THE GENERAL DUTY CLAUSE OF THE VERMONT OCCUPATIONAL SAFETY AND HEALTH ACT

INTRODUCTION

The Occupational Safety and Health Act of 1970[1] (OSHA or the Act) has been described as the "most revolutionary piece of 'labor' legislation since the National Labor Relations Act."[2] Enacted to protect the lives and health of the work force,[3] OSHA imposes a twofold duty on employers.[4] Each employer is required to comply with any specific safety standards pertinent to his industry[5] as well as to "furnish to each of his employees employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm."[6] The second requirement—the employer's general duty—was the focus of much of the early litigation under the Act.[7]

The several states are encouraged by OSHA to pass their own job safety legislation.[8] Vermont took the initiative in 1971 in the form of the Vermont Occupational Safety and Health Act[9] (VOSHA), which is similar to OSHA in many respects and borrows from it several key provisions including the general duty clause.[10] Not surprisingly, the first case to bring VOSHA to the Vermont Supreme Court, *Green Mountain Power Corp. v. Commissioner of Labor and Industry,*[11] involved an alleged violation of the general duty clause.

Green Mountain Power necessitated consideration of the standards to be applied in determining whether the general duty clause

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1. 29 U.S.C. §§ 651-678 (1976).

2. White & Carney, *OSHA Comes of Age: The Law of Work Place Environment*, 28 BUS. LAW. 1309, 1309 (1972-73) [hereinafter cited as White & Carney].

3. 29 U.S.C. § 651 (1976).

4. *Id.* § 654.

5. *Id.* § 654(a)(2).

6. *Id.* § 654(a)(1).

7. Morey, *The General Duty Clause of the Occupational Safety and Health Act of 1970*, 86 HARV. L. REV. 988, 989-90 (1973) [hereinafter cited as Morey].

8. 29 U.S.C. § 651(b)(11) (1976). *See also* 29 U.S.C. § 667 (1976).

9. VT. STAT. ANN. tit. 21, §§ 201-231 (1978).

10. *Id.* § 223(a). See text accompanying note 6 *supra*.

11. 136 Vt. 15, 383 A.2d 1046 (1978).

had been violated. The Vermont Supreme Court reviewed the three existing federal standards[12] and then declared that there was no need to adopt any one particular test because the facts supported the finding of a violation under any one of the tests. More important than the holding, however, is the effect of the court's decision not to adopt a specific test on future application of the clause. The court has left the employer without a clear indication of what the VOSHA general duty clause demands of him. In turn, the result leaves unsettled the level of protection to be afforded employees within Vermont and therefore requires further litigation or legislative action.

The alternatives available to the *Green Mountain Power* court, the court's holding and its effects are treated in this note as a basis for the proposal of a much-needed clarification of the definition of "recognized hazard" and the standard to be applied under the VOSHA general duty clause.

I. OSHA & VOSHA

Signed into law on 29 December 1970, the Occupational Safety and Health Act[13] became the first job safety act in the Nation to encompass practically every employer and employee.[14] Early federal acts proved ineffective since they were restricted in scope, dealt with a particular industry[15] or situation,[16] and generally lacked necessary enforcement provisions.[17]

In 1968 President Johnson submitted a proposal to Congress which was similar to OSHA.[18] The proposal, however, never passed the Rules Committee.[19] Two years later, having passed safety legis-

12. See text accompanying notes 69-103 *infra*.

13. 29 U.S.C. §§ 651-678 (1976).

14. White & Carney, *supra* note 2, at 1309.

15. The federal government made two attempts in the early 1890's. One in 1890 was directed toward safety for coal miners; the second, in 1893, dealt with railroad employees. BUREAU OF NATIONAL AFFAIRS, THE JOB SAFETY AND HEALTH ACT OF 1970: OPERATIONS MANUAL 14 (1971) [hereinafter cited as OSHA OPERATIONS MANUAL].

16. *E.g.*, the Longshoreman's and Harbor Workers' Compensation Act of 1927, 33 U.S.C. §§ 901-950 (1976), and the Walsh-Healey Act, 41 U.S.C. §§ 35-45 (1976).

17. OSHA OPERATIONS MANUAL, *supra* note 15, at 15.

18. *Id.* at 16.

19. *Id.*

lation pertaining to the coal, railroad, and construction industries, Congress was more receptive to a broad job safety program.[20]

The purpose of the Act is to assure "so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."[21] The Act reaches every employer whose business affects interstate commerce[22] except the state and federal governments.[23] The Act, as of 1977, covered approximately 4.1 million employer businesses and 57 million employees.[24]

OSHA is not intended to preempt state legislation.[25] Individual states are permitted,[26] indeed encouraged,[27] to submit their own state plan for employment safety to the Secretary of Labor (Secretary). For the plan to be approved, requisite minimum conditions must be met.[28] If any of the necessary conditions are not met, the

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20. *Id.*

21. 29 U.S.C. § 651(b) (1976).

22. *Id.* §§ 652(3),(5)-(6). It has been advanced that the test of whether a particular employer's business "affects" interstate commerce is the same under OSHA as it is under the National Labor Relations Act. Under the NLRA, an employer need not necessarily ship his goods in interstate commerce. It is enough that the raw materials, power, or communications he uses cross state lines. OSHA OPERATIONS MANUAL, *supra* note 15, at 6-7.

23. 29 U.S.C. § 652(5) expressly excludes the federal and state governments from the definition of "employer." Note, however, that state and federal employees are not excluded from the protection of the Act. When a state submits a proposed plan for occupational safety, *id.* § 667(b), the proposal must, to the satisfaction of the Secretary of Labor, contain "satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions." *Id.* § 667(c)(6).

24. OSHA OPERATIONS MANUAL, *supra* note 15, at 1; White & Carney, *supra* note 2, at 1309.

25. 29 U.S.C. § 667 (1976); OSHA OPERATIONS MANUAL, *supra* note 15, at *v*.

26. 29 U.S.C. § 667(b) (1976).

27. The Congress declares it to be its purpose and policy, . . . to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—

. . .

(11) by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this chapter, [and] to improve the administration and enforcement of State occupational safety and health laws.

Id. § 651(b)(11).

28. To be approved the state plan must contain standards that are at least as effective

Secretary is obliged to reject the plan.[29] Should the plan be initially approved, the Secretary is required to monitor the administration of the state law for a period of no less than three years[30] to determine whether it is being implemented and is performing as intended by Congress under OSHA. The Secretary carries out these duties through his inspection, citation, enforcement, and injunctive relief powers.[31] Once the determination is made that the state is administering its program effectively, all provisions of OSHA become inapplicable to the state except two. The record keeping requirements and the OSHA general duty clause remain in force regardless of the provisions of a state plan.[32]

The State of Vermont submitted its plan to the Secretary in 1971. Receiving approval in October of 1973, the plan became fully effective in February of 1975.

