Industry Standards: How Does OSHA Use Them to Prove Its Case Under the General Duty Clause?

William J. Wahoff*

The Occupational Safety and Health Administration (OSHA) has long relied on industry “consensus standards” to prove its case in enforcement actions.¹ Consensus standards are not promulgated by OSHA. Rather, they are drafted and published by private organizations. Some of these organizations are trade organizations for a particular industry.² Others are created by organizations that are not affiliated with a particular industry, such as the American National Standards Institute (ANSI)³ and the National Fire Protection Association (NFPA).⁴ Membership in these organizations—both the industry-specific organizations and the general organizations—is voluntary, and the standards are developed by committees made up of members of the affected industries and other “interested parties.”⁵

* Member, Steptoe & Johnson, PLLC. Mr. Wahoff is a Fellow of the College of Labor & Employment Lawyers and conducts a national practice representing employers in federal OSHA cases. Mr. Wahoff received his J.D. from The Ohio State University College of Law (now Moritz) and his B.A. from Miami University in Oxford, Ohio. Mr. Wahoff gratefully acknowledges the research and writing assistance of Law Clerk John Ferrell.


2. See, e.g., About ASME Standards and Certification, Am. Soc’y of Mech. Eng’rs, https://www.asme.org/about-asme/standards (last visited Nov. 28, 2018) (“ASME is the leading international developer of codes and standards associated with the art, science, and practice of mechanical engineering. . . . These offerings cover a breadth of topics, including pressure technology, nuclear plants, elevators/escalators, construction, engineering design, standardization, and performance testing.”).

3. About ANSI, Am. Nat’l Standards Inst., https://wwwansi.org/about_ansi/overview/overview?menuid=1 (last visited Nov. 28, 2018) (“[ANSI] oversees the creation, promulgation and use of thousands of norms and guidelines that directly impact businesses in nearly every sector: from acoustical devices to construction equipment, from dairy and livestock production to energy distribution, and many more. ANSI is also actively engaged in accreditation—assessing the competence of organizations determining conformance to standards.”).


5. See, e.g., Codes & Standards, supra note 4 (“All NFPA codes and standards are periodically reviewed by more than 9,000 volunteer committee members with a wide range
Industry standards are powerful weapons in OSHA's arsenal when it pursues an enforcement action against an employer. OSHA uses these standards in two ways. First, OSHA has incorporated many of these standards by reference,6 making them directly enforceable as *per se* violations of the Occupational Safety and Health Act (the OSH Act).7 Second, OSHA uses industry standards as evidence that an employer violated the General Duty Clause of the OSH Act.8

The General Duty Clause is a catch-all provision that is used when an employer has not violated a specific standard promulgated by OSHA (including an industry standard that has been incorporated by reference).9 The General Duty Clause requires employers to “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.”10 However, OSHA will not, as a general matter, use the General Duty Clause to do any of the following: (1) enforce “should” standards, i.e., standards that do not contain mandatory language,11 (2) require abatement methods not required by a specific standard, or (3) cover categories of hazards that are specifically exempted by an OSHA standard.12

To establish a prima facie case for a violation of the General Duty Clause, OSHA is required to prove the following four elements: (1) a condition or activity in the workplace presents a hazard to an employee; (2) the condition or activity is recognized as a hazard; (3) the hazard is causing or is likely to cause death or serious physical harm; and (4) a feasible means exists to eliminate or materially reduce the hazard.13 The Occupational Safety and Health Review Commission (Review Commission) has held that consensus standards are

---

7. Id. § 1910.6(a)(1) (“The standards of agencies of . . . organizations which are not agencies of the U.S. Government which are incorporated by reference in this part, have the same force and effect as other standards in this part.”).
8. Safety and Health Topics: Combustible Dust, *supra* note 1 (“Consensus standards may be used to provide a feasible means of abatement and establish employer and industry knowledge [under the General Duty Clause].”).
9. 29 U.S.C. § 654(a)(1) (2012); see also Safety and Health Topics: Combustible Dust, *supra* note 1 (stating that OSHA will only use the General Duty Clause “where there is no OSHA standard that applies to the particular hazard involved”).
11. Likewise, OSHA cannot enforce a “consensus standard” that has been incorporated by reference unless the standard contains mandatory language. 29 C.F.R. § 1910.6(a)(1).
probative evidence of the “recognition” and “feasible means of abatement” elements.14

