SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 93-3270
ARCADIAN CORPORATION,	:	
Respondent.	:	

DECISION

BEFORE: WEISBERG, Chairman; FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

The issue presented in this case is a narrow one: whether Administrative Law Judge Stanley M. Schwartz erred in dismissing eighty-six of eighty-seven nearly identical items contained in a single citation issued to Arcadian Corporation (''Arcadian") based upon his ruling that the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (``the Act") does not vest the Secretary with the authority to cite for each individual employee exposed to the same hazardous condition(s). For the reasons detailed below, we agree with the judge's disposition and find that the language and structure of section 5(a)(1), 29 U.S.C. § 654(a)(1),[1] and the Act, supported by the legislative history, leave no doubt that Congress' intent was that a violation of section 5(a)(1) is

[1]Section 5(a)(1) provides:

> Each employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees[.]

based on the condition(s) constituting a recognized hazard, not the exposure of each employee thereto. Because the crux of the Secretary's argument is that the language and structure of the Act, and its legislative history, do not make clear Congress' intention in this regard, and thus his interpretation of the statute is entitled to controlling deference, we find it appropriate, while not necessary, to address this issue. As also detailed below, we find no merit in these arguments because (1) in light of the Secretary's enforcement of section 5(a)(1) for over twenty years and the quality and clarity of his explanation of his policy, the Secretary's interpretation is patently unreasonable; and (2) administrative and adjudicatory functions are split under the Act, and here, the Secretary's interpretation does not concern his own standards or regulations, but rather a construction of the Act which touches directly upon an appropriate assessment of a penalty, an area that rests exclusively within the Commission's statutory authority. Finally, because there may be circumstances under which different hazards can be cited as section 5(a)(1) violations requiring different abatement actions, we remand this case to afford the Secretary an opportunity to amend the citation to address this question, if appropriate.

I.

Arcadian Corporation manufactured fertilizer at a plant in Lake Charles, Louisiana. On July 28, 1992, an after-hours explosion of the urea reactor destroyed the facility, injuring three employees and four other persons. The Occupational Safety and Health Administration (``OSHA") investigated and thereafter issued citations, among which was citation no. 2. Items 1 through 87 in citation no. 2 alleged separate willful violations of section 5(a)(1) for each employee exposed to the conditions that led to a single catastrophic failure of the urea reactor.[2] The Secretary argues that these conditions could have been abated by shutting down the reactor upon previous detection of leaks; properly monitoring it for leaks; and adequately inspecting, repairing, or maintaining the vessel's liner. A $50,000 penalty was proposed for each of the eighty-seven employees exposed to these conditions, for a total of $4,350,000.

[2]This case arose during the period when some provisions of the new process safety management standard at 29 C.F.R. § 1910.119 had been administratively stayed by the Secretary on an interim basis. 57 Fed. Reg. 23,060, 23,063 (1992).

At a relatively early stage in the proceeding, Arcadian moved for partial summary judgment under Rule 56 of the Federal Rules of Civil Procedure,[3] arguing that citation no. 2, items 2 through 87 should be vacated as duplicative and their allegations consolidated with item 1 because the facts alleged in items 1 through 87 indicate conditions which constitute only a single violation of an employer's duty under section 5(a)(1). Judge Schwartz granted the motion, relying on *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2172, 1991-93 CCH OSHD ¶ 29,962, p. 41,005 (No. 87-922, 1993), in which the Commission noted that ``[t]he test of whether the Act and the cited regulation permit[] multiple or single units of prosecution is whether they prohibit individual acts, or a single course of action." The judge concluded that, based on the circumstances in this case, the Secretary's citing of Arcadian for each employee exposure to the same condition was ``inappropriate." To expedite resolution of this entire litigation, the judge granted Arcadian's motion to sever[4] items 2 through 87 from the rest of citation no. 2 and from Docket No. 93-628, which remains before him. The Secretary's petition for review of the judge's decision was granted, and the Commission heard oral argument in this case.[5]

II.

At issue is whether, consistent with the judge's ruling, under section 5(a)(1) the unit of prosecution consists of the condition(s) constituting a recognized hazard, rather than the number of exposed employees. To address this question, the Commission and the courts consider (1) the language and structure of the specific statutory provision or regulation as well as of the regulatory framework or statute as a whole; (2) the legislative history; and, then, only if the drafter's intent remains unclear, (3) the reasonableness of an agency's interpretation. *E.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (``*Chevron*"), 467 U.S. 837, 842-43, 845 (1984) (statutory

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[3]Under Rule 56(c), the judgment sought shall be rendered if the pleadings and record show that ‘‘there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’’

[4]See Rule 10 of the Commission's Rules of Procedure, 29 C.F.R. § 2200.10, which discusses severance.

[5]Both parties participated in the oral argument in this case, as did two amici curiae, the AFL-CIO and the U.S. Chamber of Commerce.

provision); *Martin v. OSHRC (CF&I Steel Corp.)*, 941 F.2d 1051, 1055, 1056 (10th Cir. 1991) (``*CF&I*") (OSHA standard); *Securities Indus. Assn. v. Federal Reserve Sys.*, 847 F.2d 890, 893 (D.C. Cir. 1988) (statutory provision); *Unarco Commercial Prods.*, 16 BNA OSHC 1499, 1502-03, 1994 CCH OSHD ¶ 30,294, p. 41,732 (No. 89-1555, 1993) (OSHA standard). Our inquiry therefore begins with an analysis of whether the meaning of section 5(a)(1) is, or is not, clear based on its own language and the Act as a whole.

A.

