North Carolina Department of Labor
Occupational Safety and Health Division
Bureau of Compliance

Field Operations Manual
Chapter IV - Violations

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Chapter IV

Violations

A. **Basis of Violations**.

1. Standards and Regulations. NCGS 95-129(2) of the act states that each employer has a responsibility to comply with the occupational safety and health standards promulgated under the act. The specific standards and regulations are found in Title 29 Code of Federal Regulations (CFR) 1900 series. The standards are subdivided and the most specific subdivision of the standard will be used for citing violations.

   a. Definition and Application of Horizontal and Vertical Standards. Vertical standards are those standards that apply to a particular industry or to particular operations, practices, conditions, processes, means, methods, equipment or installations. Examples include 29 CFR 1910.262 for textiles and 29 CFR 1910.264 for laundries. Horizontal standards are those standards that apply across several industries. Examples include 29 CFR 1910.110 for usage of LP gas and 29 CFR 1910.1200 for hazard communication. Within both horizontal and vertical standards there are general standards and specification standards.

      i. General standards are those that address a category of hazards and whose coverage is not limited to a special set of circumstances; e.g., 29 CFR 1910.132 for personal protective equipment (PPE), 29 CFR 1910.212(a)(1) or (a)(3)(ii) for general machine guarding, 29 CFR 1910.307 for wiring in hazardous locations and 29 CFR 1926.28(a) for PPE in construction.

      ii. Specification standards are those designed to regulate a specific hazard that set forth the measures the employer must take to protect employees from that particular hazard. Examples include 29 CFR 1910. 23 for guard railings and 29 CFR 1926.451(g)(1) for fall protection from scaffolds.

      iii. There are two types of vertical standards:

         A. Standards that apply to particular industries (Maritime, Construction, etc.) and standards that apply to particular sub-industries as contained in Subpart R of 29 CFR 1910 for sawmills, wood pulping, laundries, etc., and

         B. Standards that state more detailed requirements for certain types of operations, equipment, or equipment usage than are stated in another (more general) standard in the same part; e.g., requirements in 29 CFR 1910.213 for woodworking machinery.

iv. If a CSHO is uncertain whether to cite under a horizontal or a vertical standard when both apply, the Supervisor should be consulted. The following general guidelines apply:

A. When a hazard in a particular industry is covered by both a vertical standard and a horizontal standard, the vertical standard will take precedence. This is true even if the horizontal standard is more protective. An example of this is in 29 CFR 1910.94(d) the open surface tank standard. It allows the use of a three-quarter inch hose with a quick release valve to supply water to wash harmful chemicals off the skin, instead of the deluge shower and eye wash required by 29 CFR 1910.151(c). An exception to this rule is in 29 CFR 1910.120 for hazardous waste operations where the most protective standard applies, be it horizontal or vertical.

B. If the particular industry does not have a vertical standard that covers the hazard, then the CSHO will use the horizontal (general industry) standard.

C. When a hazard within general industry (29 CFR 1910) is covered by both a horizontal (more general) standard and a vertical (more specific) standard, the vertical standard takes precedence. For example, in 29 CFR 1910.213 the requirement for point of operation guarding for swing saws is more specific than the general machine guarding requirements contained in 29 CFR 1910.212. However, if the swing saw is used only to cut material other than wood, 29 CFR 1910.212 is applicable.

D. In addition, industry vertical standards take precedence over equipment vertical standards. Thus, if the swing saw is in a saw mill, the more specific standard for sawmills is 29 CFR 1910.265 rather than 29 CFR 1910.213.

E. In situations covered by both a horizontal (general) and a vertical (specific) standard where the horizontal standard appears to offer greater protection to the employee, the horizontal (general) standard may be cited only if its requirements are not inconsistent or in conflict with the requirements of the vertical (specific) standard. To determine whether there is a conflict or inconsistency between the standards, a careful analysis of the two standards must be performed in regard to the specific conditions.

EXAMPLE: 29 CFR 1926.501(b)(1), which requires fall protection at six feet, cannot be cited for scaffolds since 29 CFR 1926.451(g)(1) requires fall protection on scaffolds at ten feet.

F. When determining whether a horizontal or a vertical standard is applicable to a work situation, the CSHO will focus attention on the activity in which the employer is engaged at the

establishment being inspected rather than the nature of the employer's general business.

G. Hazards found in construction work that are not covered by a specific 29 CFR 1926 standard will not normally be cited under a 29 CFR 1910 standard unless that standard has been identified as being applicable to construction. (For example, 29 CFR 1910.1020, Access to Employee Exposure and Medical Records, and 29 CFR 1910.1200, Hazard Communication, have been identified as applicable to construction.)

1. "Construction work" means work for construction, alteration and/or repair, including painting and decorating, and includes both contract and non-contract work. (See 29 CFR 1926.13.) Replacement in kind is general industry. Improvements or upgrades are construction.

2. If any question arises as to whether an activity is deemed to be construction for purposes of the act, the supervisor will be consulted.

3. For hazards found in construction, the supervisor will obtain the approval of the bureau chief before citing violations of 29 CFR 1910 standards that have not been identified as applicable to construction. (See Chapter XII on construction for additional guidelines.)

b. Violation of Variances. The employer's requirement to comply with a standard may be modified through granting of a variance, as outlined in NCGS 95-132 and discussed in OPN 118.

i. An employer will not be subject to citation if the observed condition is in compliance with either the granted variance or the controlling standard. In the event that the employer is not in compliance with the requirements of the variance, a violation of the controlling standard will be cited with a reference in the citation to the variance provision that has not been met.

ii. If, during a compliance inspection, the CSHO discovers that the employer has filed an application for variance regarding a condition that is determined to be an apparent violation of the standard, this fact will be reported to the supervisor who will obtain information concerning the status of the variance request.

B. **General Duty Requirement.** NCGS 95-129(1) requires that "Each employer will furnish to each of his employees conditions of employment and a place of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

1. Evaluation of Potential NCGS 95-129(1) Situations. In general, Occupational Safety and Health Review Commission and court precedent has established that the following elements are necessary to prove a violation of the general duty clause:

a. The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;

b. The hazard was recognized in the industry;

c. The hazard was causing or was likely to cause death or serious physical harm; and

d. There was a feasible and useful method to correct the hazard.

2. Discussion of NCGS 95-129(1) Elements. The above four elements of a NCGS 95-129 (1) violation are discussed in greater detail as follows:

a. A Hazard to Which Employees Were Exposed. A general duty citation must involve both a serious hazard and exposure of employees.

i. Hazard. A hazard is a danger that threatens physical harm to employees.

A. Not the Lack of a Particular Abatement Method. In the past some NCGS 95-129(1) citations have incorrectly alleged that the violation is the failure to implement certain precautions, corrective measures or other abatement steps rather than the failure to prevent or remove the particular hazard. It must be emphasized that NCGS 95-129(1) does not mandate a particular abatement measure but only requires an employer to render the workplace free of certain hazards by any feasible and effective means that the employer wishes to utilize.

1. In situations where it is difficult to distinguish between a dangerous condition and the lack of an abatement method, the Supervisor will consult with the bureau chief for assistance in articulating the hazard properly.

EXAMPLE 1. Employees doing sanding operations may be exposed to the hazard of fire caused by sparking in the presence of magnesium dust. One of the abatement methods may be training and supervision. The "hazard" is the exposure to the potential of a fire; it is not the lack of training and supervision.

EXAMPLE 2. In another situation a danger of explosion due to the presence of certain gases could be remedied by the use of non-sparking tools. The hazard is the explosion hazard due to the presence of the gases; it is not the lack of non-sparking tools.

EXAMPLE 3. In a hazardous situation involving high pressure gas where the employer has failed to train employees properly, has not installed the proper high pressure equipment, and has improperly installed the equipment that in place, there are three abatement measures which the employer failed to take; there is only one hazard (viz., exposure to the hazard of explosion due

to the presence of high pressure gas) and therefore only one general duty clause citation.

2. Where necessary, the supervisor should consult with the AG's Office.

B. The Hazard Is Not a Particular Accident. The occurrence of an accident does not necessarily mean that the employer has violated NCGS 95-129 (1) although the accident may be evidence of a hazard. In some cases a NCGS 95-129 (1) violation may be unrelated to the accident. Although accident facts may be relevant and will be gathered, the citation will address the hazard in the workplace, not the particular facts of the accident.

EXAMPLE: A fire occurred in a workplace where flammable materials were present. The fire itself injured no employee, but an employee, disregarding the clear instructions of his supervisor to use an available exit, jumped out of a window and broke a leg. The danger of fire due to the presence of flammable materials may be a recognized hazard causing or likely to cause death or serious physical harm, but the action of the employee may be an instance of unpreventable employee misconduct. The citation must deal with the fire hazard, not with the accident involving the employee who broke his leg.

C. The Hazard Must Be Reasonably Predictable. The hazard for which a citation is issued must be reasonably predictable.

1. All the factors that could cause a hazard need not be present in the same place at the same time in order to prove the hazard; e.g., an explosion need not be imminent.

EXAMPLE: If combustible gas and oxygen are present in sufficient quantities in a confined area to cause an explosion if ignited but no ignition source is present or could be present, no NCGS 95-129(1) violation would exist. If an ignition source is available at the workplace and the employer has not taken sufficient safety precautions to preclude its use in the confined area, then a foreseeable hazard may exist.

2. It is necessary to establish that the hazard is reasonably foreseeable (or predictable), rather than that the hazard that led to the accident.