This article explains how OSHA uses consensus standards in its enforcement actions, with a particular focus on OSHA’s use of such standards to prove violations of the General Duty Clause. Part I explains in more detail the role of consensus standards in OSHA enforcement actions. Part II uses recent decisions by the federal courts of appeals, the Review Commission, and the Commission’s administrative law judges (ALJs) to show the current boundaries of this doctrine. Part III discusses the role of expert witnesses in the use of consensus standards. Finally, Part IV discusses the need for guidance from OSHA regarding its use of consensus standards, preferably in the form of a rulemaking explaining which consensus standards apply to which industry.

I. The Role of Consensus Standards

This Part addresses the two ways OSHA uses consensus standards in enforcement actions: (1) incorporation by reference into OSHA’s own standards, and (2) evidence of the “recognition” and “feasible means of abatement” elements of the General Duty Clause. Then, this Part discusses the differences between these two enforcement methods, with an emphasis on the procedural requirements for directly enforcing consensus standards as substantive rules.

A. Incorporation by Reference

When OSHA wishes to incorporate a consensus standard by reference, it must follow the procedure prescribed in section 69(b)(2) of the OSH Act, which requires OSHA to publish the proposed standard and to allow thirty days for public comment.15 If the standard qualifies as a “substantive rule” under the Administrative Procedure Act (APA), OSHA must follow the notice-and-comment procedure prescribed by section 553 of the APA, which requires federal administrative agencies to publish a notice of proposed rulemaking in the Federal Register and to “give interested persons an opportunity to participate in the rule making through submission of [comments].”17

16. The D.C. Circuit Court of Appeals has noted that a “standard” under the OSH Act might not necessarily qualify as a “substantive rule” under the APA. Agric. Retailers Ass’n v. U.S. Dep’t of Labor, 837 F.3d 60, 65 (D.C. Cir. 2016) (“But nothing in the OSH Act or APA establishes that the standard/non-standard distinction under the OSH Act must directly track the legislative/interpretive rule distinction under the APA.”). Thus, in some situations, when promulgating a new “standard,” as distinguished from a “rule,” OSHA might only be required to follow the notice-and-comment procedure in the OSH Act and not the procedure in the APA.
17. 5 U.S.C. §§ 553(b)–(c) (2012).
Once OSHA incorporates a consensus standard, the mandatory provisions of such standards (i.e., provisions containing the word “shall” or other mandatory language) “have the same force and effect as [other OSHA standards].” Thus, if OSHA can prove an employer violated a mandatory consensus standard that it properly incorporated by reference into the OSHA standards, OSHA has established a per se violation, and there is no need to resort to the General Duty Clause.

B. Evidence of “Recognition” and “Feasible Means of Abatement”

When a consensus standard has not been incorporated by reference, OSHA may not directly enforce the standard, but it may still use violation of the standard as evidence of a General Duty Clause violation. Specifically, OSHA relies on consensus standards to establish two elements of the prima facie case: (1) that the condition or activity is recognized as a hazard, and (2) that a feasible means exists to eliminate or materially reduce the hazard.

For a hazard to be recognized, it is not necessary that the employer itself recognizes the hazard; recognition of a hazard may be imputed to the employer based on “general understanding in the [employer’s] industry.” Because the standard is general industry recognition and not recognition by the specific employer, consensus standards are considered probative evidence of such general understanding because they are drafted by experienced members of the industry.