``In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue[,] judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 112 S.Ct. 2589, 2594 (1992); *see American Tobacco Co. v. Peterson*, 456 U.S. 63, 68 (1982). Section 5(a)(1) states that an employer ``shall furnish . . . 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*." (emphases added) Thus, the employer's duty is to remove one or more recognized hazards from its workplace. The language at the beginning of section 5(a)(1), that ``[e]ach employer . . . shall furnish to each of his employees" employment and a place of employment free of recognized hazards, means that the employer is required to provide safe employment to ``each" employee, not just some of them.[6]

From the earliest days of the Act, the Secretary, the Commission, and the reviewing courts have considered the central inquiry in all section 5(a)(1) cases to be whether a serious ``recognized" hazard is present in the workplace and how it can be abated. *E.g., Georgia Electric Co. v. Marshall*,

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[6]This is consistent with our holding in *Caterpillar*, 15 BNA OSHC at 2172-73, 1991-93 CCH OSHD at p. 41,005, a case brought under section 5(a)(2) of the Act, 29 U.S.C. § 654(a)(2), which requires employers to comply with OSHA standards. In that case, we concluded that the Secretary can cite separate violations of 29 C.F.R. § 1904.2 (requiring employers to maintain a log and summary of recordable occupational injuries and illnesses) for each erroneous decision not to record an injury or illness. *See Hern Iron Works, Inc.*, 16 BNA OSHC 1207, 1209, 1991-93 CCH OSHD ¶ 30,046, p. 41,251 (No. 89-433, 1993); *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213, 1991-93 CCH OSHD ¶ 29,964, pp. 41,032-33 (No. 87-2059, 1993). As we noted in *Caterpillar*, whether multiple or single units of prosecution are permitted turns on whether the provision at issue prohibits individual acts or a single course of action. *Blockburger v. United States*, 284 U.S. 299, 302-04 (1932).

595 F.2d 309, 320-21 (5th Cir. 1979); *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265 (D.C. Cir. 1973); *Waldon Healthcare Center*, 16 BNA OSHC 1052, 1059-64, 1993 CCH OSHD ¶ 30,021, pp. 41,151-57 (No. 89-2804, 1993) (consolidated); *Kelly Springfield Tire Co.*, 10 BNA OSHC 1970, 1973-75, 1982 CCH OSHD ¶ 26,223, pp. 33,113-14 (No. 78-4555, 1982), *aff'd*, 729 F.2d 317 (5th Cir. 1984); *Beaird-Poulan, a Div. of Emerson Electric Co.*, 7 BNA OSHC 1225, 1228-30, 1979 CCH OSHD ¶ 23,493, pp. 28,459-61 (No. 12600, 1979); *see, e.g.*, Rothstein, *Occupational Safety and Health Law* § 141 at 187 (3d ed. 1990). The longstanding test formulated by the Commission and courts for determining a violation of section 5(a)(1) reflects this focus on the conditions which constitute a hazard to all employees: to establish a violation of section 5(a)(1), the Secretary must prove that (1) the workplace presented a hazard to employees that was (2) ``recognized" by the employer or its industry and was (3) ``causing or likely to cause death or serious physical harm," and (4) feasible means existed to abate or materially reduce the hazard. *Id.*

The focus of this approach is necessarily on a hazard and its abatement. This is so because the purpose of adjudication is to formulate an ``order" under the Administrative Procedure Act. See 5 U.S.C. §§ 551, 554, 556, and 557. If the Secretary's argument is accepted, that he is permitted under the statute to cite on a per exposed employee basis for the same condition, the same order addressing the same hazard with identical abatement would then issue eighty-seven times.[7] Though this would certainly raise administrative and legal costs, it would not heighten safety and health in the workplace. The only other tangible result would be to inflate the penalty by a factor of 87.

This plain reading of section 5(a)(1) is therefore consistent with the provisions of the whole Act, as well as the Act's object and policy. *See, e.g., Brown v. Gardner*, 115 S.Ct. 552, 555 (1994); *John Hancock Mut. Life Ins. v. Harris Trust & Sav. Bank*, 114 S.Ct. 517, 523 (1993); *Gade v. National Solid Wastes Management Assn.*, 112 S.Ct. 2374, 2383-84 (1992); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987). While the Secretary mentions that Congress refers throughout the

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[7]If 87 such ''orders'' were permitted based on the exposure of each employee, precisely the same rationale would suggest that ''orders'' can be issued for each day or each hour that a violative condition exists. As noted *infra*, this would be inconsistent with the language and structure of the Act, and we cannot conclude that Congress could have intended such virtually limitless citation authority.

Act to protecting employees as individuals,[8] we observe that throughout the Act Congress more frequently refers to employees as a group. While taken out of context the references noted by the Secretary support his argument, in the context and structure of the Act as a whole, such a reading is inconsistent with, for example, section 2(b) of the Act, 29 U.S.C. § 651(b), which describes the purpose of the Act as ``[t]o assure so far as possible *every working man and woman* in the Nation safe and healthful working conditions" (emphasis added). That provision also states that such purpose is being implemented by encouraging employers and ``employees" in their efforts to reduce hazards (section 2(b)(1)), and by providing that employers and ``employees" have separate but dependent responsibilities and rights (section 2(b)(2)).[9] This is consistent with the preamble to the Act, that provides that the Act was intended ``[t]o assure safe and healthful working conditions for *working men and women*" (emphasis added). *See, e.g., Fidelity Federal Savings & Loan Assn. v. De La Cuesta,* 458 U.S. 141, 158 (1982) (preamble to a statute or regulation may be consulted in determining the meaning of that provision). Moreover, the remedial purpose of the Act does not give license to disregard the plain meaning of a standard or provision of the Act. *Kiewit Western Co.*, 16 BNA OSHC 1689, 1694, 1994 CCH OSHD ¶ 30,396, p. 41,941 (No. 91-2578, 1994) (citing *Symons v. Chrysler Corp. Loan Guarantee Bd.*, 670 F.2d 238, 241 (D.C. Cir. 1981)). To suggest that the phrase ``to each of his employees" identifies the unit of prosecution is to place undue emphasis on this rhetorical nicety.

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[8]He cites 29 U.S.C. §§ 651(b)(7) (as a purpose of the Act, development of medical criteria that will assure (insofar as practicable) that ``no employee" will suffer diminished health, functional capacity or life expectancy as a result of his work experience), 655(b)(5) (Secretary shall set standards that assure that ``no employee" will experience material impairment of health or functional capacity), 657(c)(3) (each employer shall promptly notify ``any employee" overexposed to a toxic substance), 657(f) (``[a]ny employees" may request inspection of potential imminent danger), 659(c) (``any employee" may challenge reasonableness of abatement period), and 660(c) (``[a]ny employee" protected from discrimination).

[9]See also 29 U.S.C. § 655(b)(6)(B)(iii) (employer applying for temporary variance order must state steps to protect ``employees" against the covered hazard, (6)(B)(v) (employer must certify that it has informed ``his employees)," and (7) (labels or other appropriate warning necessary to ensure ``employees" apprised of all exposed hazards).

