

Due Process and Employee Safety: Conflict in OSHA Enforcement Procedures

The controversial Occupational Safety and Health Act of 1970¹ continues to capture the attention of legislators, courts and commentators.² Millions of dollars are at stake—the amounts employers have paid out for mandated improvements³ and penalty assessments.⁴ Employers have recently launched constitutional challenges to the Act,⁵ alleging in some cases that the enforcement procedures violate

1. 29 U.S.C. §§ 651-78 (1970) [hereinafter cited as Act].

2. See, e.g., *Hearings on the Occupational Safety and Health Act of 1970 (Oversight and Proposed Amendments) Before the Select Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 2d Sess. (1972) [hereinafter cited as 1972 Oversight Hearings]; M. STOKES, LEGAL CONSIDERATIONS OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at 73-85 (1972); Moran, *Occupational Safety and Health Standards as Federal Law: The Hazards of Haste*, 15 WM. & MARY L. REV. 777 (1974); McClintock & Bohrsen, *Constitutional Challenges*, 9 GONZAGA L. REV. 361 (1974); Comment, *Occupational Safety and Health Standards*, 9 GONZAGA L. REV. 493 (1974); Note, *The Occupational Safety and Health Act of 1970: Some Unresolved Issues and Potential Problems*, 41 GEO. WASH. L. REV. 304 (1972).

3. N.Y. Times, Feb. 2, 1975, § 3 (Business and Finance) at 5, col. 1.

4. From April 28, 1971, to December 1974, 134,505 citations were issued, proposing penalties of \$17,493,262. Of the proposed penalties, \$12,704,619 have been collected. 4 BNA OCC. SAF. & HEALTH REP. 1271 (1975).

5. Challenges have included unsuccessful allegations that the penalties, though designated civil by Congress, are criminal in nature, thereby requiring all the safeguards of criminal procedure in the enforcement proceedings. See, e.g., *Frank Irey, Jr., Inc. v. OSAHRC*, 2 BNA OCC. SAF. & HEALTH REP. 1283 (3d Cir., Nov. 4, 1974), *vacated for rehearing*, 2 BNA OCC. SAF. & HEALTH REP. 1445 (3d Cir., Dec. 20, 1974); *Lance Roofing Co. v. Hodgson*, 343 F. Supp. 685 (N.D. Ga.), *aff'd*, 409 U.S. 1070 (1972) (three-judge court; dismissed for failure to exhaust administrative remedies). See McClintock & Bohrsen, *supra* note 2, at 271-93; Comment, *OSHA Penalties: Some Constitutional Considerations*, 10 IDAHO L. REV. 223 (1974); Comment, *OSHA: Employer Beware*, 10 HOUS. L. REV. 426 (1973). A more general discussion can be found in Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478 (1974); see *Helvering v. Mitchell*, 303 U.S. 391, 402-04 (1938) (judicial explanation of the difference between civil and criminal penalties).

A second constitutional attack alleging a possible Seventh Amendment conflict was suggested by Judge Gibbons in his dissenting opinion to *Frank Irey, Jr., Inc. v. OSAHRC*, *supra*. Judge Gibbons argued that because the Act provides for civil penalties resulting in an in personam money judgment, a de novo trial in the courts is necessary. In two recent cases, Mr. Justice Marshall, writing for the Court, made clear that actions requiring a jury trial under the Seventh Amendment could, at the discretion of Congress, be committed to an administrative agency, thereby eliminating the need for a Seventh Amendment jury trial. *Pernell v. Southall Realty*, 416 U.S. 363, 383 (1974); *Curtis v. Loether*, 415 U.S. 189, 195 (1974).

Finally, the Act authorizes entry without a warrant, thereby presenting a potential fourth amendment violation. See *Camara v. Municipal Court*, 387 U.S. 523 (1967); See *v. Seattle*, 387 U.S. 541 (1967); M. STOKES, *supra* note 2, at 83; Hornberger, *Occupational Safety and Health Act of 1970*, 21 CLEV. ST. L. REV. 1, 9-11 (1972); cf. Note, *Area Search Warrants in Border Zones: Almeida-Sanchez and Camara*, 84 YALE L.J. 355 (1974). The issue, however, has been mooted by the decision of the Secretary to obtain a warrant if the employer refuses to permit an inspector to enter. 29 C.F.R. § 1903.4 (1974). For a discussion of the effect of this regulation upon the requirement that no prior notice be given of an inspection, see Comment, *Occupational Safety and Health Inspections*, 9 GONZAGA L. REV. 555, 556-58 (1974).

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due process.⁶ Perhaps the most compelling due process concern arises from the possibility of transforming a penalty of \$1000 into one of over \$100,000 solely by exercising the statutorily provided right of appeal.⁷ Congress has considered this problem, but has yet to arrive at a positive solution.⁸

This Note will analyze the due process allegations, keeping them always in the perspective of the Act's primary purpose: providing for the safety of employees.⁹ The precise problem is how to minimize the dangers to employees while preserving due process for the employer who may be forced to make irretrievable expenditures before he has a hearing and judicial review. Statutory amendments will then be suggested and examined.

I. The Enforcement Proceedings

In order to assure safe working conditions, the Act empowers the Secretary of Labor, through his designees, to inspect workplaces¹⁰ for violations of safety and health standards.¹¹ If a violation is found, a citation¹² is issued which often carries a proposed penalty.¹³ The citation describes the dangerous condition and specifies an "abatement period," a reasonable number of days for the employer to put an end

6. *E.g.*, *Frank Irely, Jr., Inc. v. OSAHRC*, 2 BNA OCC. SAF. & HEALTH REP. (3d Cir., Nov. 4, 1974); *McClellan Trucking Co. v. OSAHRC*, 503 F.2d 8 (4th Cir. 1974); *Lance Roofing Co. v. Hodgson*, 343 F. Supp. 685 (N.D. Ga. 1972).