EXAMPLE: A titanium dust fire may have spread from one room to another only because an open can of gasoline was in the second room. An employee who usually worked in both rooms was burned in the second room from the gasoline. The presence of gasoline in the

second room may be a rare occurrence. It is not necessary to prove that a fire in both rooms was reasonably foreseeable. It is necessary only to prove that the fire hazard, in this case due to the presence of titanium dust, was reasonably foreseeable.

ii. The Hazard Must Affect the Cited Employer's Employees. The employees affected by the NCGS 95-129(1) hazard must be the employees of the cited employer.

A. An employer who may have created, contributed to, and/or controlled the hazard should not be cited for a NCGS 95-129(1) violation if his own employees are not exposed to the hazard. (See FOM Chapter V - Citations).

B. In complex situations, such as multi-employer worksites, where it may be difficult to identify the precise employment relationship between the employer to be cited and the exposed employees, the supervisor will consult with the bureau chief and AG's Office to determine the sufficiency of the evidence regarding the employment relationship.

C. The fact that an employer denies that exposed employees are his/her employee's does not necessarily decide the legal issue involved. Whether or not exposed persons are employees of an employer depends on several factors, the most important of which is who controls the manner in which the employees perform their assigned work. The question of who pays these employees may not be the determining factor.

b. The Hazard Must be Recognized. Recognition of a hazard can be established on the basis of industry recognition, employer recognition, or "common-sense" recognition. The use of common-sense as the basis for establishing recognition will be limited to special circumstances. Recognition of the hazard must be supported by satisfactory evidence and adequate documentation in the file as follows:

i. Industry Recognition. A hazard is recognized if the employer's industry recognizes it. Recognition by an industry other than the industry to which the employer belongs is generally insufficient to prove this element of a NCGS 95-129 (1) violation. Although evidence of recognition by the employer's specific branch within an industry is preferred, evidence that the employer's industry recognizes the hazard may be sufficient. The bureau chief should consult with the director's office on this issue. Industry recognition of a particular hazard can be established in several ways:

A. Statements by industry safety or health experts that is relevant to the hazard.

B. Evidence of implementation of abatement methods to deal with the particular hazard by other members of the industry.

C. Manufacturer's warnings on equipment that is relevant to the hazard.

D. Statistical or empirical studies conducted by the employer's industry which demonstrate awareness of the hazard. Evidence such as studies conducted by the employee representatives, the union or other employees should also be considered if the employer or the industry has been made aware of them.

E. Government and insurance industry studies, if the employer or the employer's industry is familiar with the studies and recognizes their validity.

F. Laws or regulations that apply in the jurisdiction where the violation is alleged to have occurred and which currently are enforced against the industry in question. In such cases, however, corroborating evidence of recognition is recommended.

1. Regulations of other federal agencies generally should not be used. They raise substantial difficulties under NCGS 95-128, which provides that the division is preempted when such an agency has statutory authority to deal with the working condition in question.

2. In cases where state and local government agencies not falling under the preemption provisions of NCGS 95-128 have codes or regulations covering hazards not addressed by OSH standards, the bureau chief, upon consultation with the director's office, will determine whether the hazard is to be cited under NCGS 95-129 (1) or referred to the appropriate agency for enforcement.

G. Standards issued by the American National Standards Institute (ANSI), the National Fire Protection Association (NFPA), and other private standard-setting organizations, if the relevant industry participated on the committee drafting the standards. Otherwise, such private standards should be used only as corroborating evidence of recognition. Preambles to these standards that discuss the hazards involved may show hazard recognition as much as, or more than, the actual standards. It must be emphasized, however, that these private standards cannot be enforced like OSH standards. They are simply evidence of industry recognition, seriousness of the hazard or feasibility of abatement methods.

H. NIOSH criteria documents; the publications of Environmental Protection Agency (EPA), the National Cancer Institute, and other agencies; OSHA hazard alerts; the OSHA Technical Manual; and articles in medical or scientific journals by persons other than those in the industry, if used only to supplement other evidence which more clearly establishes recognition. Such publications can be relied upon only if it is established that they

have been widely distributed in general, or in the relevant industry.

ii. Employer Recognition. A recognized hazard can be established by evidence of actual employer knowledge. Evidence of such recognition may consist of written or oral statements made by the employer or other management or supervisory personnel during or before the compliance inspection.

A. Company memorandums, safety rules, operating manuals or operating procedures and collective bargaining agreements may reveal the employer's awareness of the hazard. In addition, accident, injury and illness reports prepared for the Division, worker's compensation, or other purposes may show this knowledge.

B. Employee complaints or grievances to supervisory personnel may establish recognition of the hazard, but the evidence should show that the complaints were not merely infrequent, off-hand comments.

C. The employer's own corrective action may serve as the basis for establishing employer recognition of the hazard if the employer did not adequately continue or maintain the corrective action or if the corrective action did not afford any significant protection to the employees.

iii. Common-Sense Recognition. If industry or employer recognition of the hazard cannot be established in accordance with (a) and (b), recognition can still be established if it is concluded that any reasonable person would have recognized the hazard. This theory of recognition should be used only in flagrant cases.

EXAMPLE: In a general industry situation, a court has held that any reasonable person would recognize that it is hazardous to dump bricks from an unenclosed chute into an alleyway between buildings that is 26 feet below and in which unwarned employees work. (In construction, NCGS 95-12 9(1) could not be cited in this situation because 29 CFR l926.252 or 1926.852 applies.)

c. The Hazard Was Causing or Was Likely to Cause Death or Serious Physical Harm. This element of a NCGS 95-129 (1) violation is virtually identical to the substantial probability element of a serious violation under NCGS 95-127(18). Serious physical harm is defined in B.1. of this chapter. This element of a NCGS 95-129 (1) violation can be established by showing that:

i. An actual death or serious injury resulted from the recognized hazard, whether immediately prior to the inspection or at other times and places; or

ii. If an accident occurred, the most reasonably predictable result would be death or serious physical harm. For example, an employee is standing at

the edge of a work platform, 25 feet above the ground. Under these circumstances if the falling incident occurs, death or serious physical harm (e.g., broken bones) is the most reasonably predictable result.

iii. In a health context, establishing serious physical harm at the cited levels may be particularly difficult if the illness will require the passage of a substantial period of time to occur. Expert testimony is crucial to establish that serious physical harm will occur for such illnesses. It will generally be easier to establish this element for acute illnesses, since the immediacy of the effects will make the causal relationship clearer. In general, the following must be shown to establish that the hazard causes or is likely to cause death or serious physical harm when such illness or death will occur only after the passage of a substantial period of time:

A. Regular and continuing employee exposure at the workplace to the toxic substance at the measured levels reasonably could occur;

B. Illness that is most reasonably predictable to result from such regular and continuing employee exposure; and

C. If illness does occur, its likely result is death or serious physical harm.

d. <u>The Hazard May Be Corrected by a Feasible and Useful Method</u>. To establish a NCGS 95-129 (1) violation the agency must identify a method that is feasible, available and likely to correct the hazard. The information will indicate that the recognized hazard, rather than a particular accident, is preventable.

i. If the proposed abatement method would eliminate or significantly reduce the hazard beyond whatever measures the employer may be taking, a NCGS 95-129 (1) citation may be issued. A citation will not be issued merely because the agency knows of an abatement method different from that of the employer, if the agency's method would not reduce the hazard significantly more than the employer's method. It must also be noted that in some cases only a series of abatement methods will alleviate a hazard. In such a case all the abatement methods will be mentioned.

ii. Feasible and useful abatement methods can be established by reference to:

A. The employer's own abatement method that existed prior to the inspection but was not implemented;

B. The implementation of feasible abatement measures by the employer after the accident or inspection;

C. The implementation of abatement measures by other companies;

D. The recommendations by the manufacturer of the hazardous equipment involved in the case; and

E. Suggested abatement methods contained in trade journals, private standards and individual employer standards. Private standards will not be relied on in a NCGS 95-129 (1) citation as mandating specific abatement methods.

1. For example, if an ANSI standard deals with the hazard of exposure to hydrogen sulfide gas and refers to various abatement methods, such as the prevention of the build-up of materials which create the gas and the provision of ventilation, the ANSI standard may be used as evidence of the existence of feasible abatement measures.

2. The citation for the example given will state that the recognized hazard of exposure to hydrogen sulfide gas was present in the workplace and that a feasible and useful abatement method existed; e.g., preventing the build-up of gas by providing an adequate ventilation system. It would not be correct to issue a citation alleging that the employer failed to prevent the build-up of materials which could create the gas, and failed to provide a ventilation system, as both of these are abatement methods, not hazards.

F. Evidence provided by expert witnesses that demonstrates the feasibility of the abatement methods. Although it is not necessary to establish that the industry recognizes a particular abatement method, such evidence will be used if available.

3. Use of the General Duty Clause. The general duty provisions will be used only where there is no standard that applies to the particular hazard involved, as outlined in 29 CFR 1910.5(f).

a. The general duty clause may be applied in situations where a recognized hazard is created in whole or in part by conditions not covered by a standard. Ergonomic hazards are not covered by any standard and are cited as general duty. Wood and metal ladders are covered by 29 CFR 1910.25 and 1910.26, while misuse of fiberglass ladders must be cited general duty.

b. The general duty clause may be applicable to some types of employment that are inherently dangerous (fire brigades, emergency rescue operations, etc.). Employers involved in such occupations must take the necessary steps to eliminate or minimize employee exposure to all recognized hazards that are likely to cause death or serious physical harm. These steps include anticipation of hazards that may be encountered, provision of appropriate protective equipment, and prior provision of training, instruction, and necessary equipment. An employer who has failed to take appropriate steps on any of these or similar items and has allowed the hazard to continue to exist may be cited under the general duty clause (if not covered under a standard).