Perhaps most significantly, section 3(8) of the Act, 29 U.S.C. § 652(8), defines the term ``occupational safety and health standard" to 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 and places of employment." It seems at least incongruous to us that Congress would define the principle enforcement mechanism in the Act in such terms if the gravamen of a section 5(a)(1) violation were not to be the ``recognized hazard." Consistent with section 3(8), Commission case law has for over ten years defined the term ``recognized hazard" in section 5(a)(1) as the ``process" by which the particular job is being done. *E.g., Davey Tree Expert Co.*, 11 BNA OSHC 1898, 1899, 1983-84 CCH OSHD ¶ 26,852, p. 34,399 (No. 77-2350, 1984). *See Well Solutions, Inc., Rig No. 30*, No. 91-340, slip op. at 3 (April 19, 1995) (recognized hazard consists of ``conditions" at the particular job site); *Pelron Corp.*, 12 BNA OSHC 1835, 1986-87 CCH OSHD ¶ 26,852, p. 34,399 (No. 77-2350, 1984) (recognized hazard must be defined to identify ``conditions" or ``practices" over which the employer has control).

For the reasons above, we conclude that the language of section 5(a)(1) and the Act as a whole, as well as the objectives and policies of that provision and the Act, do not support the Secretary's view that he can cite separate section 5(a)(1) violations for each employee exposed to the same hazard.

B.

The plain meaning of the statutory language being clear, we look to the legislative history only to determine whether there is ``clearly expressed legislative intention" contrary to that language ``which would require us to question the strong presumption that Congress expresses its intent through the language it chooses." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n. 12 (1987). While an agency's interpretation of a statutory provision or a regulation reflects its proper role of accommodator of conflicting policies, that interpretation may be disturbed if ``it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *United States v. Shimer*, 367 U.S. 374, 383 (1961), quoted in *Chevron*, 467 U.S. at 845. ``The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843. The intent

of Congress is particularly relevant where, as here, the interpretation of a statute that Congress passed is at issue rather than an agency's interpretation of its own standard or regulation.

We find that the legislative history of section 5(a)(1) does not support the Secretary's position. Congress did not specifically address whether the phrase ``to each of his employees" in section 5(a)(1) was intended to identify a unit of prosecution. Moreover, as Arcadian notes, the Senate and House reports summarizing the general duty clause never included the words ``to each of his employees" or ``each employee."[10] If Congress had intended that section 5(a)(1) could be cited on a per exposed employee basis, certainly it would have discussed this matter, particularly considering that one of the major issues before it was whether to allow penalties at all for first-instance violations of section 5(a)(1).[11] *See generally* Bokat & Thompson, *Occupational Safety and Health Law* 111-12 (1988). Indeed, when the phrase ``to each of his employees" was first used in section 5(a)(1), the bill included no penalty at all for first instance violations of the general duty clause.[12] This can only mean that the phrase could not have been intended to constitute a unit of prosecution, which is essentially a unit of penalty assessment. Moreover, it was only after considerable debate that first-instance penalties were permitted. Therefore, we cannot conclude that Congress, with *no discussion whatsoever*, passed the section intending that penalties for violating it could be assessed on a per exposed employee basis, thereby removing any limit on penalties.[13]

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[10]S. Rep. 1282, 91st Cong., 2d Sess. (''S. Rep.") 9-10, 27 (1970), *reprinted in* Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970* (''Leg. Hist."), at 149-50, 167 (1971); H.R. Rep. 1291, 91st Cong., 2d Sess. (''H. Rep.") 21-22, 37, Leg. Hist. at 851-52, 867.

[11]This reflects Congress' view that the primary method of achieving the Act's objective would not be the general duty clause, but rather the requirement (in section 5(a)(2) of the Act) to comply with specific safety and health standards of which employers would have notice. See sections 2(b)(3), 2(b)(9), 5(a)(2), and 6(a) and (b) of the Act; 29 U.S.C. §§ 651(b)(3), 651(b)(9), 654(a)(2), 655(a) and (b); S. Rep. at 5, 10, Leg. Hist. at 145, 150; *Brisk Waterproofing Co.*, 1 BNA OSHC 1263, 1264, 1971-73 CCH OSHD ¶ 16,345 at p. 21,261 (No. 1046, 1973).

[12]*E.g.*, S. Rep. at 10, 58 (individual view of Sen. Javits), Leg. Hist. at 150, 197 (same); H.R. Rep. at 21, Leg. Hist. at 851.

[13]Although it is not dispositive, we note that a few years after passing the Act at issue here, Congress
(continued...)

As the Secretary notes, the legislative history refers to the general duty clause as embodying the employer's common law duty of care under master/servant principles, which provides that the employer has a duty that runs to each worker individually and is actionable by each employee upon each breach. However, it is ``misleading'' to refer to section 5(a)(1) as a restatement of the employer's common law duty because the Act does not compensate individual employees, as does the common law, but rather is ``remedial and preventive in nature.'' *REA Express, Inc. v. Brennan*, 495 F.2d 822, 825 (2d Cir. 1974); *see* Morey, *The General Duty Clause of the Occupational Safety and Health Act of 1970*, 86 Harv. L. Rev. 988, 1003 n.66 (1973). Unlike the common law concept where an injured party has a separate cause of action, there is no private right of action for violations of section 5(a)(1) (or section 5(a)(2), the specific duty clause) of the Act. Only the Secretary can charge a violation of the Act, and the employer is ultimately liable to the federal government, not an individual employee.

Moreover, we reject the Secretary's suggestion that Congress gave approval of his per exposed employee citing policy in the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3101 (1990), which amended section 17 of the Act, 29 U.S.C. § 666, by raising by sevenfold the maximum penalty for willful and repeat violations to $70,000 and establishing a $5,000 minimum penalty for willful violations. While this increase does show that Congress sought to reduce the deficit through the Secretary's general ability to use penalties to enforce the Act, neither the Omnibus bill nor its legislative history, to which the Secretary refers, expresses any endorsement of the instance-by-instance policy.[14] *Cf. Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622 n.6,

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[13](...continued)
adopted a specific per employee penalty provision in section 209(b) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1059(b), despite ``each of his employees'' language in the corresponding requirements provision in its section 209(a), 29 U.S.C. § 1059(a).