Likewise, the “feasible means of abatement” element requires consideration of the regular practices of the employer’s industry. A proposed abatement method is feasible if it is “capable of being put into effect” and it would “be effective in materially reducing the incidence of the hazard.” In order to show that a proposed abatement method is capable of being put into effect, OSHA must demonstrate that it is economically feasible for the employer. A proposed abatement method is not feasible if it is “so idiosyncratic and implausible” that “conscientious experts, familiar with the industry, would not take it into account in prescribing a safety program.” Thus, consensus standards are con-

---

19. See supra note 7 and accompanying text.
20. Safety and Health Topics: Combustible Dust, supra note 1.
21. Otis Elevator Co., 21 BNA OSHC 2204, 2207 (No. 03-1344, 2007) (alteration in original); see also Titanium Metals Corp. of Am. v. Usery, 579 F.2d 536, 541 (9th Cir. 1978); Nat’l Realty & Constr. Co. v. Occupational Safety & Health Review Comm’n, 489 F.2d 1257, 1265 (D.C. Cir. 1973); Acme Energy Servs., 23 BNA OSHC 2121, 2124 (No. 08-0088, 2012).
24. Id. at 1191.
25. Nat’l Realty & Constr., 489 F.2d at 1266 (emphasis added); see also Beverly Enters., 19 BNA OSHC at 1191.
sidered to be relevant to the issue of feasibility because they are prescribed by industry experts.

Although the existence of a consensus standard is often dispositive of the recognition element, that is not the case with the “feasible means of abatement” element. If the employer shows that implementing a consensus standard would cause significant difficulties to the employees’ abilities to perform necessary tasks, the burden will shift back to OSHA to propose another means of abatement. Additionally, if an employer introduces evidence that the proposed means of abatement introduces a greater hazard, the burden will shift back to OSHA to rebut that evidence.

C. Distinguishing Between Direct Enforcement and Use as Evidence of a General Duty Clause Violation

Unlike consensus standards that have been incorporated into the OSHA standards as substantive rules, standards that are merely used as evidence of a General Duty Clause violation are not required to go through the notice-and-comment procedures prescribed by the APA and the OSH Act. However, OSHA must be clear that it is merely using the standard as evidence, not attempting to directly enforce the standard as a substantive rule. A pair of recent ALJ decisions illustrates this distinction.

In American Phoenix, Inc., OSHA conducted an inspection under its Combustible Dust National Emphasis Program (NEP), which specifically refers to the NFPA’s “Standard for the Prevention of Fire and Dust Explosions from the Manufacturing, Processing, and Handling of Combustible Particulate Solids” (NFPA 654). After conducting the inspection, OSHA issued a General Duty Clause citation to the employer for alleged fire and explosion hazards in multiple dust collectors.

26. See infra Section II.A.
27. See Peacock Eng’g, Inc., 26 BNA OSHC 1588 (No. 11-2780, 2017) (holding that an ASME standard was not a “feasible means of abatement” because it did not take into account the “high degree of precision” required in the employer’s work); Kokosing Constr. Co., 17 BNA OSHC at 1875 (holding that using a ladder for formwork was not feasible because the employer provided “detailed testimony of the difficulties encountered in using ladders at this worksite”).
At the hearing before the ALJ, OSHA relied on NFPA 654 to establish that the hazard posed by combustible dust was recognized by the industry.34 Both experts who testified agreed that NFPA 654 applied to the employer’s industry.35 The ALJ concluded that this was enough to establish industry recognition of the hazard posed by combustible dust.36

The employer argued that the NEP created a substantive rule that required compliance with NFPA 654.37 Since the NEP created a substantive rule and was not promulgated in accordance with the notice-and-comment requirements of the APA, the employer argued that the citation relying on the NFPA standard should be vacated.38

OSHA argued that the NEP did not create a substantive rule, and thus it was exempt from the notice-and-comment requirements of the APA. Rather, OSHA contended, the NEP provided “guidance to OSHA Area Offices on how to determine whether an employer, upon inspection, is in violation of the General Duty Clause.”39 In support of this contention, OSHA pointed to language in the NEP stating that it “should be consulted to obtain evidence of hazard recognition and feasible abatement methods.”40

The ALJ agreed with OSHA, reasoning that the NEP, while it specifically references NFPA 654, does not “require conditions, or the adoption or use of one or more practices, means, methods, operations or processes, reasonably necessary or appropriate to provide safe or healthful employment.”41 Rather, NFPA 654 is only referenced for evidence of (1) industry recognition of the hazard, and (2) feasible means of abatement.42 Thus, the ALJ explained, NFPA 654 is not a substantive rule requiring notice and comment because it is merely “used as evidence in support of a violation, not as a measuring stick.”43

In Cooper Tire & Rubber, OSHA cited another employer for alleged fire and explosion hazards, again citing NFPA 654 in the abatement portion of the citation.44 OSHA argued that it was an authority having jurisdiction under NFPA 654, and therefore it could retroactively apply sections of NFPA 654 to the employer.45 The ALJ ruled against OSHA, noting that OSHA’s position was contrary to the position it had taken.