4. Limitations on Use of the General Duty Clause. NCGS 95-129 (1) is to be used only within the guidelines given in B.2.a. of this chapter.

a. NCGS 95-129 (1) Will Not Be Used When a Standard Applies to a Hazard. Both 29 CFR 1910.5(f) and legal precedent establish that NCGS 95-129 (1) may not be used if an OSH standard applies to the hazardous working condition.

i. Prior to issuing a NCGS 95-129 (1) citation, the standards must be reviewed carefully to determine whether a standard applies to the hazard. If a standard applies, the standard will be cited rather than NCGS 95-129 (1). Prior to the issuance of a NCGS 95-129 (1) citation, a notation will be made in the file to indicate that the standards were reviewed and no standard applies.

ii. If there is a question as to whether a standard applies, the supervisor will consult with the bureau chief. The AG's office may assist the bureau chief in determining the applicability of the standard.

iii. NCGS 95-129 (1) may be cited "in the alternative" when a standard is also cited to cover a situation where there is doubt as to whether the standard applies to the hazard.

A. If the issue of the applicability of a specific standard is raised in a subsequent informal conference or notice of contest proceeding, the supervisor will consult with the bureau chief, who may refer the matter to the AG's office for appropriate legal advice.

B. If, on the other hand, the issue of the preemption of the general duty clause by a standard is raised in a subsequent informal conference or notice of contest proceeding, the supervisor will consult with the bureau chief, who may refer the matter to the AG's office for appropriate legal advice.

b. NCGS 95-129 (1) Will Not Normally Be Used To Impose a Stricter Requirement than that required by the Standard. When an existing standard is inadequate to protect worker safety and health, a NCGS 95-129 (1) citation may be considered. All of the NCGS 95-129 (1) elements discussed above must be satisfied, AND there must be actual employer knowledge that the standard was inadequate to protect employees from death or serious physical harm. See Int'l Union UAW v. Gen. Dynamics Land Sys. Div., 815 F.2d 1570 (D.C. Cir. 1987). CSHOs shall contact the Bureau Chief early in the investigation of these types of cases.

EXAMPLE: An OSHA standard provides for a permissible exposure limit (PEL) of 5 ppm, and a recognized Occupational Exposure limit (OEL)—such as an ACGIH® Threshold Limit Value (TLV®) or NIOSH Recommended Exposure Limit (REL) —is 3 ppm. A NCGS 95-129 (1) citation may only be considered for exposures between the OEL and the PEL if the data establishes that exposures at the measured level are likely to cause death or serious physical harm and the employer has actual knowledge that the PEL is inadequate to protect its employees.

c. NCGS 95-129 (1) Will Normally Not Be Used to Require an Abatement Method Not Set Forth in a Specific Standard. A specific standard is one that refers to a particular toxic substance or deals with a specific operation, such as welding. If a

toxic substance standard covers engineering control requirements but not requirements for medical surveillance, NCGS 95-129 (1) will not be cited to require medical surveillance.

d. NCGS 95-129 (1) Will Not Be Used to Enforce "Should" Standards. If a NCGS 95-131 standard or its predecessor, such as an ANSI standard, uses the word "should," neither the standard nor NCGS 95-129 (1) will ordinarily be cited with respect to the hazard addressed by the "should" portion of the standard.

e. NCGS 95-129 (1) Will Not Normally Be Used To Cover Categories of Hazards Exempted by a Standard. Although no hard and fast general rule can be stated concerning the use of NCGS 95-129 (1) to cover specific categories of hazards, types of machines, operations, or industries exempted from coverage by a standard, NCGS 95-129 (1) will normally not be cited if the reason for the exemption is the lack of a hazard.

i. If, on the other hand, the reason for the exemption is that the drafters of the standard (or source document) declined to deal with the exempt category for reasons other than the lack of a hazard, the general duty clause may be cited if all the necessary elements for such a citation are present.

ii. The supervisor will evaluate the circumstances of special situations in accord with guidelines stated herein and consult with the bureau chief to determine whether a NCGS 95-129 (1) citation can be issued in those special cases.

f. Alternative Standards. There are a number of general standards that will be considered for citation rather than NCGS 95-129 (1) in certain situations that initially may not appear to be governed by a standard.

i. If a hazard not covered by a specific standard can be substantially corrected by compliance with a personal protective equipment (PPE) standard, the PPE standard will be cited. In general industry, 29 CFR 1910.132(a) may be appropriate where exposure to a hazard may be prevented by the wearing of PPE. In construction, 29 CFR 1926.28(a) may be appropriate under similar circumstances.

ii. For a health hazard, the particular toxic substance standards, such as asbestos and coke oven emission, will be cited where appropriate. If those particular standards do not apply, however, other standards may be applicable; e.g., the air contaminant levels contained in 29 CFR 1910.1000 may apply in general industry and those contained in 29 CFR 1926.55 may apply in construction.

iii. Another standard which may possibly be cited is 29 CFR 1910.134 (a) which deals with the hazards of breathing harmful air contaminants not covered under 29 CFR 1910.1000 or another specific standard and requires the use of feasible engineering controls and the use of respirators where engineering controls are not feasible.

iv. In addition, 29 CFR 1910.141(g)(2) may be cited when employees are allowed to consume food or beverages in an area exposed to a toxic material, and 29 CFR 1910.132(a) may be cited when toxic materials are absorbed through the skin.

v. The foregoing standards as well as others which may be applicable should be considered carefully before issuing a NCGS 95-129 (1) citation for a health hazard.

5. Classification of Violations Cited Under the General Duty Clause. Only those hazards alleging serious violations may be cited under the general duty clause (including willful and/or repeat violations which would otherwise qualify as serious violations, except for their willful or repeat nature). Nonserious citations will not be issued for violations based on the general duty clause.

6. Procedures for Implementation of Section NCGS 95-129 (1) Enforcement. To ensure that all citations of the general duty clause are fully justified, the following procedures will be carefully adhered to.

a. Gathering Evidence and Preparing the File. The evidence necessary to establish each element of a NCGS 95-129 (1) violation will be documented in the file. This includes all photographs, videotapes, sampling data, witness statements and other documentary and physical evidence necessary to establish the violation. Additional documentation includes why it was common knowledge, why it was detectable, why it was recognized practice and supporting statements or reference materials.

i. If copies of documents relied on to establish the various NCGS 95-129 (1) elements cannot be obtained before issuing the citation, these documents will be accurately quoted and identified in the file so they can be obtained later if necessary.

ii. If experts are needed to establish any elements of the violation, the experts will be consulted before the citation is issued and their opinions noted in the file. The file will also contain their addresses and telephone numbers.

iii. The file will contain a statement that a search has been made of the standards and that no standard applies to the cited condition.

b. Pre-Citation Review. The supervisor will ensure that all proposed NCGS 95-129 (1) citations undergo pre-citation review as follows:

i. The bureau chief will be consulted prior to the issuance of all NCGS 95-129 (1) citations where such consultation is required by the procedures in the paragraphs under B.2. or where complex issues or exceptions to those procedures are involved. The bureau chief will ensure that such NCGS 95-129 (1) citations are issued only in appropriate circumstances after consultation with the AG's office, as conditions require.

ii. If a standard does not apply and all criteria for issuing a NCGS 95-129 (1) citation are not met but the supervisor determines that the hazard warrants some type of notification, a letter will be sent to the employer and the employee representative describing the hazard and suggesting corrective action.

7. Reporting Hazards Not Covered by a Standard. The supervisor should evaluate all alleged general duty clause violations to determine whether they should be referred to the ETTA for the development of new or revised standards. Those violations considered candidates for development or revision of a standard should be forwarded by the supervisor to the bureau chief, who should include appropriate comments, recommendations and supporting documentation with the transmittal to ETTA.

8. Using General Duty. A hazardous condition that apparently violates the general duty clause will be cited only when exposure to an employee of the employer can be documented and substantiated. Exposure must have occurred within the six months immediately preceding the issuance of the citation in order to serve as a basis for the violation.

C. **Employee Exposure.** It is important to establish that an employer-employee relationship exists as the OSH Act of North Carolina is only applicable to employers that have at least one employee. Employee exposure is one of the necessary elements to support issuing a citation for a violation of a standard.

1. Definition of Employee. GS § 95-127 defines the term "employee" to mean an employee of an employer who is engaged in a business of other capacity of his employer, including any and all business units and agencies owned and/or controlled by the employer.

Whether or not exposed persons are volunteers, self-employed contractors or employees of an employer depends on several factors. The most important questions to answer are who pays the employee and who controls the manner in which the employee performs the assigned work. Determining the employer of an exposed person may be a very complex question, in which case the bureau chief may seek the advice of the AG's office. The following questions will help determine if an individual is an employee of an employer:

a. General

1. Is the 'individual' in business (e.g., incorporated, sole owner, etc.)?
2. Does the 'individual' own a place of business?
3. Is the 'individual' engaged in making services available to the general public?
4. Is the 'hiring party' in business (e.g., incorporated, sole owner, etc.)?
5. Is the work performed by the 'individual' for an indefinite period of time?
6. Is the work being performed by the 'individual' part of the 'hiring party's' regular business or operations?
7. Are the 'individual's' services crucial to the success of the 'hiring party's' business?
8. What is the duration of the job?

b. Contracts/Relationships

1. Is there a written, expressed or implied contract between 'employer' and 'individual'?
2. Who do the 'individual(s)' consider to be their 'employer'?
3. Does the 'individual' work for more than one person, business or firm?