[14]However, this does not mean that the number of employees exposed to a hazardous condition is not a factor in penalty assessment. It has consistently been considered by the Secretary, as acknowledged in his old *Field Operations Manual* and his new *Field Inspection Reference Manual*, 3 BNA OSHR 77:2703, 2705 (Sept. 28, 1994), 4 CCH ESHG ¶ 7966.180 (Nov. 28, 1994), when determining the probability that an injury or illness will result, a factor he uses in deciding a proposed penalty. Moreover, under section 17(j) of the Act, 29 U.S.C. § 666(j), one of the factors (continued...)

1994 CCH OSHD ¶ 30,363, p. 41,882 n.6 (No. 88-1962, 1994) (Congress' intent in the Omnibus bill that the Secretary's ability to use penalties be enhanced does not reduce the Commission's authority to review penalty proposals); *MCI Telecommunications Corp. v. American Telephone and Telegraph Co.*, 114 S.Ct. 2223, 2233 (1994) (FCC's desire to increase competition cannot provide it with authority to alter rate-filing system that Congress created for the purpose of regulating common carrier rates).

For the reasons above, we conclude that there is no Congressional intent on this issue other than that clearly set forth in the language and structure of the Act.

C.

Only when the meaning of a statute is not clear from its language and legislative history is the issue for the reviewing court whether the agency's construction of the statute is ``reasonable." *Chevron*, 467 U.S. at 845. ``[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Id*. at 844. However, ``only if the Secretary's interpretation *is* reasonable" should the reviewing court defer to it. *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144, 158 (1991) (``*Martin v. OSHRC*") (emphasis in original). Such considerations as the adequacy of notice to the regulated parties and the quality of the Secretary's explanation of relevant policy concerns bear on reasonableness. *Id.* at 157.

One relevant and important factor in evaluating reasonableness is whether the Secretary ``has consistently applied the interpretation embodied in the citation." *CF&I*, 941 F.2d at 1055; *see Ehlert v. United States*, 402 U.S. 99, 105 (1971). An agency's interpretation of a regulation or statute that conflicts with its earlier interpretation is ``entitled to considerably less deference" than a view consistently held by the agency. *Cardoza-Fonseca*, 480 U.S. at 446 n. 30 (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)); *see Indus. Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 651 & n.58 (1980). As noted above, for more than twenty years the focus of the

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[14](...continued)
the Commission must give ''due consideration to" in assessing a penalty is the gravity of the violation, which includes consideration of the number of employees exposed to the violative condition. *E.g., J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214, 1991-93 CCH OSHD ¶ 29,964, p. 41,033 (No. 87-2059, 1993); *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1128, 1132, 1981 CCH OSHD ¶ 25,738, p. 32,107 (No. 76-2644, 1981).

Secretary's enforcement of section 5(a)(1), and thus the focus of Commission and court case law, has been on the existence of conditions which constitute a recognized hazard that can feasibly be abated. Even in cases that clearly involved abatement on a per employee basis, the Secretary never cited a separate violation of section 5(a)(1) for each employee exposed. *See Waldon Healthcare*, 16 BNA OSHC at 1053, 1993 CCH OSHD at pp. 41,145-46 (alleged that employer did not vaccinate its employees against hepatitis B virus); *Peter Cooper Corp.*, 10 BNA OSHC 1203, 1210-11, 1981 CCH OSHD ¶ 25,795, pp. 32,237-39 (No. 76-596, 1981) (alleged that employer did not inoculate its employees against anthrax).

Though he had not previously cited section 5(a)(1) on a per exposed employee basis, the Secretary has issued separate section 5(a)(1) citations based on separate hazards relating to the same event or area. In *ARO, Inc*., 1 BNA OSHC 1453, 1454, 1973-74 CCH OSHD ¶ 17,084, p. 21,732 (No. 465, 1973), the Secretary alleged two separate violations of section 5(a)(1), which the Commission affirmed, relating to the recognized hazard of an oxygen-deficient atmosphere: one violation charged failure to carry out safety procedures prior to repair work on the furnace; the other charged that suitable rescue equipment was not available. In *Chevron Oil Co.*, 11 BNA OSHC 1329, 1330-35, 1983-84 CCH OSHD ¶ 26,507, pp. 33,721-25 (No. 10799, 1983), the Secretary issued two section 5(a)(1) citations, which the Commission affirmed, relating to the same oil and gas platform: one for pipeline corrosion; the other for an inadequate fire detection system. In *Noble Drilling Corp.*, 6 BNA OSHC 2108, 2110-11, 1978 CCH OSHD ¶ 23,157, pp. 28,011-13 (No. 15405, 1978), the Secretary alleged two section 5(a)(1) violations, one for an inadequate emergency alarm system, and the other for failure to have a blowout valve.

The Secretary's practice in these cases is consistent with the test set out in *Caterpillar*, 15 BNA OSHC at 2172, 1991-93 CCH OSHD at p. 41,005: the question of whether the Act and (where applicable) the cited standard permit multiple or single units of prosecution turns on whether they prohibit individual acts or a single course of action. To the extent a hazard is separate and its abatement is peculiar to it, that hazard can be cited on that basis. Here, Raymond Donnelly, Director of OSHA's Office of General Industry Compliance Assistance, admitted in his deposition that there

is *only one* violative condition, not eighty-seven different violative events.[15] He further testified that if Arcadian had followed the citation's recommended abatement for any one of the section 5(a)(1) violations, it would have abated all eighty-seven.

Our finding that the Secretary's interpretation is unreasonable is not inconsistent with the Secretary's claim that Congress intended higher penalties as the result of the Omnibus Budget Reconciliation Act of 1990, discussed above. There, Congress provided explicit increases in the penalty structure; it did not authorize the Secretary to artificially inflate potential penalties by reversing twenty years of case law on section 5(a)(1). Moreover, the Secretary may not be limited to only one citation for violating section 5(a)(1) if more than one hazard exists.

Another factor in determining the reasonableness of an agency's interpretation is ''the quality of the Secretary's elaboration of pertinent policy considerations.'' *Martin v. OSHRC*, 499 U.S. at 158 (citing *Motor Vehicle Mfrs. Assn. of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). ''An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed.'' *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). The Secretary first gave express notice that he interprets section 5(a)(1) as permitting per exposed employee citing in *OSHA Instruction CPL 2.80, Handling of Cases to Be Proposed By Violation-By-Violation Penalties*, 1

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[15]The relevant part of the deposition reads:

> Q. So there is one so-called violative event or act, one condition, but there were allegedly 87 employees exposed; is that correct?
> A. That is correct.
> Q. They're not 87 different violative events, just one cited 87 items?
> A. There's one explosion.
> Q. So the number 87 is just a multiplier?
> A. 87 is the multiplier, representing the number of employees who we establish were exposed to this explosion waiting to happen while they worked. . . . .
> Q. My point is that Arcadian didn't have to correct the cited hazard 87 times, did it?
> A. No, it did not.
> Q. Just once?
> A. Yeah. . . . The answer is yes.