34. Id. at *6
35. Id. at *12.
36. Id.
37. Id. at 6.
38. Id.
39. Id.
40. Id.
41. Id. at *7 (quoting 29 U.S.C. § 652(8) (2012)).
42. Id.
43. Id.
45. Id. at *45.
in *American Phoenix, Inc.* OSHA's position in *American Phoenix, Inc.*—that voluntary consensus standards may be cited as evidence of industry recognition of hazards—comported with Commission precedent. However, if OSHA was in fact an authority having jurisdiction to enforce NFPA 654, as OSHA was now claiming, then NFPA 654 was no longer a “purely administrative effort designed to uncover violations of the Act.” Rather, it was a standard aimed to address a “specific and already identified hazard.” Therefore, the ALJ vacated the citation on the grounds that OSHA had impermissibly transformed NFPA 654 into a new OSHA standard and was attempting to directly enforce it without following the notice-and-comment procedure prescribed by the APA.

*American Phoenix, Inc.* and *Cooper Tire & Rubber* demonstrate that OSHA, when using a “consensus standard,” must be clear regarding how it is using the standard to prove its case. If OSHA is attempting to directly enforce the standard, it must have gone through the notice-and-comment procedures prescribed by the APA and the OSH Act.

## II. Survey of Consensus Standard Decisions

Part II surveys a number of recent decisions by the federal courts of appeals, the Review Commission, and its ALJs, to provide examples of the consensus standards used by OSHA in enforcement actions. These decisions illustrate the broad application that both courts and the Review Commission have given to consensus standards. Despite this broad application, however, the application of consensus standards is still subject to some important limitations, which are illustrated by the cases discussed in this Part that favored the employer. The two elements for which consensus standards are used—“industry recognition” and “feasible means of abatement”—are discussed separately. The decisions are then further separated into those that favored OSHA and those that favored the employer.

### A. Industry Recognition Cases

Both courts and the Review Commission give especially broad application to consensus standards when OSHA uses them to prove the second element of its prima facie case: that the condition or activity is recognized as a hazard. However, such application is not unlimited, as demonstrated by the ALJ’s decision in *Capitol Concrete Contractors, Inc.*

---

46. *Id.*
47. *Id.*
48. *Id.* at *46 (quoting Chamber of Commerce v. U.S. Dep’t of Labor, 174 F.3d 206, 209 (D.C. Cir. 1999)).
49. *Id.* (quoting *Chamber of Commerce*, 174 F.3d at 209).
50. *Id.*
1. Pro-OSHA Cases

a. Titanium Metals Corp. of America v. Usery

The Ninth Circuit Court of Appeals has held that OSHA may rely on consensus standards as evidence of industry recognition even if the industry is relatively new. In Titanium Metals Corp. of America v. Usery, the employer appealed a ruling of the Commission finding it in violation of the General Duty Clause. OSHA had investigated the employer’s plant after an employee was fatally burned in an accident. After its investigation, OSHA cited the employer for violating the General Duty Clause by allowing “flammable accumulations of titanium dust and fines.”

To support its argument that the hazard was not recognized, the employer relied on “the relative infancy of the titanium industry” and the lack of precise standards regarding permissible levels of accumulation of combustible dust. The employer conceded that numerous fires had occurred in its plant within the previous eight years but argued that most of them were “minor and easily contained.”