The Vermont Occupational Safety and Health Act[33] is patterned after its federal counterpart. The contents of the state act do not vary in any important respect from those of OSHA. Every provision of VOSHA can be traced to a corresponding provision in the federal act, and the wording in the respective provisions is nearly

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as those of OSHA in providing job safety. But, they must not be such as to burden interstate commerce. *Id.* § 667(c)(2). There must be a state agency specifically designated which will be responsible for application and enforcement of the plan, and there must be adequate assurance that the agency will have sufficient funds and manpower. *Id.* § 667(c)(1)(5). The plan must give the agency the power to enter and inspect a place of employment, and it must proscribe the giving of advance notice of pending inspection. *Id* § 667(c)(3). Finally, the state is required to make periodic reports to the Secretary; and employers are required to keep records in the manner specified by OSHA. *Id.* § 667(c)(7)-(8). There is, however, no explicit requirement that a general duty clause be included. *Id.* § 667.

29. *Id.* § 667(c), (f).

30. *Id.* § 667(e).

31. *Id.*

32. *Id.* As noted, *see* note 28 *supra*, any state plan submitted to the Secretary of Labor must provide for the development and enforcement of safety standards which "are or will be as effective in providing safe and healthful employment and places of employment," *id.* § 667(c)(2), as OSHA standards. The fact that the OSHA general duty clause remains applicable to a state after the Secretary has approved that state's plan for occupational safety and health portrays the OSHA general duty clause as a minimum standard—a floor beneath which the state may not go. Nothing, however, precludes a state from including a general duty clause demanding a higher degree of care from employers so long as it is in keeping with congressional intent (*i.e.*, it must not be such as to hold the employer liable as an insurer). See text accompanying notes 60-61 *infra*.

33. VT. STAT. ANN. tit. 21, §§ 201-231 (1978).

identical. This close similarity, as well as the relative infancy of VOSHA, justifies discussing the two acts together. Because of the derivative nature of the state act, the following discussion will be based on the provisions of OSHA with any dissimilarities being pointed out in the footnotes.

OSHA empowers the Secretary[34] to propose, enact, and review safety standards.[35] Three different types of standards may be employed by the Secretary: interim, permanent, and emergency temporary.[36] The Secretary also has the authority to inspect a place of

34. There is a difference in the two acts in terms of the agency charged with enforcement of the respective statute. Under OSHA, the major portions of the Act are controlled through the office of the Secretary of Labor. The Secretary of Health, Education, and Welfare is responsible for educational programs which will train those who are to apply OSHA and conduct informational programs on the proper use of safety equipment. 29 U.S.C. § 607(a) (1976).

Under VOSHA, the duties and authority are shared by the Commissioner of Labor and Industry with the Secretary of Human Services. The Commissioner is concerned with the safety aspects of VOSHA as well as with enforcement. VT. STAT. ANN. tit. 21, § 224(a) (1978). The Secretary of Human Services is primarily responsible for the creation and promulgation of standards "insofar as they relate to health." *Id.* § 224(b). To implement these provisions of VOSHA, each is given the right to inspect a workplace, *id.* § 206(a), to issue citations, *id.* § 225(a), and, as noted, to issue his respective rules and standards, *id.* § 223(a)-(b).

This administrative duality may be the source of future problems. Aside from the inherent difficulties in administrative coordination of the two departments, there is also a potential for duplication of effort, economic waste, and multiple citation for a single hazard.

35. *Compare* 29 U.S.C. § 655 (1976) *with* VT. STAT. ANN. tit. 21, §§ 201, 224 (1978).

36. OSHA provides for the promulgation of three different sets of standards. The first, interim standards, were to be issued by the Secretary as soon as possible after the effective date of the Act and to remain in effect for two years. These standards were to be based on existing federal standards or national consensus standards (standards issued by nationally recognized standards-producing organizations). 29 U.S.C. § 655(a) (1976). The second type, permanent standards, are to be enacted in a manner similar to that provided by the Administrative Procedures Act. The Secretary must first determine that a standard is needed, or, that an existing standard needs modification or revocation. *Id.* § 655(b)(1). Next, the proposed standard is published in the Federal Register and interested parties are given 30 days to submit comments or to request a public hearing. *Id.* § 655(b)(2). If a hearing is requested, notice thereof and the time and place of the hearing must be published in the Federal Register, the hearing must be held, and a decision reached and published within 60 days. *Id.* § 655(b)(3)-(4). If no hearing is held, a decision on the proposed standard must be reached and made known through the Federal Register within 60 days of the end of the 30-day comment period. *Id.* § 655(b)(4).

The Secretary may also utilize a third standard, emergency temporary. *Id.* § 655(c)(1). These standards may take effect immediately upon publication in the Federal Register provided: "(A) that employees are exposed to grave danger from exposure to substances or agents

employment,[37] issue citations for violations of a standard,[38] and propose penalties for such violations.[39] A three-member board, the Occupational Safety and Health Review Commission (OSHRC),[40] is empowered to review the decisions of the Secretary concerning citations and penalties.[41] Judicial review of OSHRC decisions may be had in the court of appeals in the circuit in which the alleged violation occurred, or where the employer has his principal place of business, or in the Court of Appeals for the District of Columbia.[42]

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determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect the employees from such danger." *Id.* § 655(c)(1). These standards remain in effect until superseded by a permanent standard. *Id.* § 655(c)(2). This section requires that upon promulgation of an emergency standard, the Secretary must begin the process required for adoption of a permanent standard. *Id.* § 655(c)(3). This new permanent standard must be enacted no more than six months from the publication of the emergency temporary standard. *Id.*

VOSHA simply adopts any federal standard applicable to industry in the state. VT. STAT. ANN. tit. 21, § 201(c)(1)-(3) (1978). Also, VOSHA gives both the Secretary of Human Services and the Commissioner of Labor and Industry power to promulgate standards relating to health and safety respectively. *Id.* § 224(a)-(b). Although VOSHA provides that these respective departments may, for the purposes of advice and counsel, set up and appoint advisory boards, *id.* § 229(a), it is silent as to the adoption procedure or the nature of permissible standards.

37. 29 U.S.C. § 657(a) (1976). To comply with a recent Supreme Court decision, Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), the Secretary must now obtain a search warrant before conducting an inspection if the employer refuses him access. *See also* VT. STAT. ANN. tit. 21, § 206 (1978).

38. *Compare* 29 U.S.C. § 658 (1976), *with* VT. STAT. ANN. tit. 21, § 225 (1978).

39. 29 U.S.C. § 659 (1976). The amounts of the penalties are set out in *id.* § 666. When considering the OSHA penalty structure, bear in mind that it is not the purpose of the Act to compensate an injured employee; the Act has no effect upon workmen's compensation. *Id.* § 653(b)(4). VOSHA also declares that it has no effect upon workmen's compensation. VT. STAT. ANN. tit. 21, § 222(a)(2) (1978).