7. *See* *Lance Roofing Co. v. Hodgson*, 343 F. Supp. 685, 689 (N.D. Ga. 1972).

8. For examples of proposed amendments, see 4 BNA OCC. SAF. & HEALTH REP. 380, 395, 420, 493, 529 (1974); S. 2823, 93d Cong., 1st Sess. (1973); H.R. 16508, 92d Cong., 2d Sess. (1972); H.R. 15539, 92d Cong., 2d Sess. (1972); H.R. 15353, 92d Cong., 2d Sess. (1972); H.R. 14956, 92d Cong., 2d Sess. (1972); H.R. 13926, 92d Cong., 2d Sess. (1972). *See* 1972 *Oversight Hearings* 238 (testimony of Richard Berman, Labor Relations Attorney for the U.S. Chamber of Commerce); 1972 *Oversight Hearings* 326 (testimony of Sen. Curtis).

9. *See, e.g.*, *Brennan v. Southern Contractors Serv.*, 492 F.2d 498, 501 (5th Cir. 1974).

10. Act § 8(a)(1), 29 U.S.C. § 657(a)(1) (1970):

In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer.

If the employer objects to the inspection, the Secretary has administratively decided to obtain a warrant before entering. 29 C.F.R. § 1903.4 (1974).

11. Act § 6, 29 U.S.C. § 655 (1970). For examples of standards which have been promulgated, see 29 C.F.R. § 1910 (1974).

12. Act § 9, 29 U.S.C. § 658 (1970).

13. Act § 10(a), 29 U.S.C. § 659(a) (1970). The amount of the penalty is determined by reference to § 17 of the Act, 29 U.S.C. § 666 (1970). Section 17 provides for a penalty of up to \$10,000 for a willful violation, § 17(a); up to \$1000 for a serious violation, § 17(b); up to \$1000 for a nonserious violation, § 17(c); and up to \$1000 for every day of non-abatement, after the abatement period set forth in the citation has run, § 17(d). It is not necessary to propose a penalty after issuing a citation except in the case of a serious violation.

to the violation.¹⁴ The employer is given 15 working days during which to contest the citation or the proposed penalty.¹⁵ Should the employer decide not to contest during the 15 working day period, the citation and penalty become self-executing and not subject to review by any agency or court.¹⁶ However, if the employer does contest the citation or the penalty, he will be given a hearing before a judge of the Occupational Safety and Health Review Commission¹⁷ (OSAHRC). An order of the Commission judge may be reviewed by the three-member OSAHRC.¹⁸ The decision of the Commission, or of the judge, if the Commission denies review, is appealable to the federal court of appeals for the appropriate circuit or for the District of Columbia.¹⁹

II. Due Process Considerations

Constitutional due process requirements must be satisfied in determining the penalties and orders directed at an employer, regardless of whether the decision is made at the administrative or judicial level.²⁰

14. Act § 9, 29 U.S.C. § 658 (1970). For a discussion of abatement, see Comment, *OSHA Enforcement: Citations and Penalties*, 9 GONZAGA L. REV. 571, 573-74 (1974).

15. Act § 10(a), 29 U.S.C. § 659(a) (1970). Section 5(a) of S. 2823, *supra* note 8, proposes extending the period to 30 days.

16. Act § 10(a), 29 U.S.C. § 659(a) (1970):

If within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty...the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

17. Act § 10(c), 29 U.S.C. § 659(c) (1970). The judge here is the hearing examiner noted in Act § 12(e), 29 U.S.C. § 661(d) (1970). Pursuant to 29 C.F.R. § 2200.1(f) (1974), the term judge is used. The judges are distinct from the three members of the Commission. Service of the notice of contest must be made not only upon the Secretary, but also upon affected employees, 29 C.F.R. § 2200.7(g) (1974), or their authorized representative, 29 C.F.R. § 2200.7(f) (1974). The Secretary must file a complaint within 20 days of the notice of contest, 29 C.F.R. § 2200.33(a) (1974), and the employer must answer the complaint within 15 days after it has been served upon him, 29 C.F.R. § 2200.33(b) (1974).

18. Such review is discretionary. The petition must be submitted within 25 days of the Commission judge's decision. Act § 10(c), 29 U.S.C. § 659(c) (1970); 29 C.F.R. § 2200.91(b) (1974). Unless a member of the Commission decides to grant review, the order of the judge becomes final 30 days after its issuance, with the silence of the Commission constituting a denial of the petition. 29 C.F.R. § 2200.91(d) (1974). If the Commission grants review, no order will become final until 30 days after the judge's decision has been reviewed. Ordinarily, there is no oral argument before the Commission. 29 C.F.R. § 2200.93(a) (1974).

19. An appeal must be taken within 60 days of the issuance of the decision. The decision of the court of appeals may be reviewed by the Supreme Court on the grant of a writ of certiorari. Act § 11(a), 29 U.S.C. § 660(a) (1970). Civil penalties adjudged to be due after the appeal process has ended may be recovered by the Secretary in civil suits in the appropriate U.S. district court, where no review of the merits is permitted. Act § 10(a), 29 U.S.C. § 659(a) (1970). *See, e.g.*, *United States v. J.M. Rosa Constr. Co.*, 1 BNA Occ. Saf. & Health Cas. 1188 (D.C. Conn. 1973).