4. What did the parties intend their relationship to be?
5. Does the 'individual' have a continuing relationship/employed by the 'hiring party' or 'contracting party'? (does not need to be on a regular basis)
6. How long has a relationship existed between the 'individual' and the 'hiring party'?
7. What is the relationship like in practice?

c. Training/Skills

1. Does the job require particular skills or qualifications?
2. Who screens the 'individual' to determine whether they have the required skill set to perform the job?
3. Does the 'hiring party' specify minimum qualification requirements?
4. Does the 'hiring party' provide training on the job?

d. Insurance

1. Whose workers compensation insurance covers the 'individual'?
2. Are any benefits provided by the 'hiring party' such as sick pay, vacation pay, severance pay, retirement, worker compensation, disability insurance, or death benefits?

e. Property/Tools/Investment

1. Does the 'hiring party' pay for tools, equipment, supplies, advertising, overhead, or administrative workers?
2. Does the 'individual' have a substantial investment in any of the equipment or tools required to perform the work?
3. Who claims depreciation on the equipment or tools?
4. Who owns the land and/or building used by the 'individual'?
5. Does the 'individual' purchase PPE and/or pay for transportation to work or traveling expenses?
6. Does the 'individual' make or is required to make an investment to perform the work? (e.g., rental of a facility/equipment)

f. Location

1. Where does the 'individual' perform their work?
2. Is the work conducted on the 'hiring party's' premises?

g. Pay

1. Is the 'individual' paid in intervals (e.g., wages, salary) based on time worked or is there a lump sum payment for work and expenses at the completion of the job?
2. Who proposes or decides how much the 'individual' gets paid?
3. How are the 'individual's' wages established?
4. Who pays the 'individual's' wages/salary? Where does the money come from?
5. Does the 'individual' receive pay through a commission?
6. Are business expense vouchers filed and by whom?
7. Does the 'individual's' ability to increase their income depend on efficiency rather than initiative, judgment and foresight?
8. Does the 'individual' have an opportunity for profit or loss upon completion of the job or on supplies?

h. Taxes

1. How are taxes handled?
2. Does the 'hiring party' withhold taxes or Social Security?
3. Who deducts money from the 'individual's' wages/salary for taxes, etc.?

i. Hiring/Firing

1. Who initially hires the 'individual' to perform the work?
2. Does the 'individual' have unilateral right to terminate their services?
3. Does the 'hiring party' have unilateral right to fire, hire or modify the employment condition of the 'individual'?
4. Is the 'individual' free to hire assistants or substitute the work to someone else as they see fit?
5. If the 'individual' can hire assistants, who pays the assistants and how?
6. Does the 'individual' have full control over hired assistants?
7. Who has authority/responsibility to control/discipline the workers?

j. Control

1. Does the 'hiring party' have the power to control the 'individual'?
2. How much supervision is the 'hiring party' authorized to exercise, or actually exercises, over the 'individual'?
3. Can the 'hiring party' assign the 'individual' additional work?
4. Does the 'hiring party' considered the 'individual' working full-time?
5. Who assigns the tasks to be performed by the 'individual'?
6. How much control does the 'individual' have over the 'hiring party'?
7. Is the work schedule and working hours subject to customer requirements?
8. Does the 'individual' select their work schedule and working hours?
9. Is the 'individual' free to select the means, manner, order, and sequence of conducting the work?
10. Who decides what work is to be done, when?
11. Does the 'individual' have to report on activities conducted or produce a written report?
12. Is the 'individual' required to perform the work himself?

The presence of one or more of these factors does not constitute, nor is the presence of all of the factors required to determine, whether an individual is or is not an independent contractor.

Note: Questions used in the development of this section were taken from the IRS 20-Factor Test, the "economics realities test" and the OSHNC Legal Aspects (141) course.

2. Observed Exposure. Employee exposure is established if the CSHO witnesses, observes, or monitors exposure of an employee to the hazardous or suspected hazardous condition.

3. Unobserved Exposure. Where employee exposure is not observed, witnessed, or monitored by the CSHO, employee exposure is established if it is determined through witness statements, employee interviews or other evidence that exposure to a hazardous condition has occurred or continues to occur.

   a. Past Exposure. In fatality/catastrophe (or other "accident") investigations, employee exposure is established if the CSHO determines, through written statements, employee interviews or other evidence, that exposure to a hazardous condition occurred at the time of the accident. In other circumstances where the

CSHO determines that exposure to hazardous conditions has occurred in the past, such exposure may serve as the basis for a violation when:

i. The hazardous condition continues to exist, or it is reasonably predictable that the same or similar condition could recur.

ii. It is reasonably predictable that employee exposure to a hazardous condition could recur when:

A. Employee exposure has occurred in the previous six months;

B. The hazardous condition is an integral part of an employer's recurring operations; and

C. The employer has not established a policy or program to ensure that exposure to the hazardous condition will not recur.

b. Potential Exposure. The possibility that an employee could be exposed to a hazardous condition may be cited when the employee can be shown to have potential exposure to the hazard. Potential employee exposure could include one or more of the following:

i. When a hazard has existed and could recur because of work patterns, circumstances, or anticipated work requirements and it is reasonably predictable that employee exposure could occur.

ii. When a safety or health hazard would pose a danger to employees simply by employee presence in the area and it is reasonably predictable that an employee could come into the area during the course of the work, to rest or to eat at the jobsite, or to enter or to exit from the assigned workplace.

iii. When a safety or health hazard is associated with the use of unsafe machinery or equipment or arises from the presence of hazardous materials and it is reasonably predictable that an employee could use the equipment or be exposed to the hazardous materials in the course of work.

iv. If the investigation reveals an adequately enforced employer policy or program which would prevent employee exposure--including accidental exposure--to the hazardous condition, the CSHO would not ordinarily find it reasonably predictable that employee exposure could occur and would, therefore, not recommend issuing a citation in relation to the particular condition.

4. Documenting Employee Exposure. The CSHO will fully document exposure for every apparent violation. This includes such items as:

a. Comments by the exposed employees, the employer (particularly the immediate supervisor of the exposed employee), other witnesses (especially other employees or members of the exposed employee's family);

b. Signed statements;

c. Photographs; and

d. Documents, which may include autopsy reports, police reports, job specifications, audit reports from safety and health consultants or insurance loss control specialists.

D. **Regulatory Requirements.**

1. Posting, Recordkeeping and Reporting Requirements. Violations of 29 CFR 1903 and 29 CFR 1904 will be documented and cited when the employer does not comply with the posting requirements, the recordkeeping requirements, and the reporting requirements of the regulations contained in these subparts. (See Chapter VI on penalties.)

Note: If a Department employee becomes aware of an incident required to be reported under 29 CFR 1904.39 (reporting of fatality or multiple hospitalization incidents) through some means other than an employer report prior to the elapse of the 8-hour reporting period and an inspection of the incident is made within the 8-hour period, a violation for failure to report does not exist.

2. Incentive/Disincentive Programs. There are several types of workplace policies and practices that could discourage employees from reporting injuries or illnesses. These policies and practices, otherwise known as employer safety incentive and/or disincentive policies and practices, may also violate OSHA's recordkeeping regulations. CSHO's should evaluate any employer safety incentive policy or practice as part of their inspection activity. If a CSHO determines an incentive program has (or could) result in discouraging an employee to report injuries or illnesses, it must be appropriately addressed with the employer. The CSHO shall consult with their supervisor in such instances to determine if associated citation items may be warranted.

3. Migrant Housing Act Violations. Violations of the Migrant Housing Act of North Carolina (NCGS §95-222, et seq.), will be documented and cited when the owner/operator of the housing either fails to register the migrant housing or occupies the migrant housing without a certificate (see FOM Chapter XI).

E. **Hazard Communication.** 29 CFR 1910.1200 applies to manufacturers and importers of hazardous chemicals even though they themselves may not have employees exposed. Consequently, any violations of that standard by manufacturers or importers will be documented and cited, irrespective of employee exposure at the manufacturing or importing location. (Refer to CPL *02-02-079*)

F. **Types of Violations**.

1. Serious Violations. NCGS 95-127 (18) provides that "a serious violation will be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation."

a. The CSHO will take four steps to make the determination that a violation is serious. The first three steps determine whether there is a substantial probability that death or serious physical harm could result from an accident or exposure

relating to the violative condition. (The probability that an accident or illness will occur is not to be considered in determining whether a violation is serious.) The fourth step determines whether the employer knew or could have known of the violation.

i. The violation classification need not be completed for each instance, only once for each full item.

ii. If the full item consists of multiple instances or grouped items, the classification will be based on the most serious instance.

b. The four-step analysis as outlined below is necessary to make the determination that an apparent violation is serious. Apparent violations of the general duty clause will also be evaluated on the basis of these steps to ensure that they represent serious violations. The four elements the CSHO will consider are as follows:

-1 The type of accident or health hazard exposure that the violated standard or the general duty clause is designed to prevent;

-2 The type of injury or illness that could reasonably be expected to result from the type of accident or health hazard exposure identified in Step 1;

-3 Whether the injury or illness identified is one that results in death or serious physical harm; and,

-4 Whether the employer knew, or with the exercise of reasonable diligence, could have known of the presence of the hazardous condition.

i. Step 1. The type of accident or health hazard exposure that the violated standard or the general duty clause is designed to prevent.