The Ninth Circuit Court of Appeals emphatically rejected the employer’s argument. The court explained that a hazard can be recognized even if the employer is “ignorant of the existence of the activity or practice or its potential for harm.” The court cited to the National Fire Code, NFPA No. 481-1972, which states that titanium is highly flammable in dust form. The court also emphasized that an engineer who worked for the employer was “instrumental in drafting” the NFPA standard, and the employer had already experienced numerous fires caused by the accumulation of titanium dust. Thus, the court concluded that the fire hazard posed by the accumulation of titanium dust was a recognized hazard.

b. Cargill, Inc.

The Review Commission has held that OSHA may use consensus standards as evidence of industry recognition even if the standard by its own terms does not apply to the employer’s particular facility. In Cargill, Inc., OSHA relied on NFPA 61B, entitled “Grain Elevators

52. 579 F.2d 536 (9th Cir. 1978).
53. See id. at 540–41.
54. Id. at 538.
55. Id. at 539.
56. Id. at 540.
57. Id. at 540–41.
58. Id. at 541.
59. Id.
60. Id.
61. Id.
62. Id.
63. Id.
64. 10 BNA OSHC 1398, 1982 WL 22586 (No. 78-5707, 1982).
65. See, e.g., id. at *5.
Bulk Handling Facilities,” to establish industry recognition of a fire hazard posed by grain dust and grain handling equipment. The standard, by its own terms, applied only to facilities erected in 1973 or later and that were undergoing major replacement or alteration. The employer argued that the standard could not be used to prove industry recognition of a fire hazard because its grain elevator and feed mill were constructed prior to 1973, and they were not undergoing major replacement or alteration.

Although the ALJ agreed with the employer, the Commission overturned the ALJ’s decision, stating that the language of the standard limiting its application to facilities erected in 1973 or later had “no bearing on its relevance to industry awareness of certain hazards.” Thus, even if a consensus standard by its own terms is not a substantive rule that the employer must follow, OSHA may, in some cases, still use the standard to establish industry recognition of the hazard.

**C. Betten Processing Corp.**

OSHA may also rely on consensus standards that it has incorporated by reference for other industries, according to the Review Commission. In Betten Processing Corp., OSHA relied on an ANSI standard requiring a crane operator to stop the engine before leaving the crane unattended. The Review Commission noted that a stated purpose of the ANSI standard was to “serve as a guide to governmental authorities having jurisdiction over the subjects within the scope of the ANSI safety code.” The Review Commission reasoned that OSHA was an authority having jurisdiction over the subject because it had incorporated the consensus standard into its construction industry standards. The employer, however, was part of the iron and steel processing industry, not the construction industry. Nevertheless, the Review Commission stated that OSHA’s adoption of the standard for the construction industry “cannot be lightly dismissed.” Thus, the Review Commission held that the ALJ should have considered the ANSI standard as evidence of a recognized hazard in the iron and steel processing industry.

66. Id.
67. Id.
68. Id.
69. Id.
70. 2 BNA OSHC 1724 (No. 2648, 1975).
71. See, e.g., id., overruled on other grounds by Pratt & Whitney Aircraft, 8 BNA OSHC 1329 (No. 13591, 1980).
72. Id. at 1726.
73. Id.
74. Id.
75. Id.
76. Id.
77. Id.
D. **CSA Equipment Co.**

In addition to standards drafted by private organizations, OSHA may also rely on documents developed by its discretionary committees, even if the document never turns into a proposed rule, according to a decision of the Review Commission. In *CSA Equipment Co.*, OSHA cited the employer under the General Duty Clause for exposing warehouse workers to crushing hazards by “fail[ing] to provide a clear view of the designated path of travel for the powered industrial trucks” when materials were being checked into the warehouse. The employer’s work involved unloading cargo from marine vessels and transferring large steel coils from the vessels. At the hearing, OSHA’s expert referred to a document developed by the Maritime Advisory Committee, which was made up of various members of the marine cargo handling industry and the shipyard industry. The document addressed how to handle accidents involving container handling. The Review Commission held that the document established the industry recognized a hazard of being struck by mobile equipment while unloading or transferring cargo.

