

CHAPTER IV

VIOLATIONS

A. Basis of Violations.

1. Standards and Regulations. Section 50-9-5B of the Occupational Health and Safety Act states that each employer has a responsibility to comply with the occupational safety and health standards promulgated under the Act. The Environmental Improvement Board has adopted Occupational Health and Safety Regulations which incorporate Federal OSHA regulations and create state specific regulations. Most of the specific standards are found in Title 29 Code of Federal Regulations (CFR) 1900 series. Subparts A and B of 29 CFR 1910 specifically establish the source of all the standards Compliance Manager which are the basis of violations. An example of the subdivision of standards is as follows:

Part - 1910;        Subpart - D;        Section - 1910.23;  
Subsection - 1910.23(a);        Paragraph - 1910.23(c)(1)  
Subparagraph - 1010.23(c)(1)(i)

NOTE: The most specific subdivision of the standard shall be used for citing violations.

- a. Definition and Application of Horizontal and Vertical Standards. Vertical standards are those standards which apply to a particular industry or to particular operations, practices, conditions, processes, means, methods, equipment or installations. Horizontal standards are those standards which apply when a condition is not covered by a vertical standard. Within both horizontal and vertical standards there are general standards and specific standards.

- (1) General standards are those which address a category of hazards and whose coverage is not limited to a special set of circumstances; e.g., 29 CFR 1910.132(a), 29 CFR 1910.212(a)(1) or (a)(3)(ii), 29 CFR 1910.307(b) and 29 CFR 1926.28(a).
- (2) Specific standards are those which are designed to regulate a specific hazard and which set forth the measures that the employer must take to protect employees from that particular hazard; e.g., 29 CFR 1910.23(a)(1) and 29 CFR 1926.451(d)(10).
- (3) There are two types of vertical standards.

- (a) Standards that apply to particular industries (Maritime, Construction, etc.) and standards that apply to particular subindustries 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.
- (4) If a CO is uncertain whether to cite under a horizontal or a vertical standard when both apply, the compliance manager shall be consulted. The following general guidelines apply;
- (a) When a hazard in a particular industry is covered by both a vertical (e.g., 29 CFR 1915) standard and a horizontal (e.g., 29 CFR 1910) standard, the vertical standard shall take precedence. This is true even if the horizontal standard is more stringent.
  - (b) If the particular industry does not have a vertical standard that covers the hazard, then the CO shall 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 sawmill, 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, 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 or not there is a conflict or inconsistency between the standards, a careful analysis of the intent of the two standards must be performed. The results of the analysis must show that the vertical standard does not address the precise hazard involved, even though it may address related or similar hazards.

EXAMPLE: In tiered structural steel erection, 29 CFR 1926.105(a) may not be cited for interior fall distances of more than 25 ft. above the temporary flooring since that specific situation is covered by 29 CFR 1926.750(b)(2)(i) for fall distances of more than 30 ft.

(f) When determining whether a horizontal or a vertical standard is applicable to a work situation, the CO shall 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 shall normally be cited under a 29 CFR 1910 standard unless that standard has been identified as being applicable to construction. (29 CFR 1910.20, Access to Employee Exposure and Medical Records, has 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 noncontract work. (See 29 CFR 1926.13.)

2 If any question arises as to whether an activity is deemed to be construction for purposes of the Act, the Legal Bureau shall be consulted.

3 For hazards found in construction, the Compliance Manager shall make a determination on citing violations of 29 CFR 1910 standards that have not been identified as applicable to construction.

b. Violation of Variances. The employer's requirement to comply with a standard may be modified through granting

of a variance, as outlined in Section 50-9-16 of the Act.

- (1) 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 shall be cited with a reference in the citation to the variance provision that has not been met.
- (2) If, during the course of a compliance inspection, the CO discovers that the employer has filed an application for variance regarding a condition which is determined to be an apparent violations of the standard, this fact shall be reported to the Compliance Manager who will obtain information concerning the status of the variance request.

2. General Duty Requirement. Section 50-9-5A of the Act requires that "Every employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

a. Evaluation of Potential 50-9-5A Situations. In general, Review Commission and court precedent has established that the following elements are necessary to prove a violation of the general duty clause:

- (1) The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;
- (2) The hazard was recognized;
- (3) The hazard was causing or likely to cause death or serious physical harm; and
- (4) There was a feasible and useful method to correct the hazard.

b. Discussion of 50-9-5A Elements. The above four elements of a 50-9-5A violation are discussed in greater detail as follows:

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

(a) Hazard. A hazard is a danger which threatens physical harm to employees.

1 Not the Lack of a Particular Abatement Method. In the past some Section 50-9-

5A 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 Section 50-9-5A 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 which the employer wishes to utilize.

a In situation where it is difficult to distinguish between a dangerous condition and the lack of an abatement method, the Compliance Manager shall 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 nonsparking tools. The hazard is the explosion hazard due to the presence of the gases; it is not the lack of nonsparking 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 is 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 hence only one general duty clause

citation.

- 2 The Hazard Is Not a Particular Accident. The Occurrence of an accident does not necessarily mean that the employer has violated section 50-9-5A although the accident may be evidence of a hazard. In some cases a Section 50-9-5A violation may be unrelated to the accident. Although accident facts may be relevant and shall be gathered, the citation shall 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. No employee was injured by the fire itself but an employee, disregarding the clear instructions of his compliance manager 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 should deal with the fire hazard, not with the accident involving the employee who broke his leg.

- 3 The Hazard Must Be Reasonably Foreseeable. The hazard for which a citation is issued must be reasonably foreseeable.

a All the factors which could cause a hazard need not be present in the same place at the same time in order to prove foreseeability of 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 Section 50-9-5A 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.

- b It is necessary to establish the reasonable foreseeability of the general workplace hazard, rather than the particular hazard which 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.

- (b) The Hazard Must Affect the Cited Employer's Employees. The employees affected by the Section 50-9-5A hazard must be the employees of the cited employer.

- 1 An employer who may have created and/or controlled the hazard normally shall not be cited for a Section 50-9-5A violation if his own employees are not exposed to the hazard.
- 2 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 Compliance Manager shall consult with the legal office to determine the sufficiency of the evidence regarding the employment relationship.
- 3 The fact that an employer denies that exposed employees are his/her employees 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.