A. The CSHO need not establish the exact way in which an accident, or health hazard exposure would occur. The exposure or potential exposure of an employee is sufficient to establish that an accident or health hazard exposure could occur. However, the CSHO will note the facts that could affect the severity of the injury or illness resulting from the accident or health hazard exposure.

B. If more than one type of accident or health hazard exposure exists which the standard is designed to prevent, the CSHO will determine which type could reasonably be predicted to result in the most severe injury or illness, and will base the classification of the violation on that determination.

C. The following are examples of a determination of the type of accident or health hazard exposure that a violated standard is designed to prevent:

1. Employees are observed working at the unguarded edge of an open-sided floor 30 feet above the ground in apparent violation of 29 CFR 1926.501(b)(1). This

regulation requires that the edge of the open-sided floor be guarded by standard railings. The type of accident that the violated standard is designed to prevent involves an employee falling from the edge of the floor, 30 feet to the ground below.

2. Employees are observed working in an area in which debris is located in apparent violation of 29 CFR 1926.252(c). The type of accident that the violated standard is designed to prevent involves an employee tripping on debris.

3. A 15 minute time-weighted average sample reveals employee overexposure to chlorine at 2 ppm in apparent violation of 29 CFR 1910.1000. This is 1 ppm above the ceiling concentration of health hazard exposure which the violated standard is designed to prevent.

4. An 8-hour time-weighted average sample reveals employee overexposure to lead at 100 ug/m^3 in violation of 29 CFR 1910.1025. This is 50 ug/m^3 above the PEL of health hazard exposure that the violated standard is designed to prevent.

ii. Step 2. The type of injury or illness that could reasonably be expected to result from the type of accident or health hazard exposure identified in Step 1.

A. In making this determination, the CSHO will consider all factors which would affect the severity of the injury or illness which could reasonably be predicted to result from an accident or health hazard exposure. The CSHO will not give consideration at this point to factors that relate to the probability that an accident or health hazard exposure will occur. The following are examples of a determination of the types of injuries that could reasonably be predicted to result from an accident:

1. If an employee falls from the edge of an open-sided floor 30 feet to the ground below, that employee could break bones, suffer a concussion, incur internal injuries or die.

2. If an employee trips on debris, that employee could experience abrasions or bruises, but it is only marginally predictable that the employee could suffer a substantial impairment of a bodily function. If, however, the area were littered with broken glass or other sharp objects, it would be reasonable to predict that an employee who tripped on debris could suffer a deep cut which could require suturing.

B. In order to support a preliminary classification of serious, the CSHO must establish a direct link between exposure at the

sampled level, if representative of conditions to which employees are normally exposed, and the expected illness. Thus the CSHO must make every reasonable attempt to show that the sampled exposure is in fact representative of employee exposure under normal working conditions. The CSHO will, therefore, identify and record all available evidence that indicates the frequency and duration of employee exposure. Such evidence would include:

1. The nature of the operation from which the exposure results.

2. Whether the exposure is regular and on-going or of limited frequency and duration.

3. How long employees have worked at the operation in the past.

4. Whether employees are performing functions that can be expected to continue.

5. Whether work practices, engineering controls, production levels and other operating parameters are typical of normal operations.

C. Where such evidence is difficult to obtain or where it is inconclusive, the CSHO will estimate the frequency and duration from the evidence available. In general, if the evidence tends to indicate that it is reasonable to predict that regular, ongoing exposure could occur, the CSHO will presume such exposure in determining the types of illness that could result from the violative condition. The following are examples of determination of types of illnesses that could reasonably result from a health hazard exposure:

1. If an employee had an exposure to chlorine greater than the ceiling concentration of 1ppm, it is reasonable to predict that the illness which could result, would be irritation to nose, eyes, throat, would not involve serious physical harm.

2. If an employee is exposed regularly and continually to lead above the PEL of 50 ug/m^3, it is reasonable to predict that central nervous system damage could occur.

iii. Step 3. Whether the injury or illness identified in Step 2 is one that results in death or serious physical harm.

A. In making this determination, the CSHO will utilize the following definition of "serious physical harm":

1. Impairment of the body in which part of the body is made functionally useless or is substantially reduced in

efficiency. Such impairment may be permanent or temporary, chronic or acute. Injuries involving such impairment would usually require treatment by a medical doctor. Examples of injuries that constitute such harm include:

a. Amputation (loss of all or part of a bodily appendage which includes the loss of bone).

b. Concussion.

c. Crushing (internal, even though skin surface may be intact).

d. Fracture, simple or compound.

e. Burn or scald, other than first degree, including electrical and chemical burns.

f. Cut, laceration, or puncture involving significant bleeding and/or requiring suturing.

2. Illnesses that could shorten life or significantly reduce physical or mental efficiency by inhibiting the normal function of a part of the body. The illness may be acute or chronic in nature. Examples of illnesses that constitute serious physical harm include:

a. Cancer.

b. Poisoning (resulting from the inhalation, ingestion or skin absorption of a toxic substance which adversely affects a bodily system).

c. Lung diseases, such as Asbestosis, Silicosis, Byssinosis.

d. Hearing loss.

e. Central nervous system impairment.

B. The following are examples of determinations of whether the types of injury or illness that could reasonably result from an accident or health hazard exposure could include death or serious physical harm:

1. If an employee, upon falling 30 feet to the ground, suffers broken bones or a concussion, that employee would experience substantial impairment of the usefulness of a part of the body and would require treatment by a medical doctor. This injury would constitute serious physical harm.

2. If an employee, tripping on debris, suffers a bruise or abrasion, that employee would not experience substantial reduction of the usefulness of a part of the body nor would that employee require treatment by a medical doctor. This injury would not be serious. However, if it is reasonably predictable that the employee would suffer a deep cut of the hand, the cut would require suturing by a medical doctor and the use of the hand would be substantially reduced. This injury would then be serious.

3. If an employee has an exposure to chlorine at 2 ppm, the irritation that would result from this exposure would not normally be considered to constitute serious physical harm.

4. If an employee, following exposure to lead at 100 ug/m3, develops permanent central nervous system effects, the illness would constitute serious physical harm.

iv. Step 4. Whether the employer knew, or with the exercise of reasonable diligence, could have known of the presence of the hazardous condition.

A. The knowledge requirement is met if it is determined that the employer actually knew of the hazardous condition that constituted the apparent violation.

1. In this regard, a supervisor represents the employer and a supervisor's knowledge of the hazardous condition amounts to actual employer knowledge. The CSHO will record *on each 1B* the evidence that establishes how the employer knew of the hazardous condition.

2. Examples of actual knowledge of the employer are: the employer saw the condition, an employee was previously injured by the condition, or an employee or employee representative reported the condition.

B. If, after reasonable attempts to do so, it cannot be determined that the employer has actual knowledge of the hazardous condition, the knowledge requirement is met if the CSHO determines that the employer *had constructive knowledge* through the exercise of reasonable diligence.

1. As a general rule, if the CSHO was able to readily observe a hazardous condition, it can be presumed that the employer could have discovered the same condition through the exercise of reasonable diligence. The CSHO will record *on each 1B* the evidence that *establishes how* the employer could have known of the hazardous condition with the exercise of reasonable diligence.

2. Examples of constructive knowledge of the employer are: the condition was in plain view and obvious, the duration of the condition was not brief, the employer failed to regularly inspect the workplace for hazards, the employer failed to train and supervise employees regarding the condition.

C. In cases where the employer may contend that their supervisor's own conduct constituted an isolated event of misconduct, the CSHO will determine whether the supervisor violated an established work rule and the extent to which this supervisor was trained and supervised so as to prevent such conduct. The employer must show that the supervisor's actions were beyond or out of the scope of their usual job duties.

2. Nonserious Violations. This type of violation will be cited in situations where the accident or illness that would be most likely to result from a hazardous condition would probably not cause death or serious physical harm but would have a direct and immediate relationship to the safety and health of employees. Serious violations where there is no employer knowledge cannot be cited as nonserious. Employer knowledge is required to cite nonserious items.

3. Willful Violations. The following definitions and procedures apply whenever the CSHO suspects that a willful violation may exist:

a. A willful violation exists under the Act where the evidence shows either an intentional violation of the Act or plain indifference to its requirements - not necessarily with knowledge of the standard itself.

i. The employer committed an intentional and knowing violation if:

A. An employer representative was aware of the requirements of the Act, or the existence of an applicable standard or regulation, and was also aware of a condition or practice in violation of those requirements.

B. An employer representative was not aware of the requirements of the Act or standards, but was aware of a comparable legal requirement (e.g., state or local law) and was also aware of a condition or practice in violation of that requirement.

ii. The employer committed a violation with plain indifference to the law where:

A. Higher management officials were aware of an OSH requirement applicable to the company's business but made little or no effort to communicate the requirement to lower level supervisors and employees.

B. Company officials were aware of a continuing compliance problem but made little or no effort to avoid violations.

EXAMPLE: Repeated issuance of citations addressing the same or similar conditions.

C. An employer representative was not aware of any legal requirement, but was aware that a condition or practice was hazardous to the safety or health of employees and made little or no effort to determine the extent of the problem or to take the corrective action. Knowledge of a hazard may be gained from such means as insurance company reports, safety committee or other internal reports, the occurrence of illnesses or injuries, media coverage, or, in some cases, complaints of employees or their representatives.