For a single violation of an OSHA standard there is a maximum penalty of $1,000. 29 U.S.C. § 666(c) (1976). Even if the violation is classified as serious (as defined in *id.* § 666(j), (*see* note 75 *infra*), the maximum is still $1,000. *Id.* § 666(b). The penalty is increased to $10,000 if the violation is willful or malicious. *Id.* § 666(a). Penalties are also provided when an employer fails to correct a violation, *id.* § 666(d), and when a willful violation results in a death. *Id.* § 666(e). If, in the latter case, it is a first violation, there is a maximum penalty of $10,000 or imprisonment for up to six months, or both. *Id.* If the conviction is for a subsequent violation resulting in death, the maximum penalty is doubled. *Id.* Penalties are also imposed on those who give advance notice of a pending inspection, *id.* § 666(f), and for those who knowingly make false statements or keep false records, *id.* § 666(g). The Vermont statute provides for the same penalties. VT. STAT. ANN. tit. 21, § 210 (1978).

40. 29 U.S.C. § 661 (1976).

41. *Compare id.* § 659(c), *with* VT. STAT. ANN. tit. 21, §§ 226(c), 230(b) (1978).

42. *Compare* 29 U.S.C. § 660(a)-(b) (1976), *with* VT. STAT. ANN. tit. 21, § 227 (1978).

Beyond the standards and regulations adopted by the Secretary, both OSHA and VOSHA contain a "general duty clause."[43] The employer's duty under this clause and the standards to be applied in determining whether that duty has been breached have posed problems for legislatures and courts.

II. The General Duty Clause

The employer's duty under both the federal and state acts is twofold. Not only must he adhere to specific regulations directly applicable to his industry,[44] but he must also protect his employees from recognized hazards that are not specifically proscribed.[45] The inclusion of the latter requirement is essential, given the nature and purpose of the Act.

The promulgation of standards to cover every workplace hazard is impossible. Arguments to the contrary ignore the practicalities involved. The absence of the general duty clause would place an enormous administrative burden on the Department of Labor. And, it would promote wholesale disregard of the regulations by employers unable to keep abreast of the latest developments. Without the general duty clause, constant reappraisal of those regulations already published would be necessary to guard against obsolescence and duplication—a burden that is already onerous under the current statute. Moreover, employers would be required to repeatedly invest time and money sifting through voluminous compilations of standards to determine their applicability or, in the alternative, would be subject to them without their knowledge.[46] The general duty clause is intended and designed to protect employees in situa-

Initial judicial review under VOSHA is had in the Vermont Superior Court with a right of appeal to the Vermont Supreme Court.

43. *Compare* 29 U.S.C. § 654(a)(1) (1976), *with* Vt. Stat. Ann. tit. 21, § 223(a) (1978).

44. *Compare* 29 U.S.C. § 654(a)(2) (1976), *with* Vt. Stat. Ann. tit. 21, § 223(b) (1978).

45. *Compare* 29 U.S.C. § 654(a)(1) (1976), *with* Vt. Stat. Ann. tit. 21, § 223(a) (1978).

46. As to the plight of the individual faced with the voluminous Federal Register, see Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947) (Jackson, J., dissenting). Justice Jackson remarked that if the respondent-farmer were to "peruse this voluminous and dull publication as it is issued from time to time in order to make sure whether anything has been promulgated that affects his rights, he would never need crop insurance, for he would never get time to plant any crops." *Id.* at 387.

tions where no standards yet exist. The problems that would result in its absence justify the inclusion of, and underscore the need for, a general duty clause.[47]

The general duty clause does not supplant existing standards,[48] rather it is applicable only when there are no standards to deal with the particular problem.[49] The clause was drafted in broad language to meet the scope of its ambitious purpose. The resulting flexibility is the essence of its vitality—it is also its greatest weakness. One commentator has noted that the "general duty clause . . . is not well drafted, and its interpretation has already been the subject of a number of difficult decisions."[50] One such difficult decision has involved the definition of the phrase "recognized hazard." Indicative of the difficulties this single part of the clause has created is the range of interpretations given to it by legislatures and courts, as discussed below.

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47. As evidence of the felt need for a general duty clause, consider the following testimony given by Governor Pyle, then President of the National Safety Council, before the Select Subcommittee on Labor, 5 November 1969:

> If national policy finally declares that all employees are entitled to safe and healthful working conditions then all employers would be obligated to provide a safe and healthful workplace rather than only complying with a set of promulgated standards. The absence of such a "general obligation" provision would mean the absence of authority to cope with a hazardous condition that is obvious and admitted by all concerned for which no standard has been promulgated.

H.R. REP. No. 91-1291, 91st Cong., 2d Sess. ——, *reprinted in* OSHA OPERATIONS MANUAL, *supra* note 15, at 159. And, as noted by the Senate Labor Committee, "precise standards to cover every conceivable situation will not always exist. Therefore, to cover such circumstances the committee has included a requirement to the effect that employers are to furnish employment and places of employment which are free from recognized hazards" that are causing or are likely to cause death or serious physical harm to their employees. S. REP. No. 91-1282, 91st Cong., 2d Sess. 9, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5177, 5185-86. The House Labor Committee voiced similar sentiments. H.R. REP. No. 91-1291, 91st Cong., 2d Sess. 21-22 (1970).

48. "Specific, promulgated standards preempt the general duty clause . . . ." National Realty and Constr. Co. v. OSHRC, 489 F.2d 1257, 1261 n.9 (D.C. Cir. 1973).

49. *See* Usery v. Marquette Cement Mfg. Co., 568 F.2d 902, 905 n.5 (2d Cir. 1977); Brennan v. Butler Lime and Cement Co., 520 F.2d 1011, 1017 n.9 (7th Cir. 1975); American Smelting & Ref. Co. v. OSHRC, 501 F.2d 504, 512 (8th Cir. 1974); National Realty and Constr. Co. v. OSHRC, 489 F.2d 1257, 1261 n.9 (D.C. Cir. 1973); Morey, *supra* note 7, at 990; Gross, *The Occupational Safety and Health Act: Much Ado About Something*, 3 LOY. CHI. L.J. 247, 261-68 (1972).

50. Currie, *OSHA*, 1 AM. B. FOUNDATION RESEARCH J. 1107, 1140 (1976); *see also* Morey, *supra* note 7, at 990.

A. *Legislative and Administrative Interpretations*

Persuaded in part by statistics[51] and in part by statutory precedent,[52] Congress, after a political battle in both Houses,[53] inserted the general duty clause in OSHA.

The original draft of the Senate version did not include a general duty clause.[54] After some debate, language was added to the effect that an employer had to keep his workplace free from "recognized hazards so as to provide safe and healthful working conditions."[55] The bill eventually passed as amended.

In the House, two bills were introduced. The original bill would have required only that the employer keep his workplace "safe and healthful."[56] Attacked as overly general, this draft was challenged by a second bill requiring that an employer maintain a place of employment free of any hazards that "are readily apparent and are causing or are likely to cause death or serious physical harm."[57] This substitute bill won the approval of the House, and the House and Senate versions were sent to a conference committee late in 1970.