(2) 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 shall be limited to special circumstances. Recognition of the hazard must be supported by satisfactory evidence and adequate documentation in the file as follows:

(a) Industry Recognition. A hazard is recognized if the employer's industry recognizes it. Recognition by an industry other than the industry which the employer belongs is generally insufficient to prove this element of a Section 50-9-5A 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. Industry recognition of a particular hazard can be established in several ways:

- 1 Statements by industry safety or health experts which are relevant to the hazard.
- 2 Evidence of implementation of abatement methods to deal with the particular hazard by other members of the industry.
- 3 Manufacturer's warnings on equipment which are relevant to the hazard.
- 4 Statistical or empirical studies conducted by the employer's industry which demonstrate awareness of the hazard. Evidence such as studies conducted by the employee representative, the union or other employees should also be considered if the employer of the industry has been made aware of them.
- 5 Government and insurance industry studies, if the employer or the employer's industry is familiar with the studies and recognizes their validity.

6 State and local laws or regulations which 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.

a Regulations of other Federal agencies or of State atomic energy agencies generally shall not be used. They raise substantial difficulties under Section 50-9-23 of the Act, which provides that OHSB is pre-empted when such an agency has statutory authority to deal with the working condition in question.

b In cases where State and local government agencies not falling under the pre-emption provisions of Section 50-9-23 have codes or regulations covering hazards not addressed by OHSB standards, the Compliance Manager shall determine whether the hazard is to be cited under Section 50-9-5A or referred to the appropriate local agency for enforcement.

EXAMPLE: A safety hazard on a personnel elevator in a factory may be documented during an inspection. It is determined that the hazard is not clearly citable under Section 50-9-5A but there is a local code which addresses this hazard and a local agency actively enforces the code. The situation normally shall be referred to the local enforcement agency in lieu of citing 50-9-5A.

7 Standards issued by the American National Standards Institute (ANSI), the National Fire Protection Agency (NFPA), and other private standard-setting organizations, if the relevant industry participated on the committee drafting the standards. Otherwise, such private standards normally shall be used only as corroborating evidence of recognition. Preambles to these standards which 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 OSHA standards. They are simply evidence of industry recognition, seriousness of the hazard or feasibility of abatement methods.

8 NIOSH criteria documents; the publications of EPA, the National Cancer Institute, and other agencies; OSHA hazard alerts; the Industrial Hygiene 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.

(b) 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 inspection.

1 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 OHSB, worker's compensation, or other purposes may show this knowledge.

2 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.

3 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.

- (c) 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 shall 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 building which is 26 feet below and in which unwarned employees work. (In construction, 50-9-5A could not be cited in this situation because 29 CFR 1926.252 or 1926.852 applies.)

- (3) The Hazard Was Causing or Was Likely to Cause Death or Serious Physical Harm. This element of a Section 50-9-5A violation is virtually identical to the substantial probability element of a serious violation under Section 50-9-24 of the Act. Serious physical harm is defined in B.1. of this chapter. This element of a Section 50-9-5A violation can be established by showing that:

- (a) An actual death or serious injury resulted from the recognized hazard, whether immediately prior to the inspection or at other times and places; or
- (b) If an accident occurred, the likely result would be death or serious physical harm. For example, an employee is standing at the edge of an unguarded piece of equipment, 25 feet above the ground. Under these circumstances if the falling incident occurs, death or serious physical harm (e.g., broken bones) is likely.
- (c) 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 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:

- 1 Regular and continuing employee exposure at the workplace to the toxic substance at the measured levels reasonably could occur;
- 2 Illness reasonably could result from such regular and continuing employee exposure; and
- 3 If illness does occur, its likely result is death or serious physical harm.

(4) The Hazard May Be Corrected by a Feasible and Useful Method. To establish a Section 50-9-5A violation the agency must identify a method which is feasible, available and likely to correct the hazard. The information shall indicate that the recognized hazard, rather than a particular accident, is preventable.

(a) If the proposed abatement method would eliminate or significantly reduce the hazard beyond whatever measures the employer may be taking, a Section 50-905A citation may be issued. A citation shall 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 shall be mentioned.

(b) Feasible and useful abatement methods can be established by reference to:

- 1 The employer's own abatement method which existed prior to the inspection but was not implemented;
- 2 The implementation of feasible abatement measures by the employer after the accident or inspection;
- 3 The implementation of abatement measures by other companies;

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

5 Suggested abatement methods contained in trade journals, private standards and individual employer standards. Private standards shall not be relied on in a Section 50-9-5A citation as mandating specific abatement methods.

a 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.

b The citation for the example given shall 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.

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

c. Use of the General Duty Clause. The general duty provisions shall be used only where there is no standard that applies to the particular hazard involved. 11 NMAC 5.1.13 expressly provides that an employer who is in compliance with a specific standard shall be deemed to be in compliance with the general duty clause.

(1) 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. An example of a hazard covered only partially by a standard would be a confined space situation where an employee could be subject to an overexposure of an air contaminant covered under 1910.1000 or to an atmosphere containing less than 16-percent oxygen. The latter condition could legitimately be cited under the general duty clause with the former cited under the appropriate standard.

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

d. Limitations on Use of the General Duty Clause. Section 50-9-5A is to be used only within the guidelines given in A.2.a. of this chapter.

- (1) Section 50-9-5A Shall Not Be Used When a Standard Applies to a Hazard. Both 29 CFR 1910.5(f) and legal precedent establish that Section 50-9-5A may not be used if an OHSB standard applies to the hazardous working condition.
  - (a) Prior to issuing a 50-9-5A citation, the standards must be reviewed carefully to determine whether a standard applies to the hazard. If a standard applies, the standard shall be cited rather than 50-9-5A. Prior to the issuance of a 50-9-5A citation, a notation shall be made in the file to indicate that the standards were reviewed and no standard applies.
  - (b) If there is a question as to whether a standard applies, the Compliance Manager shall consult with the legal office in determining the applicability of the standard.

(c) Section 50-9-5A 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.

1 If the issue of the applicability of a specific standard is raised, the Compliance Manager shall consult with the legal office for appropriate legal advice.

2 If, on the other hand, the issue of the pre-emption of the general duty clause by a standard is raised in an informal conference or notice of contest proceeding, the Bureau Chief shall consult with the legal office for appropriate legal advice.

(2) Section 50-9-5A Shall Not Be Used To Impose a Stricter Requirement Than That Required by the Standard. For example, if the standard provides for a permissible exposure limit (PEL) of 5ppm, even if data establishes that a 3ppm level is a recognized hazard, Section 50-9-5A shall not be cited to require that the 3ppm level be achieved. If the standard has only a time-weighted average permissible exposure level and the hazard involves exposure above a recognized ceiling level, the Compliance Manager shall discuss and proposed citation which the legal office.

(3) Section 50-9-5A Shall 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, Section 50-9-5A shall not be cited to require medical surveillance.