20. *See, e.g.*, *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 95 S. Ct. 719 (1975) (garnishment); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (replevin); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (garnishment); *Bell v. Burson*, 402 U.S. 535 (1971) (license

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Exactly what constitutes due process may depend on the circumstances,²¹ but an evidentiary hearing is required²² when a right is terminated²³ or property taken.²⁴

Since the courts have the right to test the constitutionality of the actions of the other two branches of government,²⁵ judicial review of the administrative hearing is necessary. This review need not include a de novo trial of the facts.²⁶ If the Act had only to meet these two due process requirements, it would be unobjectionable; both an evidentiary hearing and judicial review are available.

Employers, however, have mounted other attacks. Some have alleged that due process is denied because the Secretary simultaneously functions as prosecutor and fact finder.²⁷ Since the Commission or one of its judges reviews the violations, the allegation must be based on an

suspension); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (denial of the right to purchase alcohol); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (termination of public assistance payments); *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (trust modification); *Grannis v. Ordean*, 234 U.S. 385 (1914) (foreclosure).

21. See, e.g., *Goss v. Lopez*, 95 S. Ct. 729 (1975) (students); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (prisoners).

22. *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

23. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

24. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

25. There is controversy over the meaning of the provisions of U.S. CONST. art. III which vest in Congress authority over the creation of inferior federal courts and over the appellate jurisdiction of the Supreme Court: namely, whether Congress could in some cases prevent judicial review entirely. See, e.g., Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953). Nonetheless there are sound reasons for arguing that the right of judicial review cannot be deprived by any statute. See, e.g., *Crowell v. Benson*, 285 U.S. 22, 46 (1932); *Estep v. United States*, 327 U.S. 114, 120 (1946); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51-52 (1936); *Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329, 335-36 (1932); *Ng Fung Ho v. White*, 259 U.S. 276, 282 (1922); *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 289 (1920). But see *Radio Corp. of America v. United States*, 341 U.S. 412, 423 (1951) (Frankfurter, J., *dubitante*). For a discussion of the various arguments see 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.19 (1958); Hart, *supra*. See generally Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968); Wright, Book Review, 81 YALE L.J. 575 (1972). In *McClellan Trucking Co. v. OSAHRC*, 503 F.2d 8, 11 (4th Cir. 1974) and *Lance Roofing Co. v. Hodgson*, 343 F. Supp. 685, 689-90 (N.D. Ga. 1972), the courts placed emphasis on the fact that judicial review was available. The *Lance* court strongly implied that the Act would be unconstitutional without it.

26. See, e.g., *Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329 (1932); *Crowell v. Benson*, 285 U.S. 22 (1932); *N.A. Woodworth Co. v. Kavanaugh*, 102 F. Supp. 9 (E.D. Mich. 1952), *aff'd per curiam*, 202 F.2d 154 (6th Cir. 1953); cf. *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909). For a detailed discussion, see Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, 2 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 896, 899 (1972). For a contrary view, including a listing of all federal agencies able to levy penalties without de novo judicial review, see Judge Gibbon's dissenting opinion in *Frank Irey, Jr., Inc. v. OSAHRC*, 2 BNA Occ. SAF. & HEALTH REP. 1283, 1294-95 n.10 (3d Cir., Nov. 4, 1974).

27. See, e.g., Brief for Petitioner at 60, *Atlas Roofing Co. v. OSAHRC*, Civil No. 73-2249 (5th Cir., filed May 30, 1973); cf. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (Attorney General issuing search warrant in capacity of justice of the peace); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (neutral and detached hearing body required for parole revocation determination).

assumption that the Commission is unable to function independently of the inspectors.²⁸ The Commissioners, however, are appointed by the President, and the Secretary has no power to remove them. Moreover, their decisions are reviewable only in the court of appeals.²⁹ Employers therefore are able to have a hearing which satisfies due process because the Commission is independent of the Secretary.³⁰

Employers have also alleged that the penalties violate due process because they are self-executing.³¹ But that does not make the procedure violative of due process as long as there is an opportunity for a hearing before the penalty becomes effective and collectible.³² If the employer chooses not to contest within the 15 working days allotted, he will have waived the right to a hearing; structuring such a waiver into the procedure is not violative of due process.³³

Even though the formal procedures of the statute satisfy the foregoing due process requirements, a "chilling factor" may in practical effect deny a hearing and judicial review; herein lies the serious due process objection. The chilling factor is the possibility that the abatement period will expire before a hearing and judicial review have been completed.³⁴ If an employer does not abate within the time period

28. *E.g.*, Brief for Petitioner at 15, *Atlas Roofing Co. v. OSAHRC*, Civil No. 73-2249 (5th Cir., filed May 30, 1973).

29. Act §§ 11, 12, 29 U.S.C. §§ 660, 661 (1970).

30. See 116 CONG. REC. 37326-27 (1970) (remarks of Sen. H. Williams); Moran, *The Legal Process for Enforcement of the Occupational Safety and Health Act of 1970*, 9 GONZAGA L. REV. 349, 352 (1974): "'Review Commission' is synonymous with 'court.' It is the trial court for alleged violations of the Act . . ." See Dale M. Madden Constr., Inc. v. Hodgson, 502 F.2d 278 (9th Cir. 1974) (example of conflict between the Secretary and the Commission). The Administrative Procedure Act allows for contradictory roles within one agency. 5 U.S.C. § 554(d)(2) (1970). Administrative agencies can levy penalties as long as due process is maintained. For a general discussion, see 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.13, at 134 (1958): "[T]he administrative imposition of penalties is commonplace . . ."; L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 112-14 (student ed. 1965).

31. *E.g.*, Brief for Petitioner at 60, *Atlas Roofing Co. v. OSAHRC*, Civil No. 73-2249 (5th Cir., filed May 30, 1973).

32. *Bell v. Burson*, 402 U.S. 535 (1971).