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51. During the congressional debate over OSHA, it was pointed out that 14,500 workers are killed each year in industrial accidents, 2.5 million are disabled, and 390,000 are victims of occupational diseases. Congress also considered the economic impact of these statistics—$1.5 million lost annually in wages and an annual loss in the GNP of $8 billion. OSHA OPERATIONS MANUAL, *supra* note 15, at 1; White & Carney, *supra* note 2, at 1309; Andrews & Cross, *Defending the Employer Against An Alleged Violation of the General Duty Clause,* 9 GONZ. L. REV. 399, 400 (1974).

52. The House Labor Committee noted that over 36 states have statutes requiring that an employer provide a safe and healthful place of employment. The Committee also noted the presence of similar clauses in four federal statutes. H.R. REP. No. 91-1291, Committee on Education and Labor, 91st Cong., 2d Sess. 14-15 (1970), *reprinted in* OSHA OPERATIONS MANUAL, *supra* note 15, at 159.

53. OSHA OPERATIONS MANUAL, *supra* note 15, at 16. The principal disputed provisions of the Act were the general duty clause; "walkaround" rights of employer and employee representatives during an OSHA inspection, 29 U.S.C. § 657(e) (1976); citations and posting requirements, *id.* § 658(a)-(b); and plant closings in case of "imminent danger," *id.* § 662.

54. Andrews & Cross, *supra* note 51, at 402.

55. CONFERENCE REP. No. 91-1765, 91st Cong., 2d Sess. ——, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5177, 5229. *See generally* OSHA OPERATIONS MANUAL, *supra* note 15, at 17-21; Andrews & Cross, *supra* note 51, at 402-06; Comment, *OSHA: Employer Beware,* 10 HOUSTON L. REV. 426, 427-29 (1973).

56. OSHA OPERATIONS MANUAL, *supra* note 15, at 139. Appendix F of the OSHA OPERATIONS MANUAL provides a comparison of the development of the House and Senate Bills as well as the Conference Committee reports. *Id.* at 280-84.

57. *Id.* at 284. *See also* Andrews & Cross, *supra* note 51, at 404.

The committee combined the "recognized hazards" language of the Senate bill with the "causing or likely to cause" formulation in the House version to arrive at the present form.[58]

The consensus within the Congress was that the employer's duty under the clause was comparable to his duty at common law. During the Senate debate it was stated that:

> Under the principles of common law, individuals are obliged to refrain from actions which cause harm to others . . . . The Committee believes that employers are equally bound by this general and common duty to bring no adverse effects to the life and health of their employees throughout the course of their employment . . . . [The general duty clause] merely restates that each employer shall furnish this degree of care.[59]

At common law an employer has an obligation to provide his workers with a place of employment that is reasonably safe;[60] however, the employer is not liable as an insurer.[61]

Nowhere in the Act does there appear a definition of the term "recognized hazard." The generally accepted congressional definition is contained in a speech by Representative Daniels, made during debate over the language of the clause. According to Daniels:

> A recognized hazard is a condition that is known to be hazardous, and is known not necessarily by each and every individual employer but is known taking into account the standard of knowledge in the industry. In other words, whether or not a hazard is "recognized" is a matter for objective deter-

58. The OSHA general duty clause now reads: "(a) Each employer—(1) 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." 29 U.S.C. § 654(a)(1) (1976).

59. S. REP. No. 91-1281, 91st Cong., 2d Sess. 6-7, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5177, 5186. *See also* H.R. REP. No. 91-1291, 91st Cong., 2d Sess. 21 (1970). *Contra,* National Realty and Constr. Co. v. OSHRC, 489 F.2d 1257, 1265 n.34 (1973).

60. RESTATEMENT (SECOND) OF AGENCY § 492 (1958); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 80, at 526 (4th ed. 1971).

61. RESTATEMENT (SECOND) OF AGENCY § 492, Comment *c* (1958). This idea has been widely accepted by the courts in their application of OSHA. *See, e.g.,* Horne Plumbing and Heating Co. v. OSHRC, 528 F.2d 564, 570-71 (5th Cir. 1976); Cape & Vineyard Division v. OSHRC, 512 F.2d 1148, 1152 (1st Cir. 1975); Brennan v. OSHRC (Alsea Lumber Co.), 511 F.2d 1139, 1144-45 (9th Cir. 1975); Brennan v. OSHRC (Hanovia Lamp Division), 502 F.2d 946, 951 (3rd Cir. 1974); REA Express, Inc., v. Brennan, 495 F.2d 822, 826 (2d Cir. 1974).

> mination; it does not depend on whether the particular employer is aware of it.[62]

The quoted material can be read to mean that the speaker intended that both industry knowledge and the empoyer's personal knowledge should be considered in determining whether a hazard is "recognized." Thus, if the employer personally[63] "recognizes" a hazard, he should be cited for a violation of the Act (assuming the other elements of a violation are present); if the situation is not considered by the employer to be hazardous, but it is so considered by the industry as a whole, the employer would still be subject to citation.

An alternative reading, in view of the fact that Representative Daniels spoke in terms of an "objective determination," is that he, and Congress, intended to exclude employer knowledge from consideration.[64] It can be said that the employer's subjective opinion as to the status of a particular condition is unimportant and, as Representative Daniels goes on to say, the finding of a "recognized hazard" does not depend upon the employer's awareness of it.

In light of the language used by Representative Daniels ("not known necessarily by each and every individual employer"; "the

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62. 116 CONG. REC. (Part 28) 38377 (1970), *as cited in* National Realty and Constr. Co. v. OSHRC, 489 F.2d 1257, 1265 n.32 (D.C. Cir. 1973). This particular definition has been cited by other courts as well. Cape & Vineyard Division v. OSHRC, 512 F.2d 1148, 1152 n.5 (1st Cir. 1975); McLean Trucking Co. v. OSHRC, 503 F.2d 8, 10-11 (4th Cir. 1974).

63. The definition of "employer knowledge" may prove troublesome. If taken literally, the employer could avoid citation any time that he, or his on-site representative, is personally unaware of the particular hazard manifesting itself at that point in time. In other words, if the employer, or his representative, is not at point X when a violation of OSHA occurs at that location (assuming that the violation is an occurrence which is capable of detection by the employer), he could arguably escape citation. This reading does violence to the purposes of the Act and renders the general duty clause worthless by exempting from its coverage ordinarily recognizable hazards which manifest themselves in the employer's absence.

A more realistic reading of the "employer knowledge" requirement is that the phrase encompasses hazards, the nature and dangerous *potential* of which the employer is aware (through personal knowledge or vicariously through his agents). Here, the employer need not know of the lack of handrails on particular scaffolding in order to be subject to citation—he need only know of the inherent hazards of working on scaffolding without such rails and the potential that a workman will fall off.