(4) Section 50-9-5A Shall Not Be Used to Enforce "Should" Standards. If a standard or its predecessor uses the work "should," neither the standard nor Section 50-9-5A shall ordinarily be cited with respect to the hazard addressed by the "should" portion of the standard.

(5) Section 50-9-5A Shall 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 50-9-5A to cover specific categories of hazards, types of machines, operations, or industries exempted from coverage by a standard, Section 50-9-5A shall normally not be

cited if the reason for the exemption is the lack of a hazard.

- (a) 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.
  - (b) Compliance Managers shall evaluate the circumstances of special situations in accord with guidelines stated herein to determine whether a 50-9-5A citation can be issued in those special cases.
- (6) Alternative Standards. There are a number of general standards which shall be considered for citation rather than 50-9-5A in certain situations which initially may not appear to be governed by a standard.
- (a) 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 shall 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.
  - (b) For a health hazard, the particular toxic substance standards, such as asbestos and coke oven emission, shall be cited where appropriate. If those particular standard do not apply, however, other standards may be applicable; e.g., the air contaminant level contained in 29 CFR 1910.1000 may apply in general industry and those contained in 29 CFR 1926.55 may apply in construction.
  - (c) 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.
  - (d) 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.

- (e) The foregoing standards as well as others which may be applicable shall be considered carefully before issuing a 50-9-5A citation for a health hazard.
- e. 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 repeated violations which would otherwise qualify as serious violations, except for their willful or repeated nature). Other-than-serious citations shall not be issued for violations based on the general duty clause.
- f. Procedures for Implementation of Section 50-9-5A Enforcement. To ensure that all citations of the general duty clause are fully justified, the following procedures shall be carefully adhered to.
  - (1) Gathering evidence and Preparing the File. The evidence necessary to establish each element of a 50-9-5A violation shall be documented in the file. This includes all photographs, 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.
    - (a) If copies of documents relied on to establish the various 50-9-5A elements cannot be obtained before issuing the citation, these documents shall be accurately quoted and identified in the file so they can be obtained later if necessary.
    - (b) If experts are needed to establish any elements of the violation, the experts shall be consulted before the citation is issued and their opinion noted in the file. The file shall also contain their addresses and telephone numbers.
    - (c) The file shall contain a statement that a search has been made of the standards and that no standard applies to the cited condition.
  - (2) Pre-Citation Review. The Compliance Manager shall ensure that all proposed 50-9-5A citations undergo pre-citation review.

- (a) The legal office shall be consulted prior to the issuance of all 50-9-5A citations where such consultation is required by the procedures in the paragraphs under A.2 or where complex issues or exceptions to those procedures are involved.
- (b) If a standard does not apply and all criteria for issuing a 50-9-5A citation are not met but the Compliance Manager determines that the hazard warrants some type of notification, a letter shall be sent to the employer and the employee representative describing the hazard and suggesting corrective action.

3. Employee Exposure. A hazardous condition which apparently violates an OHSB standard or the general duty clause shall be cited only when employee exposure can be documented and substantiated. Exposure must have occurred within the 6 months immediately preceding the issuance of the citation in order to serve as a basis for the violation.

- a. Definition of Employee. 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. Determining the employer of an exposed person may be a very complex question, in which case the Compliance Manager shall seek the advice of the legal office.
- b. Observed Exposure. Employee exposure is established if the CO witnesses, observes, or monitors exposure of an employee to the hazardous or suspected hazardous condition. Where a standard requires engineering or administrative controls (including work practice controls), employee exposure shall be cited regardless of the use of personal protective equipment.
- c. Unobserved Exposure. Where employee exposure is not observed, witnessed, or monitored by the CO, employee exposure is established if it is determined through witness statements or other evidence that exposure to a hazardous condition has occurred, or continues to occur, or could recur.
  - (1) In fatality/catastrophe (or other "accident") investigations, employee exposure is established in the CO determines, through written statements or other evidence, that exposure to a hazardous condition occurred at the time of the accident.
  - (2) In other circumstances where the CO determines that

exposure to hazardous conditions has occurred in the past, such exposure may serve as the basis for a violation when employee exposure has occurred in the previous six months.

(3) Potential Exposure. A citation may be issued when the possibility exist that an employee could be exposed to a hazardous condition because of work patterns, past circumstances, or anticipated work requirements, and it is reasonably predictable that employee exposure could occur, such as:

(a) The hazardous condition is an integral part of an employer's recurring operations, but the employer has not established a policy or program to ensure that exposure to the hazardous condition will not recur; or

(b) The employer has not taken steps to prevent access to unsafe machinery or equipment which employees may have reason to use.

d. Documenting Employee Exposure. The CO shall fully document exposure for every apparent violation. This includes such items as:

(1) 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);

(2) Signed statements;

(3) Photographs; and

(4) Documents (e.g., autopsy reports, police reports, job specifications, etc.)

4. Regulatory Requirements. Violations of 11 NMAC 5.1.16 &.17 shall 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.

NOTE: If the Compliance Manager becomes aware of an incident required to be reported under 11 NMAC 5.1.16-1904.8 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, a violation for failure to report does not exist.

5. 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 shall be documented and cited, if the manufacturer is located within the legal jurisdiction of the Bureau, irrespective of employee exposure at the manufacturing or importing location.

If the manufacturer is not located within the Bureau's legal jurisdiction, a referral will be made to the OSHA Regional Office.

B. Types of Violations.

1. Serious Violations. Section 50-9-24F of the Act provides "...a serious violation shall 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 CO shall 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 know of the violation.

(1) The violation classification need not be completed for each instance; only once for each full item, or, if items are grouped, once for the group.

(2) If the full item consists of multiple instances for grouped items, the classification shall be based on the most serious item. (See Chapter VI, A.2.i.)

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 shall also be evaluated on the basis of these steps to ensure that they represent serious violations. The four elements the CO shall consider are as follows:

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

(a) The CO 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 CO shall

note the facts which 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 exist which the standard is designed to prevent, the CO shall determine which type could reasonably be predicted to result in the most severe injury or illness and shall base the classification of the violation on that determination.

(b) The following are examples of a determination of the type of accident or health hazard exposure which 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 1926.500(d)(1). This regulation requires that the edge of the open-sided floor be guarded by standard railings. The type of accident which 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 1915.91(b). The type of accident which the violated standard is designed to prevent involves an employee tripping on debris.

3 An 8-hour time weighted average sample reveals regular, ongoing employee overexposure to beryllium at .004 mg/M3 in apparent violation of 29 CFR 1910.1000(b)(1). This is .002 mg/M3 above the PEL of health hazard exposure which the violated standard is designed to prevent.

