidence of the failure of defendants to comply with safety codes. However, defendants are also free to introduce evidence of compliance in their favor as bearing on the question of negligence. However, it is well established that compliance even with governmental standards is not conclusive on the issue of negligence as there may be many situations in which a reasonable and prudent man would have complied with a higher standard of care. It is also clear that compliance with general industry codes or customs is not conclusive as, the courts have found, the industry in general may be lagging behind technological devel-

opments or, indeed, simply complying with an absolute minimum, but not reasonable, standard of care. In short, although relevant evidence, compliance with industry custom and codes, or even statutory mandates, will not conclusively establish that a defendant was not negligent.

Theoretically, statutory and voluntary safety and health codes could also play a role in establishing a defendant's claim to the common law affirmative defenses to negligence of assumption of risk and contributory negligence.

For example, suppose that, pursuant to OSHA regulations, an operator of a worksite provides eye-glasses to everyone working with grinders at the site. The operator also informs the workers of the provisions of the standard and trains the workers in use of the protectors. A worker voluntarily fails to use the protectors and his eye is injured from material thrown off by the grinder. The operator could assert, as a defense to allegations of negligence, the worker's contributory negligence or assumption of risk contending that the worker knew about the OSHA eye protection requirement and the purpose of the glasses. His failure to wear the glasses was, therefore, done in complete awareness of the dangers and amounted to negligence. See, Morrow, *The Use of OSHA in Negligence Suits Against Those Responsible for the Maintenance of Safe Worksites*, 22 Trial Lawyers Guide 167, 338-340 (1979).

However logical this argument might sound, there are few reported cases adopting this approach. Nevertheless, the theory is legally sound and has been recognized in some decisions. The key appears to be in proving that the plaintiff had a thorough understanding of the provisions of, and the reasons for, the rule—a difficult burden.

Workers' compensation and tort law

A few, rather straightforward, cases have been discussed to exemplify the potential use of safety and health standards in litigation. These cases generally involve an employee suing an entity involved in operations on the site other than his employer. It should be emphasized, however, that the potential use of evidence of noncompliance with standards and voluntary codes is perhaps bounded only by the imagination of plaintiffs' attorneys and the workers' compensation law of the state in which the case arose.

Under such laws, fault concepts such as negligence are usually irrelevant and thus compliance with safety or health standards will generally not be at issue. However, as is well known, there have been inroads in the exclusivity doctrine of workers' compensation. Further, plaintiffs' attorneys have shown remarkable ingenuity in casting about for parties who were not employers of the plaintiff worker in order to circumvent the limited recoveries typically provided under

workers' compensation law. These third parties, depending on state law, might include:

- Coemployees, including safety and health managers.
- Insurance carriers.
- Other operators at the site including affiliated companies with no practical, but with a legally separate, identity from the employer.
- Employers with a legal relationship *other* than as an employer with the plaintiff under the "dual capacity" doctrine such as when an employer is also the manufacturer of a machine that injures an employee.
- Third parties completely off the worksite—usually the manufacturer of the product that contributed to the injury.

The possible defendants are limitless; anytime an employee is able to circumvent the workers' compensation system to assert his common law rights, the question of compliance with safety and health codes, voluntary or governmental, could be raised whenever such compliance would have a logical bearing on an issue in the case.

The growing conflict between basic tenets of workers' compensation and tort law is beyond the scope of this article, but two areas should be briefly discussed:

- The possible use of safety and health standards in establishing that the employer committed an intentional tort against the employee.
- The possible use of such standards by third parties, employers in attempting to recover damages paid to employees because of worksite injuries.

Although intentional acts by employers to injure employees have long been considered outside of the workers' compensation umbrella, there have been efforts to stretch the concept of "intentional" to include other forms of misconduct short of a genuine intent to inflict harm. Examples would include an employer's knowing failure to provide appropriate machine guarding. [*Mandolidis v. Elkins Industries*, 246 S.E.2d 967 (W.Va. 1978), case limited by legislation in 1983] or the willing failure to lower the toxic exposure levels in a workplace despite knowing that the existing levels were unreasonably dangerous and could feasibly be corrected [*Blakenhip v. Cincinnati Milacron Chemicals*, 433 N.E. 2d 572 (Ohio 1982)]. The relevancy in these cases of safety and health standards and guidelines is obvious. Despite some publicity to the contrary, however, the vast majority of states have continued to adhere to the rule that the plaintiff employee must demonstrate that the employer had a deliberate intent to injure the employee before the intentional tort exception can be invoked. The following allegations, for example, were recently held to be insufficient to meet the intentional tort exception requirements:

- Knowingly permitting a hazardous work condition to exist, *Sanford v. Presto*, 594 P.2d 1202 (N.M. 1979).
- Willfully failing to furnish a safe place to work, *Austin v. Johns-Manville*, 508 F.Supp. 313 (D. Me. 1981).
- Willfully and unlawfully violating a safety stat-

ute, *Cunningham v. Aluminum Co.*, 417 N.E.2d 1186 (Ind. 1981).

• Intentionally failing to warn the employee of the dangers and health hazards to which he would be exposed, *Johnson v. Kerr-McGee*, 631 P.2d 548 (Ariz. Ct. App. 1981).

It should be noted that this state of the law seems to be in conflict with an emerging effort by state prosecutors to file criminal charges against employers in situations in which employers have knowingly and unreasonably exposed their employees to dangerous working conditions. Two such cases in Illinois involve allegations that defendants knowingly and willfully exposed their workers, in one case, to hazardous cyanide fumes during a silver recovery process and, in the other, to hazardous silica dust used in brick manufacturing.

In the first case, the executives and a foreman of the company involved were indicted and recently convicted of murder despite an absence of evidence indicating that the defendants had the actual intent of injuring their employees. Actual knowledge of strong probability of serious injury appeared to be enough to support the convictions. This case is now on appeal. See *People of the State of Illinois v. Film Recovery Systems*, Nos. 83-11091, 84-5064, filed June 14, 1985.

Acceptance in the criminal courts of these types of allegations could spell a turnabout in the civil courts' interpretation of the "intentional tort" exception. Should this occur, standards or guidelines establishing permissible exposure levels, or even safety standards, will be considered relevant as bearing on what hazards the employer knew it was exposing its employees to. It would be difficult for an employer to argue that it did not believe that an exposure level higher than an OSHA standard p.e.l. was not hazardous to its employees.

Third-party actions against employers

In the states that allow third-party actions against employers, standards have also proved useful in the hands of attorneys representing manufacturers. For example, in *Rabon v. Hardaway Construction*, 672 F.2d 1231 (5th Cir. 1982), the plaintiff was injured by a nail thrown off by a powder-activated stud gun being operated by an untrained worker within three inches of the edge of a concrete slab. The worker sued, under product liability theories, the manufacturer and distributor of the stud gun and won damages. The manufacturer and distributor, in turn, sued the workers' employer for recovery of the damages under negligence theory, citing an OSHA standard prohibiting driving fasteners into concrete closer than three inches from the edge and requiring that only trained operators use powder-activated tools. The court admitted the OSHA standards as evidence of the employer's negligence. It is safe to assume that,

in those states which allow third-party actions against employers for indemnity on the basis of negligence, safety and health standards will continue to play a role in the outcome of these cases.

Product liability cases

Two recent cases provide an interesting insight into the possible use by defendants of OSHA and national consensus standards in product liability cases and the contradictory state of the law in general. Product liability is that branch of tort law that provides for recoveries for injuries caused by products. The theories advanced for recovery may be simple negligence, breach of warranty or strict liability, or some combination thereof.

In *Smith v. Firestone Tire and Rubber*, No. 84-1005 (8th Cir., filed Feb. 20, 1985), plaintiff Smith, working as a mechanic, installed a tire mounted on a multipiece rim on his employer's truck. While Smith was checking the air pressure on the tire, the multipiece rim separated, injuring his face, head and leg. Smith contended that the defendant had negligently and defectively designed the multipiece rim. As part of these contentions, Smith argued that Firestone should have warned users of the rim of its dangers, and that Firestone should have designed and marketed a single-piece rim instead of the multipiece, alleging that the single piece was a safer design. At the trial level, the court allowed Firestone to offer into evidence, for the purpose of rebutting these two arguments, the 1980 OSHA standard *Servicing Multipiece Rim Wheels* (29 CFR 1910.177) and a proposed amendment to the OSHA regulation *Servicing of Multipiece and Single-Piece Rim Wheels*. The first standard reflected OSHA's judgment that no warning labels would be required in the 1980 standard; the proposed amendment reflected OSHA's determination that the likelihood of accidents and injuries, when servicing single piece rim wheels, was comparable to what existed when servicing multipiece rim wheels, that is, that neither design was inherently safer than the other. This evidence, reflecting a government agency's professional judgment, clearly undermined the plaintiff's case before the jury.