D. Finally, in particularly flagrant situations, willfulness can be found despite lack of knowledge of either a legal requirement or the existence of a hazard if the circumstances show that the employer would have placed no importance on such knowledge even if it had it. The employer makes a "deliberate purpose not to discharge some duty necessary to the safety of the person or the property of another". (See Appendix IV-A - "Willful Violations Under OSHA: No Knowledge of the Act Required", H. Alan Pell, 1997.)

b. It is not necessary that the violation be committed with a bad purpose or an evil intent to be deemed "willful." It is sufficient that the violation was deliberate, voluntary or intentional as distinguished from inadvertent, accidental or ordinarily negligent.

c. The CSHO will carefully develop and record all evidence available that indicates employer awareness of the disregard for statutory obligations or of the hazardous conditions. Willfulness could exist if an employer is advised by employees or employee representatives regarding an alleged hazardous condition and the employer does not make a reasonable effort to verify and correct the condition. Additional factors that can influence a decision as to whether violations are willful include:

i. The nature of the employer's business and the knowledge regarding safety and health matters that could reasonably be expected in the industry.

ii. The precautions taken by the employer to limit the hazardous conditions.

iii. The employer's awareness of the Act and of the responsibility to provide safe and healthful working conditions.

iv. Whether similar violations and/or hazardous conditions have been brought to the attention of the employer.

v. Whether the nature and extent of the violations disclose a <u>purposeful disregard</u> of the employer's responsibility under the Act.

d. The determination of whether to issue a citation for a willful or repeat violation will frequently raise difficult issues of law and policy and will require the evaluation of complex factual situations. Accordingly, a citation for a willful violation will be discussed with the bureau chief and AG's office, as appropriate.

4. Criminal/Willful Violations. NCGS 95-139 provides that: "Any employer who willfully violates any standard, rule or order promulgated pursuant to this Article, and said violation causes the death of any employee, will be guilty of a misdemeanor, and upon conviction, there of, will be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment will be a fine of not more than $20,000 or by imprisonment for not more than one year, or by both."

a. The bureau chief, in coordination with the director and the attorney general, should carefully evaluate all cases involving workers' deaths to determine whether they should be referred to an appropriate criminal law enforcement agency for possible criminal prosecution.

b. In cases where an employee fatality may have been caused by a willful violation of an OSH requirement, the Supervisor will be consulted prior to the completion of the investigation to determine whether investigative assistance from the State Bureau of Investigation or other criminal law enforcement agency should be requested. The supervisor will consult with the bureau chief and, if appropriate, the AG's office in making this determination.

c. The following criteria will be considered in investigating possible criminal/willful violations:

i. Establishment of Criminal/Willful. In order to establish a criminal/willful violation OSHA must prove that:

A. The employer violated an OSHA standard. A criminal/willful violation cannot be based on violation of the general duty clause.

B. The violation was willful in nature; i.e.,

1. The employer committed an intentional and knowing violation if:

a. An employer representative was aware of the requirements of the act, or the existence of an applicable standard or regulation, and was also aware of a condition or practice in violation of those requirements.

b. An employer representative was not aware of the requirements of the act or standards, but was aware of a comparable legal requirement (e.g., State or local law) and was also aware of a condition or practice in violation of that requirement.

2. The employer committed a violation with plain indifference to the law where:

   a. Higher management officials were aware of an OSHA requirement applicable to the company's business but made little or no effort to communicate the requirement to lower level supervisors and employees.

   b. Company officials were aware of a continuing compliance problem but made little or no effort to avoid violations.

      EXAMPLE: Repeated issuance of citations addressing the same or similar conditions.

   c. An employer representative was not aware of any legal requirement, but was aware that condition or practice was hazardous to the safety or health of employees and made little or no effort to determine the extent of the problem or to take the corrective action. Knowledge of a hazard may be gained from such means as insurance company reports, safety committee or other internal reports, the occurrence of illnesses or injuries, media coverage, or, in some cases, complaints of employees or their representatives.

   d. In flagrant situations, willfulness can be found despite lack of knowledge of either a legal requirement or the existence of a hazard if the circumstances show that the employer would have placed no importance on such knowledge even if he or she had possessed it.

C. The employer took positive action that contributed to the employee exposure (e.g., the employer installed locks on the exit doors, the employer told employees to continue working without proper fall protection.) The district attorney needs to have a "smoking gun" before proceeding with a criminal willful. Unlike OSH cases where the division must prove the case with the "preponderance of evidence", criminal cases must be proved "beyond a reasonable doubt".

D. The violation of the standard caused the death of an employee. In order to prove that the violation of the standard caused the death of an employee, there must be evidence in the file that clearly demonstrates that the violation of the standard was the cause of or a contributing factor to an employee's death.

ii. Bureau Chief Responsibilities.

A. If the bureau chief determines that expert assistance is needed to prove the causal connection between an apparent violation of the standard and the death of an employee, such assistance will be obtained in accordance with instructions in FOM Chapter III, B.5.

B. Following the investigation, if the bureau chief decides to recommend criminal prosecution, a memorandum containing that recommendation will be forwarded promptly to the director. It will include an evaluation of the possible criminal charges, taking into consideration the greater burden of proof that requires that the government's case be proven beyond a reasonable doubt. In addition, if the correction of the hazardous condition appears to be an issue, this will be noted in the transmittal memorandum because in most cases the prosecution of a criminal/willful case delays the affirming of the civil citation and its correction requirements.

C. The bureau chief will normally issue a civil citation in accordance with current procedures even if the citation involves allegations under consideration for criminal prosecution. The director's office and the commissioner will be notified of such cases. They will determine if the department recommends criminal prosecution. Such cases will be forwarded to the AG's office as soon as practicable. The AG's office goes to the local district attorney for potential prosecution.

D. When a willful violation is related to a fatality, the bureau chief will ensure that the case file contains documentation regarding the decision not to make a criminal referral.

5. Repeat Violations. An employer may be cited for a repeat violation if that employer has been cited previously for *the same or* a substantially similar condition and the citation has become a final order.

a. Identical Standard. Generally, similar conditions can be demonstrated by showing that in both situations the identical standard was violated.

EXCEPTION: Previously a citation was issued for a violation of 29 CFR 1910.132(a) for not requiring the use of safety-toe footwear for employees. A recent inspection of the same establishment revealed a violation of 29 CFR 1910.132(a) for not requiring the use of head protection (hard-hats). Although the same standard was involved, the hazardous conditions found were not substantially similar and therefore a repeat violation would not be appropriate.

b. Different Standards. In some circumstances, similar conditions can be demonstrated when different standards are violated.

EXAMPLE: A citation was previously issued for a violation of 29 CFR 1910.28(d)(7) for not installing standard guardrails on a tubular welded frame

scaffold platform. A recent inspection of the same establishment reveals a violation of 29 CFR 1910.28(c)(14) for not installing guardrails on a tube and coupler scaffold platform. Although there are different standards involved, the hazardous conditions found were substantially similar and therefore a repeat violation would be appropriate.

c. Multi-facility Employers. A multi-facility employer will be cited for a repeated violation if the violation recurred at any worksite within the state.

d. Time Limitations. NCGS 95-138(a) establishes the length of time that a citation may serve as a basis for a repeat violation. The following policy will be used in order to ensure uniformity in enforcing the statutory requirement.

i. A citation will be issued as a first instance repeat violation, with the gravity based penalty (GBP) multiplied by two, if:

A. a substantially similar condition exists; and

B. the violative condition is observed within 3 years of the final order of the previous citation or of the final abatement date of that citation, whichever is later. The final abatement date is:

1. The abatement due date on the issued citation if the employer has not contested the citation or proposed assessment of penalty; or requested an informal conference;

2. The final closing date for citations marked "immediately abated" during an inspection; or,

3. The abatement due date on amended citations.

ii. When a violation is found during an inspection and a first instance repeat citation has been previously issued for a substantially similar condition which meets the above time limitations, the violation may be classified as a second instance repeat violation and the GBP will be multiplied by five. Note that this second instance must be observed within three years of the original citation, not just the first instance repeat. Otherwise, this is also a first instance repeat.

EXAMPLE: An inspection is conducted in an establishment and a violation of 29 CFR 1910.217(c) (1) (i) is found. One year earlier a repeat violation of the same standard was issued. The violation found during the current inspection may be treated as a second instance repeat violation and the GBP will be multiplied by five.

iii. If a condition that has been cited as a second instance repeat violation is found again within the three-year time limitations described in (1), a third instance repeat violation may be issued and the GBP will be multiplied by ten.

iv. The GBP will also be multiplied by ten if the violation has previously been cited more than three times, although consideration may also be given to citing this violation as willful.

e. Repeat vs. Willful. Repeat violations differ from willful violations in that repeat violations may result from an inadvertent, accidental or ordinarily negligent act. Where a repeat violation may also meet some of the criteria for willful, a citation for a repeat violation will normally be issued with the penalty calculated as indicated in FOM Chapter VI - Penalties.

f. Repeat vs. Failure-to-abate. A failure-to-abate situation exists when an item of equipment or condition previously cited has never been brought into compliance and is noted at a later inspection. If, however, the violation was not continuous; i.e., if it had been corrected and then reoccurred, the subsequent reoccurrence is a repeat violation.

g. Supervisor Responsibilities. After the CSHO makes the initial recommendation that the violation is cited as "repeat," the Supervisor will:

i. Ensure that the violation meets the criteria outlined in the preceding subparagraphs of this section.

ii. Ensure that the case file includes a copy of the prior violation citation that serves as the basis for the repeat citation. The previous citation must be a final order. When determining the final order date the following guidelines shall be adhered to:

A. When an employer does not contest or request an informal conference.

1. Fifteen working days after the original citation(s) are issued or amended citations are issued. The date on the signed Domestic Return Receipt (PS Form 3811) "Green" card establishes when the citations were issued to the company. If a certified mailing receipt is not received in the office within fifteen (15) working days of the "No Change" mailing date, the CSHO will attempt to contact the employer via telephone or email to ascertain if the employer received the citations. If the employer verifies they received the citations, the CSHO shall document who they spoke with along with the date and time of the conversation in OE Notes and on casefile summary sheet. The citations will become final order fifteen (15) working days from the employer's confirmation of receipt (unless a contestment is received within that same fifteen (15) working day period).