4 An 8-hour time-weighted average sample reveals regular, ongoing employee overexposure to acetic acid at 20 ppm in violation of 29 CFR 1910.1000(a)(2). This is 10 ppm above the PEL of health hazard exposure which the violated standard is designed to prevent.

(2) Step 2. The most serious injury or illness which 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 CO shall 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 CO shall not give consideration at this point to factors which relate to the probability that an injury or illness will occur. The following are examples of a determination of the types of injuries which 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, or experience other more serious injuries.

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) For conditions involving exposure to air contaminants or harmful physical agents, the CO shall consider the concentration levels of the contaminant or physical agent in determining the types of illness which could reasonably result from the condition. The Chemical Information Manual, OSHA Instruction CPL 2-2.43, shall be used to determine toxicological properties of substances listed as well as a Health Code Number. A preliminary violation classification shall be assigned in accordance with the instructions given in C.6.b.

- (c) In order to support a preliminary classification of serious, OSHA must establish a prima facie case that exposure at the sampled level would, if representative of conditions to which employees are normally exposed, lead to illness. Thus the CO must make every reasonable attempt to show that the sampled exposure is in fact representative of employee exposure under

normal working conditions. The CO shall, therefore, identify and record all available evidence which 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 which can be expected to continue.
- 5 Whether work practices, engineering controls, production levels and other operating parameters are typical of normal operations.

(d) Where such evidence is difficult to obtain or where it is inconclusive, the CO shall 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 CO shall presume such exposure in determining the types of illness which could result from the violative condition. The following are examples of determination of types of illnesses which could reasonably result from a health hazard exposure:

- 1 If an employee is exposed regularly and continually to beryllium at .004 mg/M3, it is reasonable to predict that berylliosis or cancer could result.
- 2 If an employee is exposed regularly and continually to acetic acid at 20 ppm, it is reasonable to predict that the illness which could result, viz., irritation to nose, eyes throat, would not involve serious physical harm.

(3) Step 3. Whether the types of injury or illness identified in Step 2 could include death or a form of serious physical harm.

(a) In making this determination, the CO shall utilize the following definition or "serious physical

harm":

1 Impairment of the body in which part of the body is made functionally useless or is substantially reduced in efficiency on or off the job. 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 which 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, including electric 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 then normal function of a part of the body. Some examples of such illnesses include cancer, silicosis, asbestosis, bysinosis, hearing impairment, central nervous system impairment and visual impairment. Examples of illnesses which 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, anthracosis.
- d Hearing loss.

(b) The following are examples of determinations of whether the types of injury or illnesses which 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 the employee would most likely suffer a deep cut of the hand, the use of the hand would be substantially reduced and would require suturing by a medical doctor. This injury would then be serious.
  - 3 If an employee, following exposure to beryllium at .004 mg/M3, develops berylliosis or cancer, life would be shortened and breathing capacity would be significantly reduced. The illness would constitute serious physical harm.
  - 4 If an employee is exposed regularly and continually to acetic acid at 20 ppm, the irritation that would result from this exposure would not normally be considered to constitute serious physical harm.
- (4) 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 which constituted the apparent violation.
    - 1 In this regard, the supervisor represents the employer and a supervisor's knowledge of the hazardous condition amounts to employer knowledge. The CO shall record any evidence which establishes that the employer knew of the hazardous condition on the appropriate worksheet.
    - 2 In cases where the employer may contend that the Supervisor's own conduct constituted an isolated event of employee misconduct, the CO shall attempt to determine the extent to

which the supervisor was trained and supervised so as to prevent such conduct.

(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 CO is satisfied that the employer could have known through the exercise of reasonable diligence. As a general rule, if the CO was able to discover a hazardous condition, it can be presumed that the employer could have discovered the same condition through the exercise of reasonable diligence. The CO shall record any evidence which substantiates that the employer could have know of the hazardous condition with the exercise of reasonable diligence on the appropriate worksheet.

2. Other-than-serious Violations. This type of violation shall be cited in situations where the most serious injury or illness that would be most likely to result from a hazardous condition cannot reasonably be predicted to cause death or serious physical harm to exposed employees but does have a direct and immediate relationship to their safety and health.

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

a. A "willful" violation may exist under the Act where evidence shows that the employer committed an intentional and knowing, as contrasted with inadvertent, violation of the Act and the employer is conscious of the fact that what he is doing constitutes a violation of the Act. A violation may be willful if the same employer representative had simultaneous knowledge:

- (1) That a condition is hazardous and did not make a reasonable effort to eliminate the condition;
- (2) That the condition violates a standard or other obligations of the Act; and
- (3) Of the requirements of the standard or other obligation violated.

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 CO shall 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 which can influence a decision as to whether violations are willful include:

- (1) The nature of the employer's business and the knowledge regarding safety and health matters which could reasonably be expected in the industry.
- (2) The precautions taken by the employer to limit the hazardous conditions.
- (3) The employer's awareness of the Act and of the responsibility to provide safe and healthful working conditions.
- (4) Whether similar violations and/or hazardous conditions have been brought to the attention of the employer.
- (5) Whether the nature and extent of the violations disclose a purposeful disregard of the employer's responsibility under the Act.

d. The determination of whether to issue a citation for a willful or repeated violation will frequently raise difficult issues of law and policy and will require the evaluation of complex factual situations. Accordingly, a consultation with the legal office may be necessary prior to issuing a willful citation.

4. Criminal/Willful Violations. Section 50-9-24J of the Act provides that: "Any employer who willfully violates any provision of the Occupational Health and Safety Act or any regulation employee by that violation shall, upon conviction, 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 shall be a fine of not more than \$20,000 or by imprisonment for not more than one year, or by both."

a. The Compliance Manager, in coordination with the Bureau Chief and legal office, shall carefully evaluate all cases involving workers' deaths to determine whether they involve criminal violation of Section 50-9-24J of the Act.

b. In cases where an employee's death has occurred which may have been caused by a willful violation of an OSHA standard, the supervisor shall be consulted prior to the completion of the investigation to determine whether evidence exists and whether further evidence is necessary to establish the elements of a criminal/

willful violation. The Compliance Manager shall consult with the Bureau Chief and, if appropriate, with the legal office after the initial determination has been made concerning possible willful violation.

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

(1) Establishment of Criminal/Willful. In order to establish a criminal/willful violation OHSB must prove that:

(a) The employer violated an OHSB standard. A criminal/willful violation cannot be based on violation of Section 50-9-5A.

(b) The violation was willful in nature; i.e.,

1 The employer had knowledge of the hazardous working conditions. Knowledge could be demonstrated through such evidence as the foreman having been in the vicinity of an unshored, unsloped trench in which employees are working.