33. *Frank Irey, Jr., Inc. v. OSAHRC*, 2 BNA OCC. SAF. & HEALTH REP. 1283, 1288 (3d Cir., Nov. 4, 1974); *cf.* *Lichter v. United States*, 334 U.S. 742, 789-93 (1948).

34. Another potential chilling factor, not considered in the text, is the power claimed by the Commission and its judges to increase penalties over what the Secretary proposes. The power is derived from the use of the word "modifying" in Act § 10(c), 29 U.S.C. § 659(c) (1970). In the following cases, proposed penalties have been increased: *e.g.*, *REA Express, Inc. v. Brennan*, 495 F.2d 822 (2d Cir. 1974) (proposed penalty of \$900 increased to \$1000 by hearing examiner); *The Marino Dev. Corp.*, 2 BNA OCC. SAF. & HEALTH REP. 1260 (Rev. Comm'n, Oct. 9, 1974) (proposed penalty of \$500 raised to \$700 by hearing examiner, lowered back to \$500 by the Review Commission); *Republic Creosoting Co.*, 1 BNA OCC. SAF. & HEALTH CAS. 1124 (Rev. Comm'n 1973) (proposed penalty of \$600 raised to \$1300 by hearing examiner, but overruled by Review Commission which vacated the entire penalty). In the following cases penalties were reduced: *Skyline Lumber Co.*, 2 BNA OCC. SAF. & HEALTH REP. 3034 (hearing examiner, June 5, 1974) (from \$565 to \$240); *Tony Volante Sewer Serv.*, 2 BNA OCC. SAF. & HEALTH REP. 3079 (hearing examiner, July 15, 1974) (from \$700 to \$200); *Martin Masonry Co.*, 2 BNA OCC. SAF. & HEALTH REP. 1342

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allotted in the citation, a non-abatement penalty accumulates at a rate of up to \$1000 a day.³⁵ It is not uncommon for abatement periods to be only 30 days.³⁶ In contrast, the average time from the day a contest notice is filed until a decision is rendered is 114 days for a judge, 198 days for a judge and the Commission,³⁷ and approximately an additional year if review extends to a court of appeals.³⁸ With this time disparity, a \$1000 penalty could easily be transformed into one of over \$100,000 due to non-abatement.

Currently, however, a stay of the running of the abatement period is usually granted during both the hearing and review stages. With such a stay, the employer has no fear of penalties accumulating because the allotted number of days will be available after the Commission or court has come to a decision. The chilling effect only occurs, therefore, when the employer, during either the administrative or judicial proceedings, must go forward without a stay.

At the administrative level, the abatement period does not begin to run until a final order of the Commission has been entered.³⁹ How-

(Rev. Comm'n, Nov. 1, 1974) (from \$600 to \$150). As of September 1972, 365 decisions had been rendered with 167 modifications, 13 percent of those being increases over the proposed penalties and 87 percent being decreases. 1972 *Oversight Hearings* 330 (testimony of Robert D. Moran, Chairman, OSAHRC).

The legality of the Commission's modifying power is put in question by *North Carolina v. Pearce*, 395 U.S. 7.1 (1969). There the judge was directed not to increase a previously ordered sentence upon the reconviction of an individual who had successfully withdrawn his guilty plea, unless reasons justifying the increase were provided. The Court feared that the possibility of vindictive increases would "chill the exercise of basic constitutional rights." *Id.* at 724, citing *United States v. Jackson*, 390 U.S. 570, 582 (1968). However, an exact analogy to *Pearce* is foreclosed because the Commission and its judges justify increases with reasons. *E.g.*, *The Marino Dev. Corp.*, 2 BNA Occ. SAF. & HEALTH REP. 1260 (Rev. Comm'n, Oct. 9, 1974). Furthermore, the small size of the increments mitigates employers' fears. *See, e.g.*, *REA Express, Inc. v. Brennan*, 495 F.2d 822 (2d Cir. 1974) (\$100); *Chicago Bridge & Iron Co.*, 2 BNA Occ. SAF. & HEALTH REP. 1388 (Rev. Comm'n, Nov. 20, 1974) (\$65). Other than for willful violations, the maximum penalty is \$1000 so that any increase must be less than that amount. *See* note 13 *supra*; *cf.* *Wetmore & Parman, Inc.*, 1 BNA Occ. Saf. & Health Cas. 1099 (Rev. Comm'n 1973) (Commission cannot change level of violation). For a discussion of the chilling effect of increasing penalties, see *McClintock & Bohrsen, supra* note 2, at 370, 394.

There is currently disagreement among the three members of the Commission as to whether they have the power to increase penalties. *Chicago Bridge & Iron Co., supra*. S. 2823, *supra* note 8, § 5(b), would replace "modifying" with "reducing."

The following cases involve challenges to the power of the Commission to increase penalties: *Secretary of Labor v. Don L. Cooney, Inc.*, Civil No. 73-2403 (9th Cir., filed July 30, 1973), and *Secretary of Labor v. California Stevedoring & Ballast Co.*, Civil No. 73-3103 (9th Cir., filed Nov. 1, 1973).

35. Act § 17(d), 29 U.S.C. § 666(d) (1970).

36. *Lance Roofing Co. v. Hodgson*, 343 F. Supp. 685, 689 (N.D. Ga. 1972).

37. Testimony of OSAHRC Chairman Moran, *supra* note 34, at 329. Expedited proceedings at the administrative level are possible, however. 29 C.F.R. § 2200.101 (1974).

38. *Lance Roofing Co. v. Hodgson*, 343 F. Supp. 685, 689 (N.D. Ga. 1972).