E. **Elite Builders, Inc.**

One recent ALJ decision illustrates the expansive application the Commission is willing to give consensus standards to establish General Duty Clause Violations. In *Elite Builders, Inc.*, OSHA cited the employer—a residential roofing contractor—for a “tip-over and fall hazard” posed by the use of a personnel platform attached to a forklift. In support of its case, OSHA relied on an “ANSI Safety Standard for Rough Terrain Forklifts,” which requires guardrails on personnel platforms and limits the width of such platforms to the width of the truck. Even though the standard did not specify that it applied to any particular industry, the ALJ found that it applied to any industry that “use[s] powered industrial trucks.” To support this finding, the ALJ cited an opinion from the Fifth Circuit Court of Appeals quoting,
“where a practice is plainly recognized as hazardous in one industry, the Commission may infer recognition in the industry in question.”89

The ALJ reasoned that the use of powered industrial trucks was “not limited to any particular industry.”90 Thus, the industrial truck industry, to which the roofing contractor belonged, recognized the hazard posed by an oversized personnel platform and lack of fall protection.91

2. Pro-Employer Case: Capitol Concrete Contractors, Inc.92

According to one ALJ decision, a consensus standard may not serve as evidence of industry recognition of a hazard unless the industry standard contains explicit safety warnings about the particular activity at issue.93 In Capitol Concrete Contractors, Inc., OSHA conducted an inspection of the employer’s worksite after an employee injury.94 The employee had reached into the cab of a skid-steer while the loader bucket was still raised.95 The bucket arms came down and fractured the employee’s wrist.96 OSHA cited the employer for a violation of the General Duty Clause, on the grounds that the “operator would routinely approach the operational Loader at the construction jobsite and was exposed to a struck by hazard from the equipment.”97

To establish industry recognition of the hazard, OSHA cited a National Institute for Occupational Safety and Health (NIOSH) Alert that stated: “WARNING! Workers who operate or work near skid-steer loaders may be crushed or caught by the machine or its parts.”98 The ALJ found that this alert was not sufficient to establish industry recognition of the hazard.99 The alert recognized that employees must work in or near skid-steers, and there was “no general prohibition against approaching an operational skid-steer.”100 Because the alert did not contain “explicit safety warnings about approaching the cab of a skid-steer,” OSHA could not rely on the alert as evidence of a recognized general hazard associated with approaching an operational skid-steer.101

89. Id. (quoting Kelly Springfield Tire Co., Inc. v. Donovan, 729 F.2d 317, 321 (5th Cir. 1984)); But see H-30, Inc. v. Marshall, 597 F.2d 234, 235 (10th Cir. 1979) (“Some general similarity in purpose of the devices is not enough to carry over ‘recognition’ from one industry to another.”).
90. Id. at *18.
91. Id.
93. See id. at *5.
94. Id. at *2.
95. Id.
96. Id.
97. Id. at *3.
98. Id. at *4.
99. Id. at *5.
100. Id.
101. Id. at *6.
B. “Feasible Means of Abatement” Cases
   1. Pro-OSHA Cases
      A. Pepper Contracting Services\textsuperscript{102}

      One ALJ has reasoned that a consensus standard prescribing the implementation of a safety plan requires a general contractor to implement a specific safety plan for each distinct worksite, rather than a general safety plan for the project as a whole.\textsuperscript{103} In Pepper Contracting Services, the employer was a general contractor performing construction work on a highway.\textsuperscript{104} OSHA cited the employer after a fatal accident caused by a work vehicle on a construction site striking another worker on foot.\textsuperscript{105}

      The ALJ concluded that the industry standard established feasible means of abatement in this case.\textsuperscript{106} The ANSI standard required employers to develop traffic control plans to “maximize the separation of vehicles and workers on foot.”\textsuperscript{107} Importantly, the ANSI standard required employers to tailor specific traffic control plans to each work site and communicate any changes from the general plan to the workers.\textsuperscript{108} There was no evidence that the general contractor had ever provided the subcontractors with a copy of its safety policy, and the subcontractors were excluded from the daily safety meetings, despite the fact that they were performing work on the site at the same time as the general contractor.\textsuperscript{109} The ALJ reasoned that the accident could have been avoided entirely, without economic hardship, if the general contractor had communicated a traffic control plan to all of the workers on-site, including the subcontractors, as required by the ANSI standard.\textsuperscript{110}