64. Representative Daniels went on to argue that the original language in the clause, "readily apparent hazards," was inadequate because it allowed ignorant employers to escape liability. By urging adoption of the "recognized hazard" formulation, he hoped to plug the loophole in the original draft by having the Secretary look to industry knowledge rather than the employer's knowledge. 116 CONG. REC. (Part 28) 38377 (1970).

standard of knowledge in the industry"; "does not depend on whether the particular employer is aware of it"), the alternative reading would appear to be more in keeping with his intent. And, at least one federal court has adopted this reading as the proper interpretation of a "recognized hazard."[65] With these factors in mind, it is fair to say that Representative Daniels advocated the standard hereinafter referred to as industry knowledge.

The Department of Labor has also expressed an opinion as to the appropriate definition of a "recognized hazard." In its Compliance Manual,[66] it has adopted a position similar to that of the Congress. Serving as a guideline for enforcement of the Act, the Compliance Manual states that a "hazard is 'recognized' if it is a condition that is (a) of common knowledge or general recognition in the particular industry in which it occurs, and (b) detectable."[67]

Thus, in terms of the legislative history and administrative declarations, the duty of the employer under the general duty clause is comparable to his common law duty. "Recognized hazards" are those that are known to be hazards by the industry. The employer is not saved by his own ignorance, although he may be saved by the ignorance of the industry. The latter point is a serious drawback to this formulation of the definition. An employer who is personally aware of a hazardous condition is not subject to citation under this reading if the industry is unaware of the hazard. Such a situation may arise in several contexts; two are mentioned for illustration. This circumstance might occur when (1) the particular industry is so young that there are no safety standards yet developed; and (2) the particular employer is so highly specialized in his operation as to be distinct from the industry as a whole and, again, there are no standards yet promulgated relevant to the employer's activities.[68]

65. National Realty and Constr. Co. v. OSHRC, 489 F.2d 1257, 1265 n.32 (D.C. Cir. 1973).

66. OFFICE OF COMPLIANCE, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT of LABOR, COMPLIANCE OPERATIONS MANUAL (1971).

67. *Id.* Chapter VIII Part A(2)(b)(1) *as quoted in* Miller, *Occupational Safety and Health Act: A New Concern for Employers,* 34 U. PITT. L. REV. 567, 578 (1973).

68. In the second situation, however, the argument could be made that because of the high degree of specialization, this particular employer is an "industry" himself. The only source of industry knowledge would be the knowledge of the employer in question. Arguably, therefore, the general duty clause is applicable.

Thus it is clear that there is a potential for frustration of the congressional intent as embodied in the general duty clause. Such frustration is the product of the interpretation given the clause by Congress itself as well as the Department of Labor. This interpretation, in turn, flows from the inherent generality of the clause itself. Alternative definitions have been equally unsuccessful at providing the necessary pervasive protection while keeping loopholes at a minimum.

B. *Judicial Interpretation*

The provisions of OSHA entitle both the employer and the Secretary to appeal Occupational Safety and Health Review Commission (OSHRC) decisions to the federal courts,[69] so the final determination of the extent of the protection to be afforded employees under the general duty clause rests, in part, with the judiciary.

The federal courts have generally read the clause as imposing a duty on the employer commensurate with his common law duty of reasonable care.[70] Unfortunately, a consensus as to the meaning of "recognized hazard" has been more elusive.[71] To date the courts have developed at least two and arguably three basic standards. The first is that of industry knowledge, comparable to the congressional interpretation. A broader, two-step standard considers both industry knowledge and the knowledge of the individual employer. The third standard involves the application of the reasonably prudent person test to the facts involved.

Illustrative of the first approach is *National Realty and Con-*

69. 29 U.S.C. § 655(f) (1976).

70. *See* Marshall v. Knudson Constr. Co., 566 F.2d 596, 599 (8th Cir. 1977); Getty Oil Co. v. OSHRC, 530 F.2d 1143, 1145 (5th Cir. 1976); Brennan v. Butler Lime and Cement Co., 520 F.2d 1011, 1017 (7th Cir. 1975); Cape & Vineyard Division v. OSHRC, 512 F.2d 1145, 1152 n.5 (1st Cir. 1975); McLean Trucking Co. v. OSHRC, 503 F.2d 8, 11 (4th Cir. 1974). *Contra,* National Realty and Constr. Co. v. OSHRC, 489 F.2d 1257, 1265 n.34 (D.C. Cir. 1973).

71. Illustrative of the judiciary's difficulty with the definition of "recognized hazard" is the following declaration by the Eighth Circuit Court of Appeals. Citing two of the major cases in the area, one of which was an earlier decision of their own in which they purported to interpret the general duty clause, the court stated that "[n]o court has specifically interpreted the meaning of 'recognized hazard.'" American Smelting & Ref. Co. v. OSHRC, 501 F.2d 504, 510 (8th Cir. 1974).

struction Co. v. OSHRC.[72] In *National Realty,* petitioner's foreman was killed when the front-end loader on which he was riding stalled going down an earthen ramp and rolled over on him.[73] At the time of the accident, the employee was standing on the running board of the loader in violation of company policy.[74] The employer was cited for a serious violation of the general duty clause.[75] The hearing examiner dismissed the citation;[76] but the OSHRC reversed, stating that the employer had violated the clause by failing to properly implement his own safety policy.[77] The court of appeals reversed the Review Commission on the ground that, in the absence of a showing of the steps the employer ought to have taken to avoid citation, and of the feasibility of such measures, there was insufficient evidence to support a finding of a violation.[78]

Although the case itself did not turn on the "recognized hazard" portion of the general duty clause,[79] the court nonetheless held, citing the speech of Representative Daniels, that the standard to be applied under that language "would be the *common knowledge of safety experts* who would be familiar with the circumstances of the industry or activity."[80] When one considers that the knowledge of

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72. 489 F.2d 1257 (D.C. Cir. 1973).

73. *Id.* at 1262.

74. *Id.*

75. A serious violation is defined as follows:

> [A] serious violation shall be deemed to exist in a place of employement if there is a substantial probability that death or serious physical harm could result . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of a violation.

29 U.S.C. § 666(j) (1976).

76. National Realty and Constr. Co. v. OSHRC, 489 F.2d 1257, 1262, (D.C. Cir. 1973).

77. *Id.* at 1263.

78. *Id.* at 1267-68.

79. The court's decision turned on the determination of whether or not the employer had kept his workplace *free* from hazards. The court held that the employer was obligated to eliminate only preventable hazards; that hazards are not preventable when they result from employee misconduct; and that an employer owes the same duty of care to his supervisors as he does to his workers. *Id.* at 1265-67.

80. *Id.* at 1265 n.32 (emphasis added). The court, by elaborating upon the "industry knowledge" definition offered by Representative Daniels, has narrowed the applicability of the general duty clause. Such elaboration reinforces the conclusion that consideration of the employer's personal knowledge is not called for. *Contra,* Cape & Vineyard Division v. OSHRC, 512 F.2d 1148, 1152 (1st Cir. 1975). ("[I]f the employer is shown to have actual knowledge that a practice is hazardous, the problem of fair notice does not exist.")

safety experts represents the height of industry knowledge in the field of industrial safety, it is clear that the court adopted the industry knowledge test. Thus, an employer is not subject to citation unless the industry "recognizes" the hazard.