39. Act § 10(b), 29 U.S.C. § 659(b) (1970):

[The abatement] period shall not begin to run until the entry of a final order by the Commission in the case of any review proceedings under this section initiated by the employer in good faith and not solely for delay or avoidance of penalties . . .

ever, the abatement period will be treated as having begun when the citation was issued if the Secretary decides that the employer is contesting only the amount of the penalty, is initiating review without good faith, or is appealing solely to delay or avoid penalties.⁴⁰ In effect, therefore, the Secretary can withdraw what is otherwise an automatic stay.

Filing an appeal for judicial review does not act as an automatic stay of the running of the abatement period.⁴¹ Rather, the court of appeals has the discretionary power to grant a stay, if requested.⁴² The effect

The abatement period must extend beyond the 15 working day period provided to contest a citation or a penalty. *Paper Prod. Co.*, 2 BNA Occ. SAF. & HEALTH REP. 1126, 1127 (Rev. Comm'n, July 25, 1974); *Kessler & Sons Constr. Co.*, 2 BNA Occ. SAF. & HEALTH REP. 1096, 1097 (Rev. Comm'n, July 8, 1974).

40. Section 10(b) does not state who will determine the good faith of employers. See note 39 *supra*. Though it might have been logical for the Commission to decide, the Secretary has taken it upon himself to make the determination.

The following excerpt from the COMPLIANCE OPERATIONS MANUAL [hereinafter cited as MANUAL] pt. XI-6 (Jan. 1972) issued by the Office of Compliance, Occupational Safety and Health Administration, U.S. Dep't of Labor, cited in *McClintock & Bohrsen*, *supra* note 2, at 368 n.29, explains the interpretation given §§ 10(b) and 17(d) by the Secretary in making his determination.

It should be noted that if the employer contested only the amount of the proposed penalty, or if there is a determination that the employer did not initiate the review proceedings in good faith but solely for delay or avoidance of penalties, the "number of days abated" will be calculated [from the day the citation was issued].

The MANUAL vests the power to make the above determinations in the designees of the Secretary.

Determinations of what constitutes good faith have proven difficult for the Commission in other areas where the term is employed. *The Marino Dev. Corp.*, 2 BNA Occ. SAF. & HEALTH REP. 1260, 1261 (Rev. Comm'n, Oct. 9, 1974): "The phrase good faith is not capable of precise definition but must be ascertained from the facts in each case." An employer's statement to an inspector or an employee might intimate that his only reason for contesting was to delay abatement. Such a statement could be reported before, during, or after the citation is contested. Neither Act § 10(b), 29 U.S.C. § 659(b) (1970) nor the MANUAL specifies when the power may be exercised. (No consideration need be given here to the situation where only the amount of a penalty is contested, for such action implicitly admits the violations in the citation; consequently there is no reason not to have immediate abatement.)

41. Act § 11(a), 29 U.S.C. § 660(a) (1970).

42. *Id.* For the general criteria used by a court of appeals in determining whether to grant a stay, see *Reserve Mining Co. v. United States*, 498 F.2d 1073, 1077 (8th Cir. 1974); *Beverly v. United States*, 468 F.2d 732, 740 (5th Cir. 1972); *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970):

[A] party seeking a stay must show (1) that he will likely prevail on the merits of the appeal, (2) that he will suffer irreparable injury if the stay is denied, (3) that other parties will not be substantially harmed by the stay, and (4) that the public interest will be served by granting the stay.

In *Lance Roofing Co. v. Hodgson*, 343 F. Supp. 685, 689 (N.D. Ga. 1972), the three-judge district court said:

We do not believe that any Court of Appeals today would relish the prospect of having to consider a motion for a stay each time an employer appeals from a "final order" of this Commission and we may assume that *such stays will not be granted routinely.*

(emphasis supplied)

A stay of the abatement period can also be granted by the Commission prior to the filing of an appeal, so that, if the abatement period were sufficient to last the length of the appeal, there would be no need to petition the court of appeals for a stay. 29 C.F.R. § 2200.92(a) (1974). See, e.g., *Ryder Truck Lines, Inc.*, 1 BNA Occ. Saf. & Health Cas. 1326 (Rev. Comm'n 1973) (request for stay denied).

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of having to proceed without a stay is the same at either the administrative or judicial level.

If an employer is denied a stay and the abatement period ends before the proceeding terminates, he risks owing more than the sum of the original penalty and the abatement cost, should a decision eventually be rendered against him. For example, an employer may be faced with an initial penalty of \$1000 and an abatement cost of \$10,000 on the one hand, and a possible 100-day review period on the other, carrying accumulated non-abatement penalties of \$100,000. This threat of non-abatement penalties may coerce the employer into immediate abatement. It would then still be open to him to contest the initial penalty, of course, but where abatement costs are significant, the employer is probably more concerned with contesting that cost than with the original penalty.⁴³ Coerced abatement would make an appeal futile. The employer, having abated the hazard, would avoid the accumulating penalties, but even a decision in his favor would not afford recovery of the abatement expenditure.⁴⁴ At the most, the decision would provide precedent for parallel situations.

Thus coerced abatement, before an administrative hearing or judicial review is completed, forecloses consideration of the merits.⁴⁵ The procedural decision to deny a stay will bury the real issues.⁴⁶ Like an unreasonable filing fee, the threat of monumental penalties prevents an employer from challenging a government order directed at him.⁴⁷ That order directly affects the use of his property, diminish-

43. An employer might be concerned about an abatement cost which is less than the initial penalty, but his interest in contesting it would be proportionally reduced. A small abatement cost, however, could have great significance for an employer with many work areas, all having the same alleged defect.

If the employer can feasibly cease operations in the affected area, abatement would not be necessary, and penalties presumably would not accrue for non-abatement. A large build-up in inventory might permit such a cessation.