B. When an informal conference is requested.

1. Fifteen working days after a "No Change" letter is issued. The date on the signed Domestic Return Receipt (PS Form 3811) "Green" card establishes when the No Change letter was mailed to the employer. If a

certified mailing receipt is not received in the office within fifteen (15) working days of the "No Change" mailing date, the Supervisor will attempt to contact the employer via telephone or email to ascertain if the employer received the "No Change" letter. If the employer verifies they received it, the citations will become final order fifteen (15) working days from the employer's confirmation of receipt, unless a contestment is received within that same fifteen (15) working day period. The Supervisor shall document who they spoke with along with the date and time of the conversation in OE Notes and on the case file summary sheet.

2. The date on a signed Settlement Agreement

3. If a settlement agreement is mailed to the employer and the employer does not sign the Settlement Agreement and no other actions are taken, the citations become final fifteen working days from when the received the settlement agreement by mail. The date on the signed domestic return receipt (PS Form 3811) "green" card establishes when the settlement agreement was sent to the employer.

4. If neither a signed settlement agreement nor a certified mailing receipt is received in the office within six (6)working days of the settlement agreement mailing date, the Supervisor will attempt to contact the employer via telephone or email to ascertain if the employer received the agreement and whether or not that have signed sent the agreement back to the field office. If the employer verifies they received it, the SA will become final order fifteen (15) working days from confirmation of receipt, unless a contestment is received within that same fifteen (15) working day period. Attempts should be made to obtain written confirmation of delivery. If the supervisor is able to confirm delivery of the settlement agreement, , the citations will become final order fifteen (15) working days from the verbal confirmation of receipt of the settlement agreement. The Supervisor should document who they spoke with along with the date and time of the conversation in OE Notes and on casefile summary sheet (CFS).

5. If the settlement agreement containing amended citation(s) or notice of no change is returned to the field office as "undeliverable" the Supervisor should follow the instructions for Undelivered Citations in FOM Chapter V. If the Supervisor has exhausted all efforts to deliver the settlement agreement and/or notice of no change letter per the procedures for Undeliverable Citations in Chapter V of the FOM the citations will

become final order fifteen (15) working days after the informal conference.

6. If settlement agreement containing amended citation(s) or notice of notice change is delivered by the sheriff or the Secretary of State, the citations will become final order fifteen (15) working days after the date of delivery.

C. When the case file is contested.

1. Thirty days from the filing of the consent order signed by the hearing examiner. The date on the Certificate of Service signed by the administrative assistant to the Occupational Safety and Health Review Commission is the date on which the consent order is considered filed.

2. Thirty days from the filing of the hearing examiner's order after a hearing on the citations. The date on the Certificate of Service signed by the administrative assistant to the Occupational Safety and Health Review Commission is the date on which the hearing examiner's order is considered filed.

3. Thirty days from the filing of the Occupational Safety and Health Review Commission's order upon an appeal from the hearing examiner's order. The date on the Certificate of Service signed by the administrative assistant to the Occupational Safety and Health Review Commission is the date on which the review commission's order is considered filed.

iii. In questionable circumstances when it is not clear that the violation meets the criteria outlined in this section, the supervisor should consult with the bureau chief before issuing a repeat citation.

iv. If a repeat citation is issued, ensure that the cited employer is fully informed of the previous violations serving as a basis for the repeat by notation in the AVD portion of the citation, using the following language:

THE (COMPANY NAME) WAS PREVIOUSLY CITED FOR A VIOLATION OF THIS OCCUPATIONAL SAFETY AND HEALTH STANDARD OR ITS EQUIVALENT STANDARD (NAME PREVIOUSLY CITED STANDARD) WHICH WAS CONTAINED IN OSH INSPECTION NUMBER, CITATION NUMBER____, ITEM NUMBER____, ISSUED ON (DATE), *WITH A FINAL ORDER DATE OF (DATE).*

APPENDIX IV-A: **"Willful Violations under OSHA: No Knowledge of the Act Required", H. Alan Pell, NC Dept of Justice, Attorney General's Office, Labor Section, 1997.**

The Commissioner of Labor is authorized by the North Carolina Occupational Safety and Health Act [OSH Act][1] to issue citations to employers alleging "willful" violations of the Act. The term "willful", however, is not defined by the Act. Case law had provided some guidance, but one important issue had been left unanswered in North Carolina: Whether an employer could be found in "willful" violation of the Act where it was without knowledge of the specific requirement or regulation upon which the citation was based. Two decisions this year, one by the North Carolina Supreme Court, *Associated Mechanical Contractors, Inc., v. Payne*,[2] and one by the Safety and Health Review Board, *Commissioner v. City of Mt. Airy*[3] have answered this question in the affirmative.

In the spring of 1990, Associated Mechanical Contractors [AMC] was engaged in constructing a wastewater treatment plant in Albemarle, North Carolina. It dug a trench on the site for the installation of pipe. The trench, which had been dug through a shale formation called ardulite--which is layered and unstable when lying at an angle-- was approximately twelve to thirteen feet deep, five feet wide at the bottom, nine feet wide at the top, and eighty feet long[4].

Based upon the depth of the trench and its soil composition, OSHA regulations required sloping of the sides at thirty-five to forty-five degree angles. The sides of the excavation, however,

had not been intentionally sloped; any angling of the side walls was due to natural and inadvertent sloping of the sides during excavation.

On April 24, 1990, AMC's employee, Eddie Lemmons, was working in the trench. The bottom portion of the east wall caved-in, pinning Mr. Lemmons against the west wall. The top of the east wall then fell, "covering Lemmons with approximately a dump truck load of soil and rock."[5] It took eleven minutes to uncover Mr. Lemmons; he was pronounced dead at the scene by medical personnel.

The Department of Labor, Occupational Safety and Health Division, cited AMC for two willful violations of the Occupational Safety and Health Act: (1) a willful violation of the regulation which requires employers to instruct employees in the recognition and avoidance of unsafe conditions and the regulations applicable to the work environment, and (2) a willful violation of the standard which requires proper sloping, shoring, bracing, or other support, of the side walls of excavations. AMC objected to the safety/training violation, and to the "willful" categorization of the shoring/sloping violation.

A hearing was held before the Safety and Health Review Board of North Carolina, the State agency charged with hearing appeals of OSHA citations.[6] The Hearing Examiner upheld the safety/training violation as a "serious" violation, and affirmed the trenching violation as it had been issued-- "willful-serious". On appeal, the Review Board affirmed.

The Superior Court, sitting as an appellate court, reviewed the case and affirmed the final agency decision. On review, the N.C. Court of Appeals ordered that (1) the matter be remanded to the Review Board; (2) the safety/training violation be reclassified as "nonserious"; and (3) that the trenching violation be reclassified as "serious". The N.C. Supreme Court granted the Commissioner's petition for writ of certiorari.

After addressing the appropriate standards for appellate review, the N.C. Supreme Court considered whether the Superior Court Judge was correct in concluding that the Review Board had used the proper definition of willfulness when evaluating the trenching violation. The Court began by citing its previous holding in a civil case: "A violation is deemed to be willful when there is shown "a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another."[7] The Court then quoted language from an OSHA case decided by the N.C. Court of Appeals:

> *A violation of an OSHA standard is willful if the employer deliberately violates the standard. A deliberate violation is one done voluntarily with either an intentional disregard of or plain indifference to the requirements of the standard. . . . An employer's knowledge of the standard and its violation, although not alone sufficient to establish willfulness, is one of the most effective methods of showing the employer's intentional disregard of or plain indifference to the standards.*[8]

The Court then noted that the Review Board had stated that a violation was willful if "there is shown a deliberate purpose not to discharge some duty necessary to the safety of persons or property of another."[9] The foregoing "definition" is the same one which the N.C. Court of Appeals had set forth in *Brewer v. Harris* and which the N.C. Supreme Court had cited earlier in the opinion.

The Court also wrote that the Review Board had applied a four-part test for a finding of willfulness: (1) employer knowledge of a violative condition, (2) employer knowledge of the standard, (3) a subsequent violation of the standard, and (4) the violation being committed voluntarily or with intentional disregard of the standard or with demonstrated plain indifference to the Occupational Safety and Health Act. The Court stated its approval of the Review Board's four part test, but held that it was not the only way to prove "willfulness": "The definition and elements used by the Review Board *are consistent with the definitions of willfulness expounded by this Court and quoted above* [in its opinion]."[10]

In one sentence, the Court was able to provide a *non-exclusive* "bright-line" definition [the "four-part" test], *and* also adopt that body of case law which applies to those employers who may be completely unknowledgeable concerning the Occupational Safety and Health Act-- yet fail to take precautions which a reasonable person should have known were necessary in light of known hazards. The significance of this "broadening" of the definition of willfulness cannot be overstated.