The second judicial approach was advanced in *Brennan v. OSHRC (Vy Lactos Laboratories).*[81] Vy Lactos was in the business of manufacturing animal feed concentrates, one ingredient of which was fish solubles-slurry. To retard spoilage, the slurry was treated with sulfuric acid. Treated slurry leaked from the storage tank into an adjoining room. Upon discovery, most of the slurry was pumped out; and a crew was sent in to mop up. The crew was immediately overcome by hydrogen sulfide gas. No emergency breathing apparatus was available, and it took twenty minutes for the ambulance to arrive. Three crew members died, and two were seriously injured.

Cited for a serious violation of the general duty clause and faced with a fine of $750,[82] Vy Lactos challenged the citation by asserting that the presence of the gas was an unforeseeable result of a chemical reaction. The hearing examiner dismissed the citation, and the Review Commission affirmed by a vote of two to one. The Eighth Circuit Court of Appeals, on appeal by the Secretary of Labor, reversed and remanded.

Although the court agreed that the Secretary had the burden of proving that the hazard was "recognized,"[83] it felt that the Review Commission had imposed too great a burden. The Review Commission, in keeping with *National Realty,* required the Secretary to prove that the accumulation of hydrogen sulfide gas was "recognized" as a hazard in the industry.[84] The court of appeals expressly rejected that formulation of the Secretary's burden, stating that "[e]ven a cursory examination of the Act's legislative history clearly indicates that the term 'recognized' was chosen by Congress not to exclude actual knowledge, but rather to reach be-

81. 494 F.2d 460 (8th Cir. 1974).

82. For an explanation of the OSHA penalty structure, see note 39 *supra.*

83. Brennan v. OSHRC (Vy Lactos Laboratories), 494 F.2d 460, 463 (8th Cir. 1974).

84. The Review Commission stated that the question to be asked when applying the general duty clause is "not whether Respondent personally recognized the hazard, the question is whether the hazard is *recognized by the industry of which the Respondent is a part.*" *Id.* (emphasis added).

yond an employer's actual knowledge to include the generally recognized knowledge of the industry as well."[85] The court, however, failed to cite to any legislative history which would support its statement. Nonetheless, this approach of considering both industry and employer knowledge has received support from the Second Circuit Court of Appeals in *Usery v. Marquette Cement Manufacturing Co.*[86]

In *Marquette Cement,* an employee died after being struck by a load of debris dropped from a hole in the wall of the respondent's building.[87] There was no chute or other barrier to restrain the debris as it exited the building. The employer was cited for a serious violation of the general duty clause, and a $600 penalty was imposed. Before a hearing was held, the citation was amended to charge the employer with a violation of a specific standard (applicable to the construction industry).[88] The hearing examiner's vacating of the citation was affirmed by the Review Commission on the theory that the specific standard was not applicable to the employer's operations.[89] The Commission also found that there had been no violation of the general duty clause.[90] The Second Circuit Court of Appeals reversed and remanded for a determination of whether the general duty clause had in fact been violated.[91]

In its opinion the court stated, in direct support of *Vy Lactos Laboratories,* that to "constitute a recognized hazard the dangerous potential of a condition or activity must actually be known *either* to the particular employer *or* generally in the industry."[92]

Finally, in *Cape & Vineyard Division v. OSHRC,*[93] a case fac-

85. *Id.* at 464.

86. 568 F.2d 902 (2d Cir. 1977).

87. The dumping of the debris ocurred each time the employer's kiln was relined and yet the alleyway into which the debris fell was neither posted with warnings nor barricaded. The process of relining the kiln was carried on four or five times each year. *Id.* at 904.

88. The amended citation alleged a violation of 29 C.F.R. § 1926.852(a) (1978). That standard states that "[n]o material shall be dropped to any point lying outside the exterior walls of the structure unless the area is effectively protected." 568 F.2d at 904.

89. 568 F.2d at 905.

90. *Id.*

91. *Id.* at 906, 909-11.

92. *Id.* at 910 (emphasis added).

93. 512 F.2d 1148 (1st Cir. 1975).

tually similar to *Green Mountain Power,* the reasonably prudent person test was advanced where a specific OSHA standard was too vague to be applied.[94] Here, the employer was cited for failing to comply with a specific safety standard when an electrical lineman died after coming in contact with an energized line. On appeal the First Circuit Court of Appeals ruled that the specific standard under which the employer had been cited was too vague because it failed to provide adequate guidance to the employer. Under such circumstances, the court felt that "an appropriate test is whether a reasonably prudent man familiar with the circumstances of the industry would have protected against the hazard."[95] Finding that there were not enough facts in the record to support a citation, the court reversed the Review Commission holding.[96]

The court in *Cape & Vineyard*[97] applied the reasonably prudent person test when the particular regulation in question was so vague that it failed to give the employer notice of the proscribed activity. This test was intended to protect the employees in the absence of any other standard. As noted, the general duty clause was incorporated into the Act for the same purpose.[98] Because a vague regulation may be analogized to the absence of a regulation in terms of its effective implementation of OSHA policy, the application of the reasonably prudent person test is similar to the application of the general duty clause. The use of the objective reasonably prudent person test has been held to be in accord with the congressional purpose as reflected in the general duty clause.[99] It is therefore logical to assume that, regarding the employer's duty, the courts could find the reasonably prudent person to be a valid test to be applied under the general duty clause. This position was advanced in *Green Mountain Power,*[100] and the Vermont Supreme Court recognized it

94. *Id.* at 1152. This test was also advanced in *Green Mountain Power.* Brief for Appellant at 18-19, Green Mountain Power Corp. v. Commissioner of Labor and Indus., 136 Vt. 15, 383 A.2d 1046 (1978).

95. Cape & Vineyard Division v. OSHRC, 512 F.2d 1148, 1152 (1st Cir. 1975) (footnotes omitted).

96. *Id.* at 1150.

97. *See also* Brennan v. Smoke Craft, Inc., 530 F.2d 843 (9th Cir. 1976); McLean Trucking Co. v. OSHRC, 503 F.2d 8, 10 (4th Cir. 1974).

98. See text accompanying notes 44-49 *supra.*

99. McLean Trucking Co. v. OSHRC, 503 F.2d 8, 10 (4th Cir. 1974).

100. *See* note 94 *supra.*

as a valid alternative approach.[101]

Thus, from the federal courts come three different standards. The first, presented in *National Realty,* calls for consideration of the knowledge of safety experts in the industry—"industry knowledge." The second test, as expressed in *Vy Lactos Laboratories,* is the knowledge of the employer as well as industry knowledge—either one by itself being sufficient to uphold a citation. And the third approach—the reasonably prudent person—was advanced in *Cape & Vineyard.*

In *Green Mountain Power* the Vermont Supreme Court cited each of these tests of a "recognized hazard" approvingly,[102] but chose not to adopt any one in particular, holding that under any of them there had been a violation of the VOSHA general duty clause.[103] Not only is the court's holding difficult to justify under the third approach,[104] but the effect of its decision not to adopt one specific test is very serious: employers in the state are subject to citation without any declaration of the test to be applied or the nature of their duty to their employees.