2 The employer had knowledge of the requirements of the applicable standard.

a Proving knowledge of the requirements of the applicable standard may present greater difficulties. Evidence of knowledge of the applicable standard gained through a prior citation, discussions with OHSB or other safety personnel of the requirements of the standard, or other similar evidence would be sufficient to support this element of knowledge.

b In addition, it may be possible to establish willfulness, even in the absence of specific knowledge of the OHSB standard, where the requirements of the standard are known to the employer. For example, where it can be shown that it was recognized by the employer that certain precautions must be taken in order to make a trench safe, either through the employer's past practice of shoring or sloping, through

employee complaints, or otherwise, knowledge of the standard's requirement will have been shown.

c Finally, in particularly flagrant situations, willfulness can be proved where employees are exposed to a working condition which a reasonably prudent employer should have recognized as being hazardous and requiring corrective action. Even in the absence of evidence that an employer knew that specific precautions should have been taken, if the working conditions are so obviously hazardous and the accepted industry practice is to take certain precautions, an employer's conduct could constitute a willful violation.

NOTE: It must be emphasized that, particularly with regard to this situation, a key element of willfulness is flagrancy of the conduct and the employer's plain indifference to employee safety.

(c) 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 which clearly demonstrates that the violation of the standard was the cause of or a contributing factor to an employee's death.

(2) Compliance Manager Responsibilities. Although it is generally not necessary to issue "Miranda" warnings to an employer when a criminal/willful investigation is in progress, the Compliance Manager shall seek the advice of the legal office on this question.

(a) If the Compliance Manager 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 shall be obtained in accordance with instructions in Chapter III, B.3.

(b) Following the investigation, if the Compliance Manager decides to recommend criminal prosecution, a memorandum containing

that recommendation shall be forwarded promptly to the Bureau Chief. It shall include an evaluation of the possible criminal charges, taking into consideration the greater burden of proof which 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 shall be noted in the transmittal memorandum because in most cases the prosecution of a criminal/willful case delays the affirmation of the civil citation and its correction requirements.

- (c) The Compliance Manager shall normally issue a civil citation in accordance with current procedures even if the citation involves allegations under consideration for criminal prosecution. The Bureau Chief shall be notified of such cases, and they shall be forwarded to the legal office as soon as practicable for possible referral to the Office of the Attorney General.

5. Repeated Violations. An employer may be cited for a repeated violation if that employer has been cited previously for 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 repeated 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 repeated violation

would be appropriate.

- c. Geographical Limitations. For purposes of determining whether a violation is repeated, the following criteria shall apply:

- (1) Fixed Establishment. A fixed establishment is interpreted to mean "a single physical location where business is conducted or where service or industrial operations are performed," as defined in 29 CFR 1903.2(b). For purposes of considering whether a violation is repeated, citations issued to employers having fixed establishments (e.g., factories, terminals, stores) shall be limited to the cited establishment.

EXAMPLE: A multi-establishment employer would not be cited for a repeated violation if the same violation recurred at a plant or business location other than the one previously cited.

- (2) Nonfixed Establishment. A nonfixed establishment (e.g., construction sites, oil and gas drilling sites) as interpreted to mean "all geographical sites or locations within the Bureau's jurisdiction where construction, drilling, or other movable operation is being performed by the employer." For employers engaged in businesses having no fixed establishments, repeated violations will be alleged based on prior violations occurring anywhere within the same Bureau's jurisdiction.

EXAMPLE: Where the construction site extends over a large area and/or the scope of the job is unclear (such as road building), that portion of the work place specified in the employer's contract high falls within the Bureau's jurisdiction is the establishment.

- d. Time Limitations. Although there are no statutory limitations upon the length of time that a citation may serve as a basis for a repeated violation, the following policy shall be used in order to ensure uniformity.

- (1) A citation will be issued as a repeated violation if:
- (a) The citation is issued within 3 years of the final order of the previous citation, or,
  - (b) The citation is issued within 3 years of the final abatement date of that citation, whichever is later.
- (2) When a violation is found during an inspection and a repeated citation has been issued for a substantially similar condition which meets the

above time limitations, the violation may be classified as a second instance repeated violation with a corresponding increase in penalty (See Chapter VI, B.6.b.).

EXAMPLE: An inspection is conducted in an establishment on 2/17/87. A violation of 29 CFR 1910.217(c)(1)(i) is found. On 10/9/84 a repeated violation of the same standard was issued. The violation found during the current inspection may be treated as a second instance repeated violation and the gravity-based penalty may be multiplied by 4.

- (3) If a condition that has been cited as a second instance repeated violation is found again with the 3-year time limitations described in (1), a third instance repeated violation may be issued with a corresponding increase in penalty. (See Chapter VI, B.6.b.)
  - (4) For any further repetition, the Bureau Chief shall be consulted.
- e. Repeated vs. Willful. Repeated violations differ from willful violations in that they may result from an inadvertent, accidental or ordinarily negligent act. Where a repeated violation may also meet the criteria for willful but the element of willfulness cannot be sufficiently proved, a citation for a repeated violation shall normally be issued with the penalty calculated as indicated in Chapter VI, B.7.c.
- f. Repeated 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 abated and reoccurred, the subsequent reoccurrence is a repeated violation.
- g. Compliance Manager Responsibilities. After the CO makes the initial recommendation that the violation be cited as "repeated," the Compliance Manager shall:
- (1) Ensure that the violation meets the criteria outlined in the preceding subparagraphs of this section.
  - (2) Ensure that the case file includes a copy of the prior violation citation which serves as a basis for the repeated citation. If the prior violation citation is not available, the basis for the repeated citation shall, nevertheless, be adequately documented in the case file.

- (3) IN questionable circumstances when it is not clear that the violation meets the criteria outlined in this section, consult with the Bureau Chief before issuing a repeated citation.
- (4) If a repeated citation is issued, ensure that the cited employer is fully informed of the previous violations serving as a basis for the repeated citation, either by telephone or by notation in the AVD portion of the citation, using the following or similar language:

THE (COMPANY NAME) WAS PREVIOUSLY CITED FOR A VIOLATION OF THIS OCCUPATIONAL HEALTH AND SAFETY STANDARD OR ITS EQUIVALENT STANDARD (NAME PREVIOUSLY CITED STANDARD) WHICH WAS CONTAINED IN OHSB INSPECTION NUMBER \_\_\_\_\_, CITATION NUMBER \_\_\_\_\_, ITEM NUMBER \_\_\_\_\_, ISSUED ON (DATE).