The court of appeals upheld this use of the OSHA standard and amendment, noting that the jury was instructed that the decision by the agency not to require warnings was not controlling, but only evidence to be considered on the question of whether or not a warning should have been provided by Firestone.

In contrast, the court held in *Minichello v. U.S. Industries*, No. 83-3236 (6th Cir., filed Feb 27. 1985), that OSHA regulations were inadmissible for rebutting plaintiff's contentions in a product liability suit. In that case, plaintiff Minichello was injured upon falling from an operator's platform of a spotting press. The platform, part of the press itself, stood ap-

proximately three feet off the ground and had no guard rail. The standing surface was smoothed metal. Minichello sued the manufacturer of the press, U.S. Industries, under product liability theories, specifically strict liability and breach of implied warranty.

At the following trial, a safety engineer, offered as an expert by the plaintiff, testified that the failure to place a guard rail around the platform made it unreasonably dangerous, in view of its height and smooth surface, despite the fact that it stood only three feet off the ground. On cross examination by defendant, the expert was questioned about apparent variances between his opinion and applicable OSHA and ANSI standards. Defendant also put before the jury the text of an OSHA standard governing raised working surfaces that required employers to guard surfaces four or more feet above the ground. The obvious implication was that OSHA concluded surfaces *below* four feet need not be guarded, and, thus, at least in the view of OSHA, unguarded surfaces below four feet are not unreasonably dangerous, the key issue in the case. The jury found for the defendant.

The court of appeals reversed, concluding that admission of the OSHA standard as bearing on the question of whether the platform was unreasonably dangerous violated Section 4(b)(4) of the OSH Act. The court also noted that the standard was not relevant because the OSHA regulations pertained only to employer conduct.

In my view this case was wrongly decided and is against the weight of authority. One can speculate that, had the *plaintiff* been using the OSHA standard to augment his case (an event quite likely had the platform been *above* four feet), the standard may have magically become properly admissible.

The use of the ANSI standards was not objected to below. However, the court did imply that such standards may be admissible because no law similar to Section 4(b)(4) limits use of ANSI standards in litigation.

Discrimination cases

Compliance with safety and health procedures can also be used against employers. In 1978, Olin Corp. adopted an employment and fetal vulnerability pro-

gram that excluded all fertile women from jobs requiring contact with, or exposure to, substances that could possibly harm a fetus. The company was sued in a class action under Title VII of the 1964 Civil Rights Act on the basis that the program intentionally discriminated against women and had a disparate impact on women. While it is not possible to review here how the case was resolved and all the relevant aspects of Title VII law, the case is mentioned to suggest that employers be aware of the liability dangers associated with safety and health practices, even those implemented with the best of intentions, which exclude protected categories of minorities, including women, from job opportunities. Litigation in this area is expected to increase, as employers continue to attempt to limit their liability for possible injuries to the unborn and begin to explore use of new employee screening methods, such as genetic testing, to ascertain which job applicants are the most resistant to on the job injury or illness.

In conclusion

Because of the potential use of OSHA and national consensus standards against employers in litigation, the business community should make every effort, where possible, to ensure that such standards do not set requirements which are not achievable by the vast majority of employers in the industry affected. Standards that set requirements which some members of the industry cannot comply with will invariably be used against those organizations in tort litigation. Similarly, an individual employer who chooses to issue extensive internal guidelines should ensure that employees have the training and resources to consistently comply with those guidelines. Unrealistic directives, which can be complied with only under the best of circumstances, will only provide useful ammunition for the cannon of opposing counsel.

In the final analysis, the value of standards and internal guidelines must be measured by the degree to which they promote safer working conditions and, ultimately, reduce workplace injuries and illnesses. The benefits provided through standards and guidelines that achieve these goals will far outweigh any possible detriments that result from the use of standards and guidelines against employers in litigation.



Johnson