III. Vermont and the General Duty Clause

Green Mountain Power Corp. v. Commissioner of Labor and Industry[105] was a case of first impression in the State of Vermont. "Neither the general duty clause nor any other aspect of VOSHA . . . [had] been construed by this Court."[106] The facts were, for the most part, undisputed.

Steven Baglio was a lineman first class A for petitioner Green Mountain. He was working with three other linemen and a site foreman reconductoring sections of power line at the time of his death.[107] During the procedure, in keeping with the customary prac-

101. Green Mountain Power Corp. v. Commissioner of Labor and Indus., 136 Vt. 15, 25, 383 A.2d 1046, 1052 (1978).

102. *Id.*

103. *Id.* at 26, 383 A.2d at 1052.

104. See text following note 132 *infra.*

105. 136 Vt. 15, 383 A.2d 1046 (1978).

106. *Id.* at 24, 383 A.2d at 1051.

107. *Id.* at 19, 383 A.2d at 1048.

tice in the industry,[108] "jumpers"—short sections of flexible insulated conductor—had been attached to the energized lines so that the linemen could work on the lines without having to curtail service to petitioner's customers.[109] Baglio was working on one pole when he descended and informed the foreman that he was going up another pole to remove a jumper.[110] The foreman did nothing other than warn Baglio and remind him that he ought not to do anything further without assistance once he had removed the jumper.[111] Baglio, with the authorization of the foreman, climbed the pole and began to remove the jumper. It is speculated[112] that once in position, Baglio leaned too far back in his effort to remove the second portion of the jumper and his neck made contact with an energized line not covered by protective rubber, resulting in his instantaneous electrocution.[113]

At the time of the accident, Baglio had had six years experience with Green Mountain and had, during that time, worked up from an apprentice lineman to a lineman first class A.[114] He was physically and mentally capable of performing the work in question and had never shown any inclination to violate company policy.[115] In this instance, however, he failed to cover all energized lines within his reach in violation of company policy and industry practice.[116] It is recognized, however, that it was also petitioner's policy to allow linemen first class A to make the final determination as to the need for protective cover on any particular operation, even when he is under immediate supervision.[117] The court found that at the time of the accident there was insufficient covering on the line on which Baglio was working and that the foreman was aware of that fact.[118]

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108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. No one was actually watching Baglio at the time of the accident. *Id.* at 20, 383 A.2d at 1049.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id. Contra,* Brief for Appellant at 12-14, Green Mountain Power Corp. v. Commissioner of Labor and Indus., 136 Vt. 15, 383 A.2d 1046 (1978).
118. *Id.* at 19, 383 A.2d at 1046.

As a result, the petitioner was cited for a serious violation of the VOSHA general duty clause.[119] The Occupational Safety and Health Review Board[120] found that the employer had violated the clause by failing to insure that adequate covering was being used by the lineman.[121] On appeal, the Chittenden County Superior Court confirmed the factual findings of the Review Board but reversed their decision on the grounds that the facts "did not support the conclusion of a violation of VOSHA."[122] The court reasoned that the uncovered line was not a "recognized hazard" for the purposes of the general duty clause. "[R]ather, the employee's failure to obey the company rule requiring covering of lines within reach constituted the hazard."[123] The court also found that this particular hazard was an isolated incident of employee misconduct beyond the employer's control for which the employer could not be liable.[124] The Vermont Supreme Court vacated the superior court ruling and reinstated the finding of a violation. The rationale for the decision was that the lower court had decided the case on the basis of an incorrect reading of the general duty clause.[125]

The Vermont Supreme Court first stated that there "[was] no question that there was a 'hazard' "[126] in this case and that the hazard was likely to cause death or significant physical harm.[127] Then, identifying the three federal judicial approaches to the determination of the existence of a "recognized hazard," the court declared that it "need not adopt any one interpretation . . . because the evidence . . . is sufficient to establish a 'recognized hazard' under any construction of the term."[128] The court's decision rested

119. The VOSHA general duty clause declares that "each 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 death or significant physical harm to his employees." VT. STAT. ANN. tit. 21, § 223(a) (1978).

120. *Id.* § 230(a) (1978).

121. Green Mountain Power Corp. v. Commissioner of Labor and Indus., 136 Vt. 15, 18, 383 A.2d 1046, 1049 (1978).

122. *Id.* at 19, 383 A.2d at 1048.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 25, 383 A.2d at 1051.

127. *Id.*

128. *Id.* at 26, 383 A.2d at 1052.

on the fact that both Green Mountain and the industry as a whole "took the hazard in question seriously enough to formulate a specific safety rule."[129]

While the court is correct that this would be a "recognized hazard" under the first two standards, its decision is more troublesome in terms of the reasonably prudent person formulation. Yet, of greater importance, is the dilatory effect that the court's decision will have on effective enforcement of job safety in Vermont.

If the court had adopted either the industry knowledge test or the employer/industry knowledge test, then it would have been necessary for them to find evidence of employer or industry knowledge. As noted, both the industry and the employer had a safety policy requiring the covering of lines within reach—sufficient evidence of their knowledge to warrant the court's finding of a recognition of the hazard. While it might be argued that reliance on existing industry or employer safety policies as evidence of recognition of a hazard would have a chilling effect on their promulgation, consideration of the relative economics of operating a business with and without employer promulgated safety policies tends to refute this argument.

The nature and purpose of the penalty structure of both OSHA and VOSHA is not to compensate injured employees, but rather to penalize employers for maintaining a hazardous workplace.[130] This point is clear when one considers the amounts of the penalties levied for violations.[131] Also, a citation may issue and a penalty be imposed even in the absence of an injury.[132] Balancing these facts against the cost and inconvenience of equipment downtime, the hiring and training of new employees, and replacement and repair costs of damaged machinery, it is to the benefit of the conscientious, economically minded employer to adopt, publish and enforce rules and safety policies. Regardless of their use as evidence of recognition of

129. *Id.* The court went on to state that "[t]hese safety rules certainly show their awareness of the hazard." *Id.*

130. *Id.* at 23-24, 383 A.2d at 1051. *See also* VT. STAT. ANN. tit. 21, § 201(b)(3) (1978) and 29 U.S.C. § 653(b)(4) (1976).

131. Green Mountain Power Corp. v. Commissioner of Labor and Indus., 136 Vt. 15, 23-24, 383 A.2d 1046, 1051 (1978). *See also* VT. STAT. ANN. tit. 21, § 225(a) (1978).

132. Green Mountain Power Corp. v. Commissioner of Labor and Indus., 136 Vt. 15, 23-24, 383 A.2d 1046, 1051 (1978).

a hazard, the economics favor their adoption. Thus, it is doubtful that such use of industry or employer safety policies will have a chilling effect on their promulgation, and therefore no adverse effects on the health and safety of employees should accompany their adoption.