Deposition of Raymond Donnelly at pp. 122-25, August 16, 1993.

BNA OSHR Ref. File 21:9649, 9652, 1990 CCH ESHG New Developments ¶ 10,662, p. 13,592 (Transfer Binder) (October 1, 1990). There, he stated that for willful ``egregious" cases ``[e]ach employee exposed to the recognized hazard at the time of the violation constitutes a separate violation." *Id.* He also noted that ``[o]ver the past several years, in a limited number of cases OSHA has alleged a separate violation and proposed a separate penalty for each instance of noncompliance with OSHA recordkeeping regulations, with the safety and health standards, and with the General Duty Clause"[16] as a ``compliance strategy which improves the efficiency and effectiveness of the agency and conserves its limited resources." *Id.* at 21: 9649; 1990 CCH ESHG at 13,589. However, he provided *no specific explanation* for this policy change regarding *section 5(a)(1)* cases, just as he provided no discussion of his authority to issue such citations and no advance notice of this major change in interpreting the Act.

For the reasons above, we conclude that the Secretary's interpretation of section 5(a)(1) as permitting per exposed employee citing is unreasonable because ``it goes beyond the meaning that the statute can bear." *MCI*, 114 S.Ct. at 2226 (citing *Pittston Coal Group v. Sebben*, 488 U.S. 105, 113 (1988)); *Chevron*, 467 U.S. at 842-43; *see City of Chicago v. Environmental Defense Fund*, 114 S.Ct. 1588, 1594 (1994). The Secretary's claim that it can cite on a separate per employee basis in section 5(a)(1) cases ``rings hollow" after he has cited section 5(a)(1) on a per hazard basis for over twenty years. *See Building and Construction Trades Dept. v. Donovan*, 553 F.Supp. 352, 356 (D.D.C. 1982), *aff'd in part and reversed in part*, 712 F.2d 611 (D.C. Cir. 1983), *cert. denied*, 105 S.Ct. 93 (1984) (Secretary's claim to have ``discovered a wholly different congressional intent" than that perceived by prior fifteen Secretaries ``rings hollow"); *cf. Reich v. OSHRC (Erie Coke Corp.)*, 998 F.2d 134, 139 n.2 (3d Cir. 1993) (``*Erie Coke*") (court found it ``difficult to believe" that after living with particular precedent for twenty years, the Secretary now considers it to pose a threat to implementation of the Act).

There may be circumstances under which different hazards can be cited as section 5(a)(1) violations requiring different abatement actions. *See Chevron Oil*, 11 BNA OSHC at 1330-35, 1983-

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[16]We note that none of these section 5(a)(1) citations that the Secretary refers to as having been issued prior to CPL 2.80 reached the Commission for review.

84 CCH OSHD at pp. 33,721-25; *Noble Drilling Corp*., 6 BNA OSHC at 2110-11, 1978 CCH OSHD at pp. 28,011-13; *ARO*, 1 BNA OSHC at 1454, 1973-74 CCH OSHD at p. 21,732.

D.

Even if the Secretary's interpretation of section 5(a)(1) were reasonable, the Commission need not accord it deference. Although *Chevron*, 467 U.S. at 844, provides that courts must accord ''considerable weight" to a reasonable interpretation of a statute by the agency that administers it, this case is distinguishable from *Chevron* in one major respect. In *Chevron*, the agency in question was the Environmental Protection Agency, an agency to which Congress gave both administrative and adjudicative functions. *See* Reorganization Plan No. 3 of 1970, *reprinted in* 5 U.S.C. app. at 115 (supp. 1994). However, as the Court recognized in *Martin v. OSHRC*, 499 U.S. at 151, under the Occupational Safety and Health Act of 1970, the administrative and adjudicative functions are split between the Secretary and the Commission, respectively. The Court declared in that case that the Secretary's reasonable interpretation of the *standards and regulations that he himself promulgated* under the Act are entitled to deference. 499 U.S. at 152 (''[b]ecause the Secretary promulgates these *standards*, the Secretary is in a better position than is the Commission to reconstruct the purpose of the *regulations* in question" (emphases added), 157-58 (''Congress did not intend to sever the [Secretary's] power authoritatively to interpret OSH Act *regulations* from the Secretary's power to promulgate and enforce *them*" (emphases added)). *See Martin v. American Cyanamid Co.*, 5 F.3d 140, 141-42 (6th Cir. 1993) (Secretary's interpretation of his own standard at issue).

At issue in this case, however, is the Secretary's interpretation of a *statute*, the adjudication of which Congress expressly left to the Commission, not a regulation that the Secretary himself drafted and promulgated. ''The judiciary is the final authority on issues of statutory construction . . . ." *Cardoza-Fonseca*, 480 U.S. at 446-47 (quoting *Chevron*, 467 U.S. at 843 n.9). It is the Commission, not the Secretary, that is charged with the final administrative adjudication of the Act. *Brennan v. OSHRC (Ron M. Fiegen, Inc.)*, 513 F.2d 713, 715-16 (8th Cir. 1975); *see* section 2(b)(3) of the Act, 29 U.S.C. § 651(b)(3) (Congress assures so far as possible safe and healthful working conditions ``by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under this Act"). Therefore, the Commission need not defer to the Secretary's interpretation of this, or any other, statute.

Moreover, the construction of section 5(a)(1) at issue touches directly upon the appropriateness of the penalty, which is solely within the Commission's statutory authority. *See* section 17(j) of the Act, 29 U.S.C. § 666(j); *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1621-23, 1994 CCH OSHD ¶ 30,363, pp. 41,881-83 (No. 88-1962, 1994). Under this authority, the Commission may assess a single, combined penalty even when the Secretary has cited an employer for more than one violation. *See H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1046, 1981 CCH OSHD ¶ 25,712, p. 32,056 (No. 76-4765, 1981) (violations of different standards with common abatement); *Hoffman Constr. Co.*, 6 BNA OSHC 1274, 1275-76, 1977-78 CCH OSHD ¶ 22,489, p. 27,120 (No. 4182, 1978) (violations of the same standard at two locations at same worksite).