44. Irretrievable expenditures would be necessary where work in an affected area cannot be economically halted and no costless halfway measures are available. For instance, if the ceiling in a building released dangerous asbestos fibers into the air, immediate replacement would be necessary. If indefinite evacuation were financially unfeasible, an employer would have to make significant expenditures. If halfway measures are feasible, such as covering a hole in the floor with plywood, the maintenance of a stay might be conditioned on putting them into effect.

45. If the stay is withdrawn by the Secretary, coercion may occur without any hearing. Neither the Act nor the MANUAL, *supra* note 40, provides for any hearing before the Secretary acts. At least when a preliminary injunction is issued in a situation of imminent danger, the employer has such a hearing. *FED. R. CIV. P.* 65.

46. The Act provides no apparent method for appealing the Secretary's decision to withdraw the automatic stay. *Lance Roofing Co. v. Hodgson*, 343 F. Supp. 685, 690 n.4 (N.D. Ga. 1972). Nevertheless, the penalties subsequently assessed for non-abatement are subject to review. Act §§ 10(b)-(c), 11, 29 U.S.C. §§ 659(b)-(c), 660 (1970).

47. See *Boddie v. Connecticut*, 401 U.S. 371 (1971) (due process denied persons wishing to sue for divorce, but unable to pay the filing fee). For arguments that *Boddie* should be broadly construed as requiring guaranteed access to the courts as part of due

ing liquidity or substituting one form of property for another.⁴⁸ Yet the ability to have a hearing and judicial review, ostensibly provided in the Act, is made so burdensome for the class of employers forced to proceed without a stay that they may forego their constitutional right to challenge the order. This burden works a substantial diminution of an employer's right to a hearing. Unless justified by an exigent state need, this burden denies the employer due process of law.⁴⁹

III. Maximizing Employee Safety

In providing for the possibility of withdrawing or denying a stay, Congress intended to foster the goals of the Act.⁵⁰ The health and lives of employees are at stake and quick abatement is meant to minimize the dangers which prompted passage of the program. Since the Act's objectives embody an important governmental interest, severely limit-

process, see Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights* (pts. I, II), 1973 DUKE L.J. 1153, 1974 DUKE L.J. 527; Abram, *Access to the Judicial Process*, 6 GA. L. REV. 247 (1972); cf. Lindsey v. Normet, 405 U.S. 56, 74-79 (1972) (double bond requirement created a substantial barrier to appeal, violating Equal Protection Clause); 19 VILL. L. REV. 340 (1973); Duquesne Light Co. v. EPA, 481 F.2d 1 (3d Cir. 1973) (EPA ordered not to impose penalties during the pendency of administrative and judicial actions because such action was "fundamentally unfair"). *But see* United States v. Kras, 409 U.S. 434 (1973) (indigents unable to pay filing fee for bankruptcy not denied due process). Analogous denials of due process can be found in the criminal sector. North Carolina v. Pearce, 395 U.S. 711 (1969) (imposing greater sentence without reasons upon reconviction); United States v. Jackson, 390 U.S. 570 (1968) (plea of not guilty created possibility of death sentence whereas guilty plea precluded it); cf. Brooks v. Tennessee, 406 U.S. 605 (1972); Griffin v. California, 380 U.S. 609 (1965). Sen. H. Williams, in opposing the exclusion of an automatic stay, foresaw the problem during debate on the Act:

I believe the court will not generally let an appeal right be substantially nullified by permitting a penalty to run while a case is under court review....
116 CONG. REC. 37609 (1970).

48. Cf. Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928); Buchanan v. Warley, 245 U.S. 60 (1917); Getty Oil Co. (Eastern Operations) v. Ruckelshaus, 467 F.2d 349, 356 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) (EPA compliance order must be subject to a hearing); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 631 (D.C. Cir. 1973).

49. See, e.g., Goss v. Lopez, 95 S. Ct. 729, 740 (1975) (only students posing "a continuing danger" may be suspended without notice or a hearing); Wolff v. McDonnell, 418 U.S. 539, 555, 560 (1974) (prisoners' due process rights "may be diminished by the needs and exigencies of the institutional environment," but disciplinary proceeding must include notice and a written record); Goldberg v. Kelly, 397 U.S. 254, 262-64 & n.10 (1970) ("governmental interest in summary adjudication" outweighed by the impact of terminating welfare benefits); Lindsey v. Normet, 405 U.S. 56, 88 (1972) (Douglas, J., dissenting in part).

50. The widely quoted figures of 14,000 annual deaths and over two million annual disabilities caused by work-related accidents provided by Secretary of Labor Schultz explain why Congress wanted abatement as quickly as possible. See H.R. REP. NO. 1765, 91st Cong., 2d Sess. 39 (1970); *Hearings on S. 2193 and S. 2788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st and 2d Sess., 77 (1969-70) [hereinafter cited as *Senate Hearings*]; 116 CONG. REC. 37607 (1970) (remarks of Sen. Javits); note 47 *supra* (response of Sen. H. Williams).

Though the Act gives the court of appeals more discretion than the Secretary in determining whether to force an employer to proceed without a stay, Congress's purpose in coercing quick abatement is presumably the same at both levels.

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ing procedural safeguards might be justified if no way existed to assure safety while affording a meaningful hearing and judicial review. However, as will be explored in this and the next section, procedural safeguards need not be diminished to achieve safety. The existence of workable alternatives makes the burden on employers forced to proceed without a stay a violation of due process.