6. De Minimis Violations. De minimis violations are violations of standards which have no direct or immediate relationship to safety or health. Whenever de minimis conditions are found during an inspection, they shall be documented in the same was as any other violation but shall not be included on the citation. An OSHA-1B/1-BIH is not required for De Minimis.

a. Explanation. The criteria for finding a de minimis violation are as follows:

- (1) An employer complies with the clear intent of the standard but deviates from its particular requirements in a manner that has no direct or immediate relationship to employee safety or health. These deviations may involve distance specifications, construction material requirements, use of incorrect color, minor variations from recordkeeping, testing, or inspection regulations, or the like.

EXAMPLES:

- (a) 29 CFR 1910.27(b)(1)(ii) allows 12 inches as the maximum distance between ladder rungs. Where the rungs are 13 inches apart, the condition is de minimis.
- (b) 29 CFR 1910.28(a)(3) requires guarding on all open sides of scaffolds. Where employees are tied off with safety belts in lieu of guarding, the intent of the standard is met; and the absence of guarding is de minimis.
- (c) 29 CFR 1910.217(e)(1)(ii) requires that mechanical power presses be inspected and tested at least weekly. If the machinery is

seldom used, inspection and testing prior to each use is adequate to meet the intent of the standard.

- (2) An employer complies with a proposed standard or amendment or a consensus standard rather than with the standard in effect at the time of the inspection when the employer's action provides equal or greater employee protection.
  - (3) An employer's workplace is at the "state of the art" which is technically beyond the requirements of the applicable standard and provides equivalent or more effective employee safety or health protection.
- b. Professional Judgment. Maximum professional discretion must be exercised in determining the point at which noncompliance with a standard constitutes a de minimis violation.
  - c. Compliance Manager Responsibilities. Compliance Manager shall ensure that the de minimis violation meets the criteria set out in B.6.a.

C. Health Standard Violations.

1. General. The classification of health violations involves the exercise of maximum professional judgment. All relevant factors must be carefully considered when making classification decisions.
2. Citation of Ventilation Standards. In cases where a citation of a ventilation standard may be appropriate, consideration shall be given to standards intended to control exposure to recognized hazardous levels of air contaminants, to prevent fire or explosions, or to regulate operations which may involve confined space or specific hazardous conditions. (See IH Technical Manual, Chapter VII, Tables VII-1 through -5.) In applying these standards, the following guidelines shall be observed:
  - a. Health-Related Ventilation Standards. An employer is considered in compliance with a health-related airflow ventilation standard when the employee exposure does not exceed appropriate airborne contaminant standards; e.g., the PELs prescribed in 29 CFR 1910.1000.
    - (1) Where an over-exposure to an airborne contaminant is detected, the appropriate air contaminant engineering control requirement shall be cited; e.g., 29 CFR 1910.1000(e). In no case shall citations of the standard be issued for the purpose of requiring specific volumes of air to ventilate such exposures.

- (2) Other requirements contained in health-related ventilation standards shall be evaluated without regard to the concentration of airborne contaminants. Where a specific standard has been violated and an actual or potential hazard has been documented, a citation shall be issued.

b. Fire- and Explosion-Related Ventilation Standards. Although they are not technically health violations, the following guidelines shall be observed when citing fire- and explosion-related ventilation standards:

- (1) Adequate Ventilation. In the application of fire- and explosion-related ventilation standards, OHSB considers that an operation has adequate ventilation when both of the following criteria are met:

- (a) The requirement of the specific standard has been met.
- (b) The concentration of flammable vapors is 25 percent or less of the lower explosive limit (LEL).

EXCEPTION: Certain standards specify violations when 10 percent of the LEL is exceeded. These standards are found in construction exposures.

- (2) Citation Policy. If 25 percent (10 percent when specified for construction operations) of the LEL has been exceeded and:

- (a) The standard requirements have not been met, the standard violation normally shall be cited as serious.
- (b) There is no applicable specific ventilation standard, Section 50-9-5A of the Act shall be cited in accordance with the guidelines given in A.2. of this chapter.

(c) Special Conditions Ventilation Standards. The primary hazards in this category are those resulting from confined space operations and welding.

- (1) Overexposure need not be shown to cite ventilation requirements found in the standards themselves.
- (2) Other hazards associated with confined space operations, such as oxygen deficiency, must be adequately documented before a citation may be issued.

3. Violations of the Noise Standard. Current enforcement policy

regarding 29 CFR 1910.95(b)(1) allows employers to rely on personal protective equipment and a hearing conservation program rather than engineering and/or administrative controls when hearing protectors will effectively attenuate the noise to which the employee is exposed to acceptable levels as specified in Tables G-16 or G-16a of the standard. Professional judgment is necessary to supplement the general guidelines provided her.

a. Citations for violations of 29 CFR 1910.95(b)(1) shall be issued when engineering and/or administrative controls are feasible, both technically and economically; and

(1) Employee exposure levels are so high that hearing protectors alone may not reliably reduce noise levels received by the employee's ear to the levels specified in Tables G-16 or G-16a of the standard.

Given the present state of the art, hearing protectors which offer the greatest attenuation may not reliably be used when employee exposure levels border on 100 dBA (See OSHA Instruction CPL 2-2.35A.); or

(2) The costs of engineering and/or administrative controls are less than the cost of an effective hearing conservation program.

NOTE: See Chapter III for guidelines on technical and economic feasibility.

b. A control is not reasonably necessary when an employer has an ongoing hearing conservation program and the results of audiometric testing indicate that existing controls and hearing protectors are adequately protecting employees. (In making this decision such factors as the exposure levels in question, the number of employees tested, and the duration of the testing program shall be taken into consideration.)

c. When employee noise exposures are less than 100 dBA but the employer does not have an ongoing hearing conservation program or the results of audiometric testing indicate that the employer's existing program is not working, the CO shall consider whether:

(1) Reliance on an effective hearing conservation program would be less costly than engineering and/or administrative controls.

(2) An effective hearing conservation program can be established or improvements can be made in an existing hearing conservation program which could bring the employer into compliance with Tables G-16 or G-16a.

- (3) Engineering and/or administrative controls are both technically and economically feasible.
- d. If noise levels received by the employee's ear can be reduced to the levels specified in Tables G-16 or G-16a by means of hearing protectors and an effective hearing conservation program, citations under the hearing conservation standard shall normally be issued rather than citations requiring engineering controls.
  - (1) If improvements in the hearing conservation program cannot be made or, if made, cannot be expected to reduce exposure sufficiently and feasible controls exist, a citation under 1910.95(b)(1) shall normally be issued.
  - (2) The Compliance Manager shall discuss such cases with the Bureau Chief prior to issuing a citation. If the Bureau Chief agrees that controls are justifiable, a citation shall be issued.
- e. When hearing protection is required but not used and employee exposure exceeds the limits of Table G-16, 29 CFR 1910.95(i)(2)(i) shall be cited and classified as serious (See C.3.h.) whether or not the employer has instituted a hearing conservation program. 29 CFR 1910.95(a) shall no longer be cited except in the case of the oil and gas drilling industry.