Furthermore, in *Chevron*, the Court stated that where an agency has a ``legislative delegation of authority," it is entitled to deference or controlling weight. 467 U.S. at 844. However, OSHA Instruction CPL 2.80, upon which the Secretary relies, is a discretionary enforcement guideline not published in either the Federal Register or the Code of Federal Regulations. Therefore, it does not establish the kind of binding legal standard entitled to deference under *Chevron*. *See Batterton v. Francis*, 432 U.S. 416, 425 n. 9 (1977).[17]

III.

Section 10(c) of the Act, 29 U.S.C. § 659(c), authorizes the Commission to ``issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or *directing other appropriate relief*." (emphasis added) *See Erie Coke*, 998 F.2d at 139, *aff'g* 15 BNA OSHC 1561, 1570, 1991-93 CCH OSHD ¶ 29,653, p. 40,156 (No. 88-611, 1992). As with any equitable concept, the nature of ``other appropriate relief" may vary from case to case. In *Erie Coke*, it was the Commission's authority to characterize, *sua sponte*, a violation as *de minimis* based on the unique record, where the Secretary had classified it as other-than-serious. *See, e.g., Oil, Chemical and Atomic Workers International Union*, 16 BNA OSHC 1339, 1343 (No. 91-3349, 1993) (it is under ``other appropriate relief" authority that the Commission reviews and approves

[17]The Court also mentioned in *Chevron* that an agency's expertise may be a basis for its interpretation being entitled to certain weight. 467 U.S. at 865-66. The Commission members are selected based on their ''training, education, or experience" and thus have expertise. Section 12(a) of the Act, 29 U.S.C. § 661(a). Even assuming that the Secretary is entitled to deference in light of his expertise, his interpretation is entitled to considerable, but not controlling, weight. *Chevron*, 467 U.S. at 844.

settlements as enforceable final orders); *Granite City Terminals Corp.*, 12 BNA OSHC 1741, 1748, 1986-87 CCH OSHD ¶ 27,547, p. 35,777 (No. 83-882-S, 1986) (``other appropriate relief'' authority is consistent with the Administrative Procedure Act's grant of authority to issue declaratory orders, 5 U.S.C. § 554(e)); *Continental Can Co.*, 4 BNA OSHC 1541, 1552, 1976-77 CCH OSHD ¶ 21,009, p. 25,261 (No. 3973, 1976) (consolidated) (Cleary, Commr., dissenting) (if an employer affirmatively shows economic hardship, Commission can adjust the abatement period under its power to afford ``other appropriate relief'').

Because this is a case of first impression, the Secretary had no notice of the holding that we announce here. Therefore, it would be inequitable not to extend an opportunity for the Secretary to amend the citation. Thus, we remand this case to the judge and order him to consolidate this case with *Arcadian Corp.*, Docket No. 93-628, which is still before him, and to afford the Secretary an opportunity to amend the citation, if appropriate, to allege separate section 5(a)(1) violations for separate hazards, requiring different abatements, which may have existed. *See ARO*, 1 BNA OSHC at 1454, 1973-74 CCH OSHD at p. 21,732.

It is so ordered.

/s/
Edwin G. Foulke, Jr.
Commissioner

/s/
Velma Montoya
Commissioner

Dated: April 27, 1995

Arcadian Corporation, Docket No. 93-3270
WEISBERG, Chairman, dissenting:

I.

Although the confidentiality of the Commission's deliberative process in this case has already been breached, the importance of maintaining confidentiality in our deliberative process makes me extremely reluctant to discuss this process further here. However, the affront to the integrity and reputation of the Commission produced by the controversy surrounding this case leaves me little choice.

I note first that the Commission's sole function is adjudicatory. Indeed, the Supreme Court analogized the Commission to a ''court" in *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144, 154 (1991). Moreover, as the Occupational Safety and Health Act of 1970, 29 U.S.C. §§651-678 (``the Act"), calls for the appointment of three Commissioners, it envisions that the adjudicative process will be a collegial one. Consistent with such collegial decision making it has been the Commission's longstanding and unwavering practice that all sitting Commissioners participate in every case absent recusal on the part of one of the Commissioners. This practice assumes that each Commissioner has a reasonable opportunity to act on each case. Such action might consist of circulating a separate or dissenting opinion, and responsive revisions in an attempt to persuade other Commissioners of the merits of his or her position or, alternatively, to force them to address issues or case precedent they might prefer to avoid. The circulation of opinions and responses sharpens debate and improves the articulation of views on all sides, the very essence of collegial decision making. Thus, the quorum provision of the Act, section 12(f), 29 U.S.C.§ 661(f), has always been *de facto* interpreted as merely enabling the Commission to act when either the third Commissioner has chosen not to participate in a case for whatever reason or a Commissioner position is vacant. Indeed, there is no basis for interpreting 12(f) as a tool for, in effect, aborting the deliberative process by permitting two Commissioners to unilaterally act on their own without the participation of a third sitting Commissioner.

On April 27, 1995, the last day of former Commissioner Edwin Foulke's term, Commissioners Foulke and Montoya signed an opinion in this case and one in *Hartford Roofing Co.,*

Inc., OSHRC Docket No. 92-3855.[18] These cases both raise important issues concerning the Secretary's discretion to cite an employer on a person by person or instance by instance basis under his ''egregious, willful" policy and are inextricably interrelated, as the Commission acknowledged on July 15, 1994 when it granted Hartford's motion requesting that the two cases be considered "in conjunction" with one another.