      B. American Recycling & Manufacturing Co.\textsuperscript{111}

      One ALJ found a consensus standard to be especially probative of feasible means of abatement if the prescribed means is also included in the employer’s own safety manual or rules.\textsuperscript{112} In American Recycling & Manufacturing Co., OSHA cited the employer for a General Duty Clause violation based on an employee working without fall protection twelve feet above a concrete floor in a plastic basket supported by a

\begin{thebibliography}{9}
\bibitem{103} See id. at *17–18.
\bibitem{104} Id. at *1.
\bibitem{105} Id. at *2.
\bibitem{106} Id. at *12–14.
\bibitem{107} Id. at *13.
\bibitem{108} Id.
\bibitem{109} Id.
\bibitem{110} Id. at *14.
\bibitem{112} Id. at *62.
\end{thebibliography}
forklift. To establish industry recognition of the hazard, OSHA relied on a pair of safety standards by ASME. The first standard provided that personnel should only be lifted in “operator-up high lift trucks.” The second standard provided that fall protection devices should be used whenever a truck is used to elevate personnel. Because the employer’s own safety manual required the use of a fall protection system, and a fall protection system was the same means of abatement prescribed by the ASME standard, the ALJ concluded that the use of a fall protection system was a feasible means of abatement.

2. Pro-Employer Cases

A. Kokosing Construction Co.

Although OSHA may rely on consensus standards as evidence of feasible means of abatement, the Review Commission has held that the employer may rebut the evidence by demonstrating that the prescribed abatement method is not feasible in a particular case. In Kokosing Construction Co., OSHA cited the employer for exposing its carpenters to fall hazards. The carpenters had been climbing formwork walls without any lifelines, safety belts, scaffolds, ladders, or other form of fall protection. To establish industry recognition of the hazard, OSHA cited ANSI A10.9-1982, which required construction workers to use only “approved means of access” when work cannot be done from ground level. OSHA also cited a Scaffolding, Shoring and Forming Institute (SSFI) guideline entitled “Guide to Safety Procedures for Vertical Concrete Formwork,” which stated that form panels should not be used as a ladder.

The Review Commission found that the standards were “sufficient to establish a prima facie case of feasibility as to ladders.” However, in this case, the employer successfully rebutted OSHA’s prima facie case with “detailed testimony of the difficulties encountered in using ladders at this worksite.” Thus, the Commission confirmed that an employer can rebut a showing of feasible means of abatement with evidence of difficulties posed by the prescribed means of abatement in a particular case.

113. Id.
114. Id.
115. Id.
116. Id.
117. Id. at *62–63.
118. 17 BNA OSHC 1869 (No. 92-2596, 1996).
119. Id. at 1874–76.
120. Id. at 1870.
121. Id. at 1872.
122. Id.
123. Id. at 1873.
124. Id. at 1875.
B. Vitakraft Sunseed, Inc.\textsuperscript{125}

If an employer offers evidence that the method prescribed by a consensus standard is not economically feasible, OSHA must present additional evidence to establish feasible means of abatement, as one ALJ decision demonstrates.\textsuperscript{126} In Vitakraft Sunseed, Inc., the employer—a manufacturer of small animal products—was cited under the General Duty Clause for exposing its employees to fire hazards by “failing to separate the dust room from the upstream process.”\textsuperscript{127} The employer had hired an outside consulting company to design a dust collection system, and the consulting company recommended that the dust collection system comply with NFPA 61.\textsuperscript{128} However, the employer rejected the proposal due to cost.\textsuperscript{129}

On the issue of feasible means of abatement, the ALJ ruled in favor of the employer.\textsuperscript{130} The ALJ reasoned that even if there is a consensus standard on point, OSHA still must establish that the proposed abatement method is economically feasible for the particular employer in question.\textsuperscript{131} In this case, the employer’s CEO had rejected the proposal it received from the outside consulting company due to cost, and OSHA did not provide any evidence to rebut that statement.\textsuperscript{132} Therefore, NFPA 61 did not provide a feasible means of abatement for this employer because the prescribed means was not economically feasible.\textsuperscript{133}