NOTE: Citations of 29 CFR 1910.95(i)(2)(ii)(b) shall also be classified as serious.
- f. If an employer has instituted a hearing conservation program and a violation of the hearing conservation amendment (other than 1910.95(i)(2)(i) or (i)(2)(ii)(b)) is found, a citation shall be issued if employee noise exposures equal or exceed an 8-hour time-weighted average of 85 dB.
- g. If the employer has not instituted a hearing conservation program and employee noise exposures equal or exceed an 8-hour time-weighted average of 85 dB, a citation for 1910.95(c) only shall be issued.
- h. Violations of 1910.95(i)(2)(i) from the hearing conservation amendment may be grouped with violations of 29 CFR 1910.95(b)(1) and classified as serious when an employee is exposed to noise levels above the limits of Table G-16 and:
  - (1) Hearing protection is not utilized or is not adequate to prevent overexposure to an employee; or
  - (2) There is evidence of hearing loss which could reasonably be considered:

- (a) To be work-related, and
    - (b) To have been preventable, at least to some degree, if the employer had been in compliance with the cited provisions.
  - i. When an employee is overexposed but effective hearing protection is being provided and used, an effective hearing conservation program has been implemented and no feasible engineering or administrative controls exist, a citation shall not be issued.
4. Violations of the Respirator Standard. When considering a citation for respirator violations, the following guidelines shall be observed:
- a. In Situations Where Overexposure Does Not Occur. Where an overexposure has not been established:
    - (1) But an improper type of respirator is being used (e.g., a dust respirator being used to reduce exposure to organic vapors), a citation under 29 CFR 1910.134(b)(2) shall be issued, provided the CO documents that an overexposure is possible.
    - (2) And one or more of the other requirements of 29 CFR 1910.134 is not being met; e.g., an unapproved respirator is being used to reduce exposure to toxic dusts, generally an other-than-serious violation shall be recorded. (Note that this policy does not include emergency use respirators.) The CO shall advise the employer of the elements of a good respirator program as required under 29 CFR 1910.134.
    - (3) In exceptional circumstances a citation may be warranted if an adverse health condition due to the respirator itself could be supported and documented. Examples may include a dirty respirator that is causing dermatitis, a worker's health being jeopardized by wearing a respirator due to an inadequately evaluated medical condition or a significant ingestion hazard created by an improperly cleaned respirator.
  - b. In Situations Where Overexposure Does Occur. In cases where an overexposure to an air contaminant has been established, the following principles apply to citations of 1910.134:
    - (1) 29 CFR 1910.134(a)(2) is the general section requiring employers to provide respirators "... when such equipment is necessary to protect the health of the employee" and requiring the establishment and maintenance of a respiratory protection program which meets the requirements outlined in 29 CFR 1910.134(b). Thus, if no

respiratory program at all has been established, 1910.134(a)(2) alone shall be cited; if a program has been established and some, but not all, of the requirements under 1910.134(b) are being met, the specific standards under 1910.134(b) that are applicable shall be cited.

- (2) An acceptable respiratory protection program includes all of the elements of 29 CFR 1910.134; however, the standard is structured such that essentially the same requirement is often specified in more than one section. In these cases, the section which most adequately described the violation shall be cited.

5. Violations of Air Contaminant Standards (29 CFR 1910.1000 Series). The standard itself provides several requirements.

- a. 29 CFR 1910.100(a) through (d) provide ceiling values and 8-hour time weighted averages (threshold limit values) applicable to employee exposure to air contaminant.
- b. 29 CFR 1910.1000(e) provides that to achieve compliance with those exposure limits, administrative or engineering controls shall first be identified and implemented to the extent feasible. When such controls do not achieve full compliance, protective equipment shall be used. Whenever respirators are used, their use shall comply with 29 CFR 1910.134.
- c. 29 CFR 1910.134(a) provides that when effective engineering controls are not feasible, or while they are being instituted, appropriate respirators shall be used. Their use shall comply with requirements contained in 29 CFR 1910.134 which provide for the type of respirator and the proper maintenance.
- d. The situation may exist where an employer must provide feasible engineering controls as well as feasible administrative controls (including work practice controls) and personal protective equipment. 29 CFR 1910.1000(e) has been interpreted to allow employers to implement feasible engineering controls and/or administrative and work practice controls in any combination the employer chooses provided the abatement means chosen eliminates the overexposure.
- e. Where engineering and/or administrative controls are feasible but do not or would not reduce the air contaminant levels below the applicable ceiling value or threshold limit value, the employer, nevertheless, must institute such controls. Only where the implementation of all feasible engineering and administrative control fails to reduce the level of air contaminants below applicable levels will the use of personal protective

equipment constitute satisfactory abatement. In such cases, usage of personal protective equipment shall be mandatory.

5. Classification of Violations of Air Contaminant Standards. When it has been established that an employee is exposed to a toxic substance in excess of the PEL established by OSHA standards (without regard to the use of respirator protection), a citation for exceeding the air contaminant standard shall be issued. The violation shall be classified as serious or other-than-serious on the basis of the requirements in the Chemical Information Manual, OSHA Instruction CPL 2-2.43, and the use of respiratory protection at the time of the violation. Classification of violations is dependent upon the determination that the illness is reasonably predictable at that exposure level, whether the illness is serious or other-than-serious and that the employer knew or could have known through reasonable diligence that a hazardous condition existed.

a. Principles of Classification. Exposure to a substance shall be considered serious if the exposure could cause impairment to the body as described in B.1.b.(3).

- (1) In general, substances having a single health code of 13 or less shall be considered as serious at any level above the Permissible Exposure Limit (PEL). Substances in categories 6, 8 and 12, however, are not considered serious at levels where only mid, temporary effect would be expected to occur.
- (2) Substances causing irritation (i.e., categories 14 and 15) shall be considered other-than-serious up to levels at which "moderate" irritation could be expected.
- (3) For a substance (e.g., cyclohexanol), having multiple health codes covering both serious and other-than-serious effects, a classification of other-than-serious shall be applied up to the level at which a serious effect(s) could be expected to occur.
- (4) For a substance having an ACGIH Threshold Limit Value (TLV) or a NIOSH recommended value, but no OSHA PEL, a citation for exposure in excess of the recommended value shall be considered under Section 50-9-5A of the Act in accordance with the guidelines given in A.2.
- (5) If an employee is exposed to concentrations of a substance below the PEL, but in excess of a recommended value (e.g., ACGIH TLV or NIOSH recommended value), a citation for inhalation cannot normally be used. The CO shall advise the employer that a reduction of the PEL has been

recommended.