On the afternoon of April 27, Commissioner Montoya, relying on section 12(f) of the Act which, as noted above, merely provides that two Commission members constitute a quorum, informed the Commission's Executive Secretary by memorandum that she "expect[ed]" the two decisions to be issued that day and that any separate opinion from the Chairman could follow. Her memorandum was not copied by her to me or to then-Commissioner Foulke, nor had I been informed earlier that an attempt would be made to issue these cases whether or not I had yet completed and circulated my separate opinion. The Executive Secretary then responded to Commissioner Montoya by memorandum and circulated his response and Commissioner Montoya's memorandum to all the Commissioners stating that he had not been instructed by then-Commissioner Foulke to issue the signed opinions or to issue them without the Chairman's signature or opinion. Commissioner Foulke

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[18] When a single Commissioner directs a case for review, the Commissioner signs and dates the direction and delivers it to the Executive Secretary to be issued. In contrast, the usual practice for issuing a Commission decision is that, when deliberations on the case have been completed and all the Commissioners have signed off on either the main or a separate opinion, the signed opinion(s) are delivered first to the Office of General Counsel so that the Commission decision number can be placed on the first page. Then the opinion(s) normally are delivered by the General Counsel's Office to the Executive Secretary, who enters the issuance date on the signature page(s) and issues the decision. Unlike *Gurney Industries*, 1 BNA OSHC 1376, 1973-74 CCH OSHD ¶ 16,805 (No. 722, 1973)(date of issuance of direction for review is the date the direction is delivered to the Executive Secretary and *not* the date that it is signed by the Commissioner) which specifically relates to a direction for review that, under section 12(j) of the Act, can be done by any Commission member acting alone, the instant case involves the issuance of a *decision* by the three-member Commission entailing a different protocol. However, on April 27, Commissioners Montoya and Foulke submitted the opinions they had signed in these cases to the Executive Secretary, with the date of April 27 already entered on the signature page and without the Commission decision number on the first page.

did not respond to that memorandum nor did he take any other action to instruct the Executive Secretary to issue the cases without my participation.

However, on the day after his term ended, former Commissioner Foulke apparently informed Arcadian, the respondent in this case, that he had signed an opinion in the case on the preceding day (see letter from Arcadian's attorneys to the Commission's Executive Secretary dated May 1, 1995 and attached as Exhibit A to Arcadian's petition in *In re: Arcadian Corporation,* No. 95-1259 (D.C. Cir., filed May 15, 1995)). It is unclear who informed Arcadian that Commissioner Montoya had signed the opinion as well. In any event, a mandamus action in the circuit court against the Commission, the Executive Secretary and

myself was filed by Arcadian attempting to force the Commission to issue the opinion signed by my two colleagues as a final action of the Commission without my participation. *In re: Arcadian Corp., supra.* Subsequently, several members of Congress, including two House subcommittee chairmen, began expressing their concern and, in some instances, questioning why the opinions reportedly signed by my colleagues in April had not issued.

Putting aside the chilling effect that contacts by a former Commissioner with one party to a case may have on the deliberative process, I feel compelled, however, to address the threat to the deliberative process posed by the attempt to issue these cases without my participation. Commissioner Montoya's view, that under section 12(f) two Commissioners constitute a quorum and therefore they are free to act without providing the third Commissioner a reasonable opportunity to respond, has the effect of relegating the third Commissioner to "potted plant" status. Indeed, the ordinary definition of a "quorum" is "the number of the members of an organized body . . . that when duly assembled is legally competent to transact business *in the absence of other members*." *Webster's Third New International Dictionary* at 1968 (1986) (emphasis added). *See Murray v. National Broadcasting Co.*, 35 F.3d 45 (2d Cir. 1994). The Congress did not provide for three Commissioners only to have two Commissioners take it upon themselves to act without affording the third a reasonable opportunity to "weigh in".

As to Commissioner Montoya's suggestion that I could issue a separate opinion later on, I know of no case in the Commission's almost twenty-five year history, and Commissioner Montoya has not cited any, where the Commission has issued a decision on

a piecemeal basis. The sixty day time period for appealing a Commission decision to the court of appeals runs from the issuance date. Section 11(a) & (b) of the Act, 29 U.S.C. § 660(a) & (b). *Reich v. Trinity Industries*, 16 F.3d 1149, 1155 (11th Cir. 1994) (cross-petition denied if not filed within sixty days after issuance of Commission decision). *See also Midway Indus. Contractors. v. OSHRC*, 616 F.2d 346 (7th Cir. 1980). Clearly, the parties should have the benefit of the opinion of all three sitting Commissioners before determining whether to file an appeal. Nor should the third Commissioner by fiat, as opposed to by duly promulgated Commission procedures, be given a time period to respond which bears no relationship to reasonableness. Most importantly, however, this approach denies a third Commissioner the opportunity to influence his colleagues' views or to elicit response by forcing them to address issues, arguments or case precedent they might prefer to ignore. Under this approach "collegial" decision making is thus reduced to a forum for unilateral statements of position with no further illumination through the process of debate and comment or responsive revisions.[19]

Moreover, any suggestion that I deliberately withheld my opinion in these two cases to block or "pocket veto" decisions by my colleagues simply because I disagreed with the results is totally baseless. During the last two months of Commissioner Foulke's term, the Commission issued more than twenty decisions. *Ralph Taynton d/b/a Service Specialty Co.*, 17 BNA OSHC 1205 1995 CCH OSHD ¶ 30,766 (No. 92-498, 1995), *petition for review filed*, No. 95-4788 (11th Cir. June 26, 1995) and *General Motors Corp., Delco Chassis* Div., 17 BNA OSHC 1217, 1995 CCH OSHD ¶ 30,793 (No. 91-2973, 1995) *(*consolidated), *petition for review filed*, No. 95-3660 (6th Cir. June 9, 1995), two similarly important precedent setting cases in which I dissented, issued during the last two days of Commissioner Foulke's term. Given the

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[19] Commissioner Montoya's present notion that somehow the deliberative process was concluded when this case was voted on at a Commission meeting makes a mockery of that process and the concept of collegial decision making. It is undisputable that the votes taken at a Commission meeting are "preliminary" in nature and not binding. Not only can a Commissioner change his or her vote or rationale up to the moment that a decision issues but most, if not all Commissioners, including myself and Commissioner Montoya, have exercised their right to do so. Indeed, in one particular case, both former Commissioner Foulke and myself were persuaded by the rationale and case precedent cited in a dissenting opinion circulated by Commissioner Montoya and we both changed our votes and joined Commissioner Montoya.

crush of cases the Commission considered and issued in the last months of Commissioner Foulke's term, the comprehensive separate opinions that I drafted in other cases, and the time it took for the majority opinions in *Arcadian* and *Hartford Roofing* to coalesce and circulate, there simply was insufficient time for me to draft dissenting opinions in these two related cases by April 27. In this regard, in one of these cases my colleagues took almost seven months to complete a *first draft* of the majority opinion and in the other a *first draft* of the majority opinion was not even completed and circulated to me until the final days of Commissioner Foulke's term. Revisions to both majority opinions continued to be made until 48 hours before the end of Commissioner Foulke's term.