Congress provided three methods for correcting dangerous conditions. First, in situations of imminent danger, the Secretary is empowered to seek a preliminary injunction or temporary restraining order.⁵¹ This temporary relief, provided by the district courts, supersedes any abatement periods contained in a citation. Second, where the potential for harm to employees is limited, delayed correction is acceptable and a stay of the abatement period can and should be provided throughout the proceedings. Between these two methods lies a third where a stay is withdrawn or denied. In this third category—between imminent and limited dangers—injunctive relief is not available, but quick corrective action nonetheless is desirable because employees may be injured. An example of corrective action which is not sufficiently urgent to mandate injunctive relief but might best be undertaken quickly is a sprinkler system in a flammable fertilizer factory.⁵² The danger, though not imminent, should be countered with quick abatement because the lives of employees are endangered by the risk of fire. In contrast, a ceiling currently releasing dangerous asbestos fibers into the air, for example, presents an imminent danger justifying injunctive relief.

When faced with a case where quick abatement is appropriate but where the danger is not so immediate as to justify an injunction, it makes sense for the Secretary and a court of appeals to be able to consider withdrawing or denying a stay.⁵³ In particular, when an

51. Act § 13, 29 U.S.C. § 662 (1970). See Oldham, *OSHA May Not Work in "Imminent Danger" Cases*, 60 A.B.A.J. 690 (1974) (particular emphasis on the mandamus provisions). In granting preliminary injunctive relief, due process is considered satisfied, due to the exigencies of the situation, by an abridged hearing or the limited life of the order. See *Carroll v. President & Comm'rs*, 393 U.S. 175 (1968). While the procedures involved in granting preliminary injunctive relief do not violate due process, the coercive result does unless justified by an imminent danger. In other words, the entire injunctive procedure cannot be invoked consistently with due process except where there is an imminent danger. See *Allison v. Froehlke*, 470 F.2d 1123, 1126 (5th Cir. 1972). See generally *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994 (1965).

52. 29 C.F.R. § 1910.109(i)(7)(i) (1974).

53. Congress could decide to dispense with the third category and allow hazards not enjoined to continue throughout the proceedings. This Note argues that the intermediate method is both appropriate and necessary, and it assumes Congress's continued interest in maintaining it. In fact, if the Secretary and the Commission were to guarantee administratively that an employer will always proceed with a stay, *Lance Roofing Co. v. Hodgson*, 343 F. Supp. 685, 689-90 (N.D. Ga. 1972), they would, in effect, be amending the Act and defeating a congressional purpose. Cf. note 10 *supra*.

employer's legal claim is dubious and the amount involved is not significant when compared with his worth or earnings, there should be no hesitation in forcing him to proceed without a stay. Such a course of action creates a dilemma: coercing abatement by denying a stay protects employees' health and safety, but drastically impairs employers' procedural rights. Even employers with dubious legal positions may ultimately be victorious. The present statutory scheme cannot effectively give meaningful content to due process in all cases while simultaneously satisfying the goal of protecting employees. More importantly, narrowing the content of due process is unjustifiable because there are viable alternatives which allow safety to be achieved without rendering meaningless the right to a hearing and judicial review.⁵⁴

IV. Alternatives

A

The amendment to the Act currently before Congress, S. 2823,⁵⁵ would make the stay in the court of appeals automatic for 90 days after the commencement of an appeal or until the court has ruled on the motion, whichever is less. This proposed amendment would eliminate the possibility of a short abatement period ending before the court of appeals had ruled on the request for a stay, but it accomplishes little more toward relieving the employer's dilemma. Although it removes the pressure to file an immediate motion for a stay, the proposal does not eliminate the potential for a denial of due process through coercion after the rejection of the request.

The ability of this proposal to achieve its very limited purpose depends on whether 90 days is sufficient. If the court of appeals takes longer to rule on the motion, the possibility of a short abatement period ending before the court ruled would continue. At a minimum, this amendment should be coupled with an explicit provision for the expedited consideration of the motion for a stay.

B

A second alternative is to guarantee truly expedited proceedings at both the review⁵⁶ and appeal levels.⁵⁷ With such a procedure an auto-

54. See note 49 *supra*.

55. *Supra* note 8, § 5(e).

56. Provision for expedited proceedings at the Commission level is made in 29 C.F.R. § 2200.101 (1974).

57. It is already provided that appeals are to be heard "expeditiously." Act § 10, 29 U.S.C. § 660(a) (1970). The House version of the bill which became the Act provided for

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matic stay,⁵⁸ preserving due process, could be prescribed. Because a final decision would be rendered within a short time, the risks involved in exposing employees to dangerous conditions would be minimized. Delayed abatement would be tolerable if all the proceedings were over within a few months, rather than after more than a year.⁵⁹ As the number of contested citations, 831 in a representative four month period in 1974,⁶⁰ would seem to preclude quick proceedings in all cases, expedited action could be confined to cases where the Secretary requests it.

In the alternative, the stay procedure could remain discretionary, as it is now, but with expedited proceedings guaranteed any employer forced to proceed without a stay. To avoid coercing an employer into abating before he had a hearing and judicial review, all proceedings would have to be completed before the abatement period had terminated.

While expedited proceedings assure due process and safety, their availability must be real, not illusory. Court dockets are crowded and the consideration of other cases, such as criminal, environmental, and labor matters, often deserves more expedited action than is currently possible. Assuring due process and safety by providing for complete expedited procedures would, therefore, require a commitment to provide more funds at both the administrative and judicial levels.

C

A third alternative is to reimburse the employer for abatement costs if he is ultimately successful after a stay has been withdrawn by the Secretary or denied by a court of appeals. This would give an employer a purpose in litigating, preserve due process because an employer victory would be a meaningful one, and simultaneously assure employee safety. The reimbursements could be funded, at least partially, out of the penalties collected.⁶¹ To mitigate the financial burden upon the employer of having to abate beforehand, a program of short

an automatic stay. H.R. REP. No. 1765, *supra* note 50, at 39. Chairman Moran believes that such an automatic stay should be granted. *Ryder Truck Lines, Inc.*, 1 BNA Occ. Saf. & Health Cas. 1326, 1329 (Rev. Comm'n 1973) (dissent). See *McClintock & Bohrsen*, *supra* note 2, at 371; J. Sharpe Queener, Safety Director, DuPont Co., representing the U.S. Chamber of Commerce, *Senate Hearings*, *supra* note 50, at 330 (statement).