(6) For a substance having an 8-hour PEL with no ceiling PEL but which a ceiling ACGIH TLV or NIOSH ceiling value has been recommended, the case shall be referred to the Bureau Chief in accordance with A.2.d.(2) of this chapter. If no citation is to be issued, the CO shall, nevertheless, advise the employer that a ceiling value has been recommended.

b. Effect of Respiratory Protection Factors. The CO shall consider protection factors for the type of respirator in use as well as the possibility of overexposure if the respirator fails. If protection factors are exceeded and if the potential for overexposure exists, a citation for failure to control excessive exposure shall be issued.

c. Additive and Synergistic Effects. Substances which have a known additive effect and, therefore, result in greater probability/severity of risk when found in combination shall be evaluated using the formula found in 29 CFR 1910.1000(d) (2).

(1) The use of this formula requires that the exposures have an additive effect on the same body organ or system. Caution must be used in applying the additive formula, and prior consultation with the Bureau Chief is required.

(2) If the CO suspects that synergistic effects are possible, it shall be brought to the attention of the supervisor. If it is decided that there is a synergistic effect of the substances found together, the violations shall be grouped, when appropriate, for purposes of increasing the violation classification severity and/or the penalty.

7. Guidelines for Issuing Citations of Air Contaminant Violations. No violation of 29 CFR 1910.1000 series would exist and no citation would be issued in the following circumstances:

a. Where no identified employee exposure level is above that specified in the standard, whether or not engineering controls, administrative controls or personal protective equipment are utilized.

b. Where the exposure level of an identified employee is above that specified in the standard, but all feasible engineering and administrative controls are utilized and personal protective equipment is provided, worn and maintained in accordance with the provisions of 29 CFR 1910.134.

8. Violations of the Hazard Communication Standard. Violations of the hazard communication standard shall be classified as serious whenever such a violation causes or contributes to a potential exposure capable of producing serious physical harm or death.
- a. Because of the difficulty of using the penalty calculation factors outlined in Chapter VI for shipped containers (as opposed to in-plant hazards), the following special penalty guidelines for shipped containers shall apply when a violation is classified as serious.
- (1) If no hazard determination has been conducted, a probability/severity factor of 5 shall be applied.
  - (2) If there is no material safety data sheet (MSDS) available or no label for a hazardous chemical (classified as serious), a probability/severity factor of 10 shall be applied.
  - (3) If the label has an inadequate hazard warning or none at all, a probability/severity factor of 5 or 10 shall be applied, depending on the significance of the missing element.
  - (4) If the MSDS does not contain sufficient hazard information, a probability/severity factor of 5 or 10 shall be applied, depending on the significance of the missing elements.
- b. Violations of 29 CFR 1910.1200(i)(2) (when the employer refuses to provide specific chemical identity information in a medical emergency) may be classified as willful with a probability/severity factor of 5 to 10, depending on the circumstances involved in the particular case.
9. Citing Improper Personal Hygiene Practices. The following guidelines apply when citing personal hygiene violations:
- a. Ingestion Hazards. A citation under 29 CFR 1910.141(g)(2) or (4) shall be issued where there is reasonable probability that, in areas where employees consume food or beverages (including drinking fountains), a toxic material may be ingested and subsequently absorbed.
- (1) For citations under 29 CFR 1910.141(g)(2) or (4) wipe sampling results shall be adequately documented to establish a serious hazard.
  - (2) Where, for any substance, a serious hazard is determined to exist due to the potential of ingestion or absorption of the substance for reasons other than the consumption of contaminated food or drink (e.g., smoking materials contaminated

with the toxic substance), a serious citation shall be considered under Section 50-9-5A of the Act.

- (3) Such citations do not depend on measurements of airborne concentrations.
- b. Absorption Hazards. A citation for exposure to materials which can be absorbed through the skin or which can cause a skin effect (e.g., dermatitis) shall be issued where appropriate personal protective equipment (clothing) is necessary but not worn. (See 29 CFR 1910.1000, Table Z-1, substances marked "skin".) The citation shall be issued under 29 CFR 1910.132(a) as either a serious or other-than-serious citation according to the hazard.
- (1) Such citations do not depend on measurements of airborne concentrations.
  - (2) If a serious skin absorption or dermatitis hazard exists which cannot be eliminated with protective clothing, a 50-9-5A citation may be considered. Engineering or administrative (including work practice) controls shall be required in these cases to prevent the hazard.
- c. Wipe Sampling. In general, wipe sampling (not air sampling) will be necessary to establish the presence of a toxic material posing a potential absorption or ingestion hazard. (See IH Technical Manual for sampling procedures.)
- (1) Issuing Citation. There are two primary considerations when issuing a citation of an ingestion or absorption hazard, such as a citation for lack of protective clothing:
    - (a) A health risk exists as demonstrated by one of the following:
      - 1 A potential for an illness, such as dermatitis, and/or
      - 2 The presence of a toxic material that can be ingested or absorbed through the skin or in some other manner. (See the Chemical Information Table.)
    - (b) The potential that the toxic material can be ingested or absorbed, e.g., that it can be present on the skin of the employee, can be established by evaluating the conditions of use and determining the possibility that a health hazard exists.
    - (c) The conditions of use can be documented by taking both qualitative and quantitative

results of wipe sampling into consideration when evaluating the hazard.

- (2) Supporting Citation. There are four primary considerations which must be met to support a citation:
    - (a) The potential for ingestion or absorption of the toxic material must exist.
    - (b) The ingestion or absorption of the material must represent a health hazard.
    - (c) The toxic substance must be of such a nature and exist in such quantities as to pose a serious hazard. The substance must be present on surfaces which have hand contact (such as lunch tables, cigarettes, etc.) or on other surfaces which, if contaminated, present the potential for ingestion or absorption of the toxic material (e.g., a water fountain).
    - (d) The protective clothing or other abatement means would be effective in eliminating or significantly reducing exposure.
  - d. Biological Monitoring. If the employer has been conducting biological monitoring, the CO shall evaluate the results of such testing. The results may assist in determining whether a significant quantity of the toxic material is being ingested or absorbed through the skin.
  - e. Determination of Source. Prior to the issuance of a citation, the CO shall carefully investigate the source or cause of the observed hazards to determine if some type of engineering, administrative or work practice control, or combination thereof, may be applied which would reduce employee exposure.
10. Classification of Violations for the New Health Standards. In general, classification decisions regarding violations of the exposure limits of the new health standards shall be governed by the Chemical Information Manual.