The primary difference between the four-part test and the "disregard of duty" test is that, in the latter test a finding of willfulness *does not* require the Commissioner to prove that the employer had actual knowledge of the OSHA regulation that it allegedly *willfully* violated. Knowledge of the standard is an element of the "four-part" definition-- it is not an element of the other "definitions" which the Court had "expounded" upon in its decision. Federal case law in this area is consistent with the N.C. Supreme Court's holding that actual knowledge of a standard is not a prerequisite for a finding of willfulness under the OSH Act.

In James Tull Excavating and Construction Company,[11] the federal Safety and Health Review Commission held that even though an employer had never been previously cited for trenching violations, it could still be held in willful violation of OSHA standards. In Tull, the Review Commission held that the employer's

> *conscious and deliberate act* of placing an employee into a nine-foot deep unshored trench of little slope, *knowing* of hazardous soil conditions, constituted a reckless disregard of consequences equivalent to the deliberate flouting of the Act needed to establish a willful violation.[12]

In a later case, the federal Review Commission held that willful violations can be shown by proving that the employer committed the violation with intentional, knowing or voluntary disregard for the requirements of the [federal] Act, or with plain indifference the employee safety. The Review - Commission stated, in regard to one cited employer's actions, that

> *evidence of such reckless disregard for employee safety or the requirements of the law... [were such] that one can infer that if the employer had known of the standard or provision, the employer would not have cared that the conduct or conditions violated it.*[13]

There would appear to be no difference, in regard to what constitutes willfulness, between the federal view of "reckless disregard for employee safety" and the State view of "deliberate disregard of a duty necessary to the safety" of an employee. In either case, the employer's actions must be shown to have been done "voluntarily" with an intentional disregard or with plain indifference to the *requirements* of the standard-- not necessarily with knowledge of the standard itself.

For example, an employer who normally does minor excavation work-- nothing greater than three to four feet in depth-- is suddenly required to excavate to a depth of eighteen feet. The employer digs the three foot wide excavation with vertical sidewalls.[14] Cracks subsequently appear in the excavation's side walls; soil begins sloughing off the sides and into the trench and water begins to accumulate in the bottom. An employee voices his concern about working in the excavation. If the employer required his employees to work in the bottom of such an excavation, he would be deliberately placing them into a dangerous situation. Because the employer would be intentionally placing his employees into the trench, he would be violating his duty to ensure their "safety"-- a "requirement" of the standard. Thus, he would be in willful violation of the excavation standard-- despite the fact that he had no specific knowledge of the excavation standard.[15]

The Safety and Health Review Board's decision in *Commissioner v. City of Mt Airy* illustrates the foregoing principle i.e., an employer may be in violation of the OSH Act without reference to any specific standard. In *City of Mt. Airy*, the Review Board considered whether the Hearing Examiner had correctly determined that the City of Mt. Airy, North Carolina, had willfully committed a violation of N.C.G.S. 95-129(l), the General Duty Clause. The General Duty Clause is that portion of the Occupational Safety and Health Act which provides that:

> *Each employer will furnish to each of his employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm to his employees.*

The General Duty Clause is a "catch-all" regulation; the drafters of the Act wanted to provide some method of regulating hazardous conditions for which there were no specific standards. The employer may not be held strictly liable-- the Commissioner must, prove either actual or constructive knowledge of the hazardous condition.

On June 9, 1991, two workers at the Mount Airy Waste Water Treatment Plant were overcome by toxic gases while tying to unclog a pipe at the bottom of a sludge well pit containing raw sewerage. One worker died from exposure to the toxic gases.

An investigation by OSHA compliance officers resulted in a willful-serious citation of the General Duty Clause, and 13 other serious violations. The Department of Labor alleged, and the Review Board found, that the City had standard operating procedures concerning entry into confined spaces; that the City had been reminded on an annual basis that a confined space entry program was required; that the City had previously verified that (1) it had such a program; (2) it had appropriate equipment to test for flammable or toxic gases and the amount of oxygen; (3) the standard procedure was used; and (4) that its employees were trained in the use of the testing equipment.

In fact, the City-- contrary to its other verifications-- had only a written standard procedure. It did not have appropriate testing equipment; the employees were not trained; and although the superintendent and the supervisor of the Plant knew what a confined space program was, they did not follow-up to make sure it was implemented. Employees were regularly allowed to enter confined spaces without following procedures necessary to ensure their safety. The Commissioner produced additional evidence which reflected that the City had previously been made aware of the necessary safety precautions by outside agencies.

The Review Board began its analysis of the willful violation with a reference to the penalty provisions of the Act. The Act provides a civil penalty of not more than seventy thousand dollars ($70,000), and not less than five thousand dollars ($5,000) for any employer who "willfully or repeatedly violates the requirements of this Article, any standard, rule or order promulgated pursuant to this Article, or regulations prescribed pursuant to [the] Article..".[16]

The Review Board found that (1) the General Duty Clause is one of the "requirements" of the Article [the OSH Act], *i.e.*, the employer is required to provide a workplace free of recognized hazards; (2) a violation of the general duty clause involves a disregard for recognized serious safety and health hazards and not the violation of a particular standard; and, consequently, (3) employer knowledge of a particular standard or regulation cannot be a prerequisite for a finding of a willful violation of the General Duty Clause.[17]

In a lengthy discussion, the Review Board cited to federal law,[18] State law, and authoritative commentary.[19] The Review Board, for the first time, formally adopts the view that "a willful violation can be proven by conduct marked by intentional disregard of or plain indifference to employee safety and health..."[20]

In summary, the "definition" of willful conduct, for the purposes of the OSH Act, actually springs from the common [tort] law. In *Brewer v. Harris*, a case involving an automobile accident, the N.C. Supreme Court stated that a violation is deemed to be willful when there is a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another. In *Associated Mechanical*, the Court applied its holding in *Brewer* in an OSHA context.

The N.C. Supreme Court has, therefore, established a common law duty in the employment relationship: an employer has a duty to his employee not to purposefully place him in danger. If the evidence supports such a finding, then the employer may be sanctioned with the most severe penalties provided by law--regardless of the employer's knowledge of a specific regulation which prohibited such conduct.

References:

1. *Cf.* N.C.G.S. 95-127(18) [a "serious" violation exists where there is a possibility of an accident with death or serious bodily injury as the substantially probable result].

2. 342 N.C. 825, 467 S.E.2d 398 (1996).

3. Docket No. OSHANC 91-2077 (RB March 25, 1996).

4. 467 S.E.2d at 399.

5. *Id*.

6. N.C.G.S. 95-135(b).

7. *Id*, citing *Brewer v. Harris*, 279 N.C. 288, 297, 182 S.E.2d 345, 350 (1971), quoting *Foster v. Hyman*, 197 N.C. 189, 191, 148 S.E. 36, 37 (1929).

8. Associated Mechanical, 467 S.E.2d. at 402, quoting *Brooks v. Ansco & Assoc*., 114 N.C. App. 711, 717, 443 S.E.2d 89, 92 (citations and quotes omitted).

9. *Id.*

10. *Id.* (Emphasis added). As noted below, the Review Board has adopted a definition of a willful violation which does not require knowledge of a standard. The Supreme Court decision in *Associated Mechanical*, however, was issued on March 8, 1996; the decision by the Review

Board in *Mt. Airy* was issued on March 25, 1996. Thus, although neither the Supreme Court nor the Review Board had knowledge of the analysis which would be applied by the other, the decisions are entirely consistent.

11. 78 CCH OSHD P22,602 (Wienman, J. 1978).

12. *James Tull Excavating and Construction Company,* 1978 CCH OSHD P22,602 (Wienman, J. 1978) (emphasis added).

13. *Williams Enterprises, Inc*., 1986-87 CCH OSHD P27,893, at page 36,589 (RC 1987) (emphasis added).

14. The OSH Act provides that sides of excavations must be shored or sloped, or a trench box used by employees. The extent (angle) of the sloping depends upon the type of soil and other factors.

15. The above facts are taken from an actual OSHA case. Employees who complained about the danger were told to get in the excavation or they would be fired. The subsequent cave-in killed one and seriously injured three others.

16. N.C.G.S. 95-138(a).

17. *City of Mt. Airy*, Docket No. OSHANC 91-2077 (RB March 25, 1996), slip op. at 14.

18. The Review Board notes that although it is not bound by federal law, it will look to federal law interpreting like provisions of the federal OSH Act as guidance in interpreting similar provision of the State Act.

19. *Eg*., Rothstein, OCCUPATIONAL SAFETY AND HEALTH LAW (3d ed. 1990), and Bokat & Thompson, OCCUPATIONAL SAFETY AND HEALTH LAW.

20. *City of Mt. Airy*, slip op. at 20. The holding is, in large measure, an adoption of the Fourth Circuit Court of Appeals decision in *Intercounty Construction Co. v. OSHRC*, 522 f.2d 777 (4th Cir. 1975), *cert. denied*, 423 U.S. 1072, 96 S.Ct. 854, 47 L.ed.2d 82 (1976), and is consistent with the view adopted by the First, Second, Fifth, Sixth, Eighth, Ninth, and Tenth Circuit Courts of Appeal.