In terms of the first two judicial approaches to hazard recognition and the Vermont Supreme Court's reliance on existing safety standards, its holding is supportable. When, however, the reasonably prudent person test is applied to the facts of *Green Mountain Power,* the court's holding is arguably incorrect.

The inquiry to be pursued is whether the acts and conduct of the employee are foreseeable to the reasonably prudent employer. As noted, petitioner Green Mountain Power vested a lineman first class A with the unilateral discretion to determine what the dangers were in a given situation and what steps should be taken to guard against them. This discretion was allowed only after considerable on-the-job experience and after the employee had acquired a thorough familiarity with company safety procedures and policies. One such policy required that linemen cover all energized lines within his reach. The danger of electrocution was one of which both Green Mountain and their employee, Baglio, were well aware. Protective covering was available to Baglio and he was warned of the danger by a site foreman. Baglio simply failed to take the precautions which were strictly required of him—if he had taken the required precautions, he would still be alive. When an employee thus disregards his employer's specific instructions regarding a regulation of which the employee is aware, and when the reason for the regulation is readily apparent, as here, it is questionable whether there is anything more the employer could have reasonably done to prevent the employee's injury. There was no showing that Green Mountain negligently vested Baglio with the discretion to determine in the field what precautions were required. To find a violation of VOSHA absent such a showing would approach too closely the forbidden point of holding the employer liable as an insurer. It seems entirely plausible to argue that despite the unfortunate accident here, Green Mountain had done all that the law requires (*i.e.*, had protected its

employee "*insofar as practicable*"[133]) in the discharge of its duty under the reasonably prudent person test, and that therefore no violation of VOSHA had occurred.[134]

Thus, in terms of the reasonably prudent person test, the court's statement of recognition of a hazard "under any construction of the term"[135] is weak at best and arguably incorrect.

There is, however, a more serious weakness in the decision in *Green Mountain Power*—the court's declaration that it "need not adopt any one interpretation" of "recognized."[136] By not providing an explicit declaration of the standard to be applied, the court left Vermont employers without guidance as to the requirements of the general duty clause. Employers remain unsure of the types of working conditions proscribed by the clause; employees remain in jeopardy. Also, consider the plight of the Commissioner of Labor and Industry and his staff who must try to enforce the clause. A great deal of time and money will be expended needlessly as a result of this opinion. Vermont has a valid interest in knowing what the law is and how it will be applied. *Green Mountain Power* brings us no closer to that end.

IV. A Proposal

Inasmuch as each of the three existing standards has its own weakness, and we have yet to see any real concurrence among the various circuit courts as to the appropriate approach, the following hybrid test is suggested. Such a test would involve the commingling of the three tests so as to counteract, as much as possible, the weaknesses of each and to give some guidance to employers and protection to employees. Also, this test would comport with the intended purposes and goals of the statute.[137]

The logical starting point would be to determine if there is

133. Vt. Stat. Ann. tit. 21, § 201(a) (1978) (emphasis added).

134. *See* note 79 and text accompanying note 78 *supra*.

135. Green Mountain Power Corp. v. Commissioner of Labor and Indus., 136 Vt. at 26, 383 A.2d at 1052.

136. *Id.*

137. See text accompanying note 21 *supra*.

industry recognition of hazards. As noted, the existence of industry safety policies would be evidence of such recognition.[138] It would be difficult for an employer to argue that a hazard does not exist or is not recognized when there is an industry regulation designed to protect workers from such hazard. Absent industry policy, the court could look to other indicia which would reflect industry recognition. Such indicia may be found, for instance, in expert testimony to the effect that the majority of those in the field refrain from a certain activity or methodology. Resort to the knowledge of the industry would impose a duty upon the employer who is ignorant of or oblivious to hazards and who might otherwise escape citation under the employer-knowledge test.

If the inquiry into industry knowledge proves fruitless, the next consideration would be the personal knowledge of the employer. Again, the same basic indicia would be considered to determine employer recognition of hazards. Taking into account employer knowledge enables the general duty clause to encompass those businesses not sufficiently widespread or developed to constitute an "industry." Employer knowledge is equally helpful where there is an industry whose practices or policies do not apply to the particular employer because of his specialization or experimentation in the field beyond the level of the rest of the industry.

Finally, if neither the employer nor the industry "recognizes" (or admits to recognizing) a hazard, the court would look to the reasonably prudent person. This phase of the test would be helpful in at least two situations. First, where industry practice is so diversified or embryonic and the employer himself does not recognize a hazard, the court could subject the facts of a particular case to this common sense scrutiny. Second, it would be helpful where a court feels that a hazard may unnecessarily endanger employees despite the fact that the hazard is accepted by the industry and employer as an inherent danger of the trade. Granted, most cases will be decided on the basis of the first two parts of this test, but the infrequency of application of the reasonably prudent person element should not argue against its adoption.

138. See text accompanying notes 130-32 *supra*.

This three-pronged analysis is a valid alternative to the rigidity of the divided front of precedent now facing Vermont. It provides the court with flexibility so that the inherent limits of the several standards may be avoided. Any set of facts calling for the application of the general duty clause is in some degree unusual. The proposed system enables a court to tailor the application of the test to the facts.

Also, this system would provide a degree of predictability lacking under *Green Mountain Power*. Although prior general duty clause cases are of limited precedential value because of their unique facts, the declaration of a standard at least permits employers to speculate about their own duty—without a declared standard, they cannot even begin to speculate.

Equally as important as its flexibility and predictability is this system's congruence with the purpose of VOSHA. The goal of VOSHA is to protect the lives and health of Vermont workers *"insofar as practicable."*[139] The analysis suggested here would permit a court to consider fully the various ways in which hazards are recognized, thereby promoting full enforcement of the act. Moreover, it would not impose too great a burden on the employer. Although somewhat more burdensome than would be any of the three existing standards taken separately, it would not violate the common law standard because it would not hold the employer liable as an insurer.[140]

This proposed system would be, therefore, most useful in future inquiries under the VOSHA general duty clause. At the very least it would be preferable to the Vermont Supreme Court's choice not to adopt any standard at all; at most it would provide the greatest degree of protection under the general duty clause.

Conclusion

There is a need for a definitive statement of the duty of an employer under the general duty clause. To facilitate the satisfac-

139. Vt. Stat. Ann. tit. 21, § 201(a) (1978) (emphasis added).

140. See text accompanying notes 59-61 *supra*.

tion of this need, it is necessary for the courts, the Secretary of Labor and Industry, and the legislature to settle on a definition of the term "recognized hazard." So long as the agencies charged with enforcing the statute are unsure of what is demanded thereby, a great disservice is being done to the employers in the state, and an even greater one is being done to the employees. The failure of the Vermont Supreme Court to seize the opportunity to define the term and the duty flowing therefrom will be an impediment to the effectiveness and uniform application of the VOSHA general duty clause.

Once a definition is provided, the ambiguity shrouding the general duty clause will dissipate; and it will allow for the implementation of VOSHA as it was intended.

Robert E. Fletcher, Jr.