III. Expert Witnesses

When OSHA relies on consensus standards to prove violations of the General Duty Clause, it will often present expert testimony as well.\textsuperscript{134} In many cases, the expert testimony merely supplements the consensus standard. However, in some cases, expert witnesses will rely upon consensus standards as the basis of their own opinions.\textsuperscript{135} For example, in CSA Equipment Co., OSHA presented expert testimony to establish that the marine cargo handling industry recognized

\begin{itemize}
  \item \textsuperscript{125} 25 BNA OSHC 1176, 2014 WL 5794302 (No. 12-1811, 2014) (ALJ).
  \item \textsuperscript{126} Id. at *15.
  \item \textsuperscript{127} Id. at *11.
  \item \textsuperscript{128} Id. at *13.
  \item \textsuperscript{129} Id. at *15.
  \item \textsuperscript{130} Id.
  \item \textsuperscript{131} Id.
  \item \textsuperscript{132} Id.
  \item \textsuperscript{133} Id.
  \item \textsuperscript{135} See, e.g., CSA Equip. Co., 24 BNA OSHC 1476; Imperial Aluminum, 24 BNA OSHC 2081.
\end{itemize}
a hazard of employees being struck by moving equipment. To support his testimony, the expert relied upon a document developed by OSHA’s Maritime Advisory Committee. Because the document addressed methods to prevent accidents involving container handling, the expert concluded in his testimony that the industry recognized a struck-by hazard posed by moving equipment.

When OSHA presents an expert witness who relies on a consensus standard to support his testimony, the employer should consider whether the industry standard is a “shall” standard or a “should” standard. Only industry standards incorporated by reference through the appropriate notice-and-comment rulemaking or standard-making procedures have the force and effect of law, and only then if they contain the word “shall” or other mandatory language. Likewise, when using industry standards that have not been incorporated by reference to meet the industry recognition and “feasible means of abatement” elements of a General Duty Clause violation, OSHA should only rely on “shall” standards. Thus, experts who rely on industry consensus standards that have not been incorporated by reference, or who rely on “should” standards, as the basis of their opinions are subject to challenge in a compliance or enforcement setting.

IV. The Need for Guidance from OSHA

Guidance from OSHA regarding these standards could immensely help employers to evaluate and reduce their risks. Promulgating substantive rules through the notice-and-comment process can be cumbersome and will undoubtedly consume precious time and resources. Nevertheless, specific rules would ultimately save time and money by reducing litigation and would lead to safer work environments, because every employer would be on notice of the specific standards OSHA expects to be recognized by its industry.

Conclusion

OSHA continues to use “consensus standards” in enforcement actions, and there is no sign that it will stop any time soon. With that in mind, employers should consider how OSHA is attempting to use a consensus standard in an enforcement action. Applicability to the industry and the industry’s own language as to the scope and retroactivity of a particular standard should receive rigorous review. If OSHA is attempting to enforce a consensus standard directly, the standard

136. 24 BNA OSHC at 1478.
137. Id.
138. Id.
140. Safety and Health Topics: Combustible Dust, supra note 1 (stating that OSHA will not use the General Duty Clause to enforce “should” standards).
must have gone through the applicable notice-and-comment procedure. However, even if OSHA is only using a consensus standard to meet the industry recognition or “feasible means of abatement” element of a General Duty Clause violation, its ability to do so is limited. If the consensus standard does not relate specifically to worker safety, or if the employer introduces evidence that employing that standard would present additional hazards or impose unnecessary difficulties, OSHA must present additional evidence to prove its case. If OSHA is not complying with those parameters in an enforcement action, OSHA’s use of the consensus standard is subject to challenge. Ultimately, employers should be aware of the broad application given to consensus standards by courts and by the Review Commission to avoid being caught off guard when OSHA attempts to use a consensus standard in an enforcement action.

141. See supra Section I.C.
142. See supra Section II.A.2.
143. See supra Section II.B.2.