59. See *Lance Roofing Co. v. Hodgson*, 343 F. Supp. 685, 689 (N.D. Ga. 1972).

60. 4 BNA OCC. SAF. & HEALTH REP. 896 (1974). In addition, 37 cases are currently pending in the courts of appeals. 4 BNA OCC. SAF. & HEALTH REP. 900 (1975).

61. See note 4 *supra*.

term loans could be added to the current funds and guarantees available from the Small Business Administration.⁶²

Reimbursements for abatement costs are similar to provisions for reimbursing successful litigants for their attorney's fees and costs.⁶³ In certain statutes, Congress has provided for the recovery of attorney's fees and costs from the government if it loses a case.⁶⁴ The difference with reimbursing abatement costs is that such reimbursement would do more than just make the employer whole. After having irreversibly abated by making some improvement, the employer would be paid for his costs and would keep whatever he had purchased. For example, if a sprinkler system were installed at a cost of \$5000, and the employer were then paid that sum, he would have both \$5000 and the fire prevention system.

Congress might try to limit such windfall recoveries by reimbursing an employer only for what he would not have otherwise spent—a "normal course of business" rule. Such a policy, however, would be difficult, if not impossible, to implement because an employer could almost always argue that he would have spent nothing at that time. As an alternative, some attempt could be made to create a "net benefit" rule to determine what an employer's true costs were. For example, the \$5000 sprinkler system might reduce fire insurance costs. The decrease in premium charges could be capitalized and subtracted from the initial expenditure.

A "net benefit" or "normal course of business" rule would help determine that portion of the expenditure which was coerced. Care would have to be taken not to construe such rules so broadly as to eliminate the reimbursement entirely, for without reimbursement the employer has no substantial purpose in challenging the order to abate. Either of these rules would mitigate the costs to the government of a reimbursement program, but costs would also be minimized because of the likely hesitancy of the Secretary and the court of appeals to

62. Act § 28, 15 U.S.C. §§ 633(c), 636(b)(6) (1970), 42 U.S.C. § 3142-1 (1970). See Randall, *Tax Aspects of OSHA Costs*, 9 GONZAGA L. REV. 447 (1974) (discussion of the lack of special tax benefits provided for mandated changes under the Act).

63. Certain statutes make such provisions. See, e.g., 15 U.S.C. § 15 (1970) (action for injuries due to violation of antitrust laws). For a general listing of statutory provisions providing for the reimbursement of attorney's fees, see 28 U.S.C.A. Rule 54(d), note to subdivision (d) (1971). Courts may also award attorney's fees and costs in their discretion. See, e.g., *Fairley v. Patterson*, 493 F.2d 598 (5th Cir. 1974).

64. See, e.g., 7 U.S.C. § 210(f) (1970) (actions for damages based on an order of the Secretary of Agriculture under the Stockyards Act). For proposals with respect to the Act that employers be reimbursed for attorney's fees and costs if they are successful in court, see, e.g., *1972 Oversight Hearings*, *supra* note 1, at 73, 78 (Congressman Anderson); *1972 Oversight Hearings* 88 (Congressman McClure referring to H.R. 15539, *supra* note 8).

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withdraw or deny a stay. The risk of loss to the government would be justified only when abatement seemed desirable *and* the employer's chances of success seemed slim.

Since federal funds would be used for the reimbursements, the Secretary's power to determine whether an employer proceeds with or without a stay should be expanded by Congress to include not only the administrative level, but also appeals at the judicial level. With reimbursement assured a victorious employer, the court of appeals would have no reason to question the Secretary's determination. Needless to say, the Secretary would be wary about withdrawing or denying a stay. Any payments by the government would act as a strong incentive to clarify the standards and procedures⁶⁵ of the Act so as to avoid future potential reimbursements.⁶⁶

Conclusion

While the general enforcement procedures under the Act seem to satisfy due process, the possibility for its denial lurks in the procedures involved in obtaining a stay. As long as stays are never withdrawn by the Secretary and are always granted by the courts of appeals, the problem will not surface. However, forcing an employer to proceed without a stay and thereby coercing abatement makes good sense in some circumstances if employees are to be protected. In order to allow such pressure, without violating due process, Congress should amend the provisions of the Act concerning stays of the abatement period.

Either the definite availability of expedited proceedings in both the Commission and the court of appeals, or a program of reimbursing employers for their abatement costs, if forced to abate without a stay, seems to satisfy the demands both of safety and of due process. While the windfall benefits that would accrue to those employers who gain reimbursements are troublesome, the policing effect upon a branch of the federal bureaucracy might be worth the cost. Regardless of which of the two alternatives is implemented, their availability makes it certain that Congress cannot justify weakening the procedural safeguards of due process.

65. Cases where procedures or standards have been found defective include: Moser Lumber Co., 1 BNA Occ. Saf. & Health Cas. 3108 (hearing examiner 1973) (standard too vague) and Oberhelman-Ritter Foundry, 1 BNA Occ. Saf. & Health Cas. 3087 (hearing examiner 1973) (improperly promulgated standards).

66. Apprehension over reimbursements might thus result in a de facto program of automatic stays. However, pressure from employees and their unions should be sufficient to prevent the Secretary from thus abdicating his responsibility for employee safety.