The Commission issued an exceptional number of cases in the last months of Commissioner Foulke's term. Regrettably, this case was not among them. However, typically when a commissioner's or board member's term ends there are many cases in various stages of the decision-making process, some closer to completion than others, and not all cases that that commissioner has worked on issue.

Nevertheless, I am mindful that during the Commission's early years, apparently on an occasional and ad hoc basis, the Commission, without discussion, issued decisions with a departing Commissioner's signature after that individual's term had ended. *See, e.g., Southern Bell Telephone and Telegraph Co.* 5 BNA OSHC 1405, 1977-78 CCH OSHD ¶21,840 (No. 10,340, 1977), *General Electric Co.* 5 BNA OSHC 1448, 1977-78 CCH OSHD ¶21,853 (No. 11,344,1977), *rev'd,* 583 F.2d 61 (2d Cir. 1978). It appears that the Commission has issued only one decision in the past decade with a departing Commissioner's signature after the expiration of that member's term. Evidently, in all those cases the three Commissioners had consented to issuing the decisions after the expiration of a Commissioner's term. Moreover, it does not appear that the validity of those Commission decisions was challenged or that the issue of whether a Commissioner's signature authority survives the expiration of his term was raised before the courts.

In my view, former Commissioner Foulke's signature on this Commission decision is invalid. There is nothing in the Act to suggest that Congress intended that a Commissioner's signature authority would continue past the expiration of his or her term. Nor is there a consistent and agreed upon practice of doing so. *Cf. State of Idaho v. ICC*, 939 F. 2d 784 (9th Cir. 1991). Indeed, in theory, Commissioner Foulke's successor could have been sworn in on April 28. Had this occurred,

continuing to count Commissioner Foulke's vote could have resulted in four votes by a three member Commission. Moreover, Commissioner Foulke's departure deprives me of the opportunity to persuade him by means of a well-reasoned dissent to change his vote or to elicit response.

I have now had an opportunity to craft my dissent in this case and have given Commissioner Montoya every opportunity to respond, which she has declined.[20] Therefore, given the controversy and the resulting disruption and the aspersions cast on the integrity of the Commission, I believe that the public interest is best served at this juncture by issuing this decision with former Commissioner Foulke's signature. The Secretary is then free to challenge the validity of this decision on appeal, thus permitting the courts to consider the troubling issues that are raised.

II.

This case is before the Commission on the narrow issue of whether the Secretary is precluded *as a matter of law* from citing an employer for violations of section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 654(a)(1), the general duty clause, on a per employee basis. My colleagues once again find refuge and support in what they term the "plain meaning."[21] In this case they rely on the "plain meaning" of section 5(a)(1) to find that the Secretary does not have the authority under the Act to cite an employer for each individual employee exposed to the same hazardous condition(s). The majority's action, however, is at odds with the Commission's holding and rationale in *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2172-73,1991-93 CCH OSHD ¶ 29,962, pp. 41,005-07 (No.87-922, 1993), where my colleagues endorsed instance-by-instance

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[20]Rather than respond in a collegial fashion in the proper forum, in this decision, as envisioned by Congress when it established this three-member Commission, Commissioner Montoya instead today filed a petition for a writ of mandamus in the D.C. Circuit Court of Appeals. *In re: Montoya*, No. 95- (D.C. Cir. filed September 15, 1995). She filed this action in her own name and also, inexplicably, "on behalf of the Commission," and has moved to have her mandamus petition consolidated with those of Arcadian and Hartford, the parties in these cases before us.

[21] *See, e.g.,General Motors Corp., Delco Chassis Div.*, 17 BNA OSHC 1217, 1995 CCH OSHD ¶ 30,793(No. 91-2973, 1995) *(*consolidated), *petition for review filed*, No. 95-3660 (6th Cir. June 9, 1995); *Ralph Taynton d/b/a Service Specialty Co.*, 17 BNA OSHC 1205, 1995 CCH OSHD ¶ 30,766 (No. 92-498, 1995), *petition for review filed*, No. 95-4788 (11th Cir. June 26, 1995).

citations by the Secretary under section 5(a)(2) of the Act, 29 U.S.C. § 654(a)(2), for violating certain standards even though the Act and its legislative history neither mandates nor prohibits such actions by the Secretary. My colleagues here, relying on the same legislative history and arguments that they did not find persuasive or determinative in *Caterpillar*, deny the Secretary this same prosecutorial discretion in the section 5(a)(1) context and yet fail to address this fundamental inconsistency. I find that the Secretary is not precluded from citing section 5(a)(1) on a per employee basis as a matter of law, and that such a unit of prosecution is reasonable *either* where the action or conduct giving rise to each separately-cited violation of the general duty clause involves an act that is physically discrete or distinctly individual in nature *or* where the evidence shows that the circumstances in the case warrant the use of this extraordinary enforcement tool. Accordingly, I must dissent.

The Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act") established a "split enforcement" structure. The Secretary was given the responsibility for promulgating substantive occupational safety and health standards, conducting inspections and prosecuting contested cases. The Commission was assigned the responsibility to adjudicate contested citations and to assess penalties. The enforcement of the Act is the sole responsibility of the Secretary. *See Cuyahoga Valley Ry.* v. *United Transp. Union*, 474 U.S. 3, 6 (1985); *see also* sections 8, 9, and 10 of the Act, 29 U.S.C. §§ 657, 658, and 659. The framework of the Act provides the Secretary with two tools or mechanisms for enforcement: section 5(a)(2), requiring employers to comply with "the occupational

safety and health standards" and regulations promulgated by the Secretary; and section 5(a)(1), requiring an employer 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."

Section 5(a)(1) protects employees from all recognized hazards that can be characterized as "serious," not simply the relatively few workplace dangers specifically addressed by OSHA standards. Section 5(a)(1) was included in the Act to protect employees from safety and health

hazards where no standard has been enacted to cover the situation.[22] The Commission has long held that a citation for violation of section 5(a)(1), the general duty clause, "is not appropriate where there exists a specific occupational safety and health standard covering the conduct at issue." *Sun Shipbuilding & Drydock Co.*, 1 BNA OSHC 1381, 1382, 1973-74 CCH OSHD ¶ 16,725, p. 21,474 (No. 161, 1973), *quoted with approval in New York State Electric & Gas Corp.*, 17 BNA OSHC 1129, 1130, 1995 CCH OSHD
¶ 30,745, p. 42,706 (No. 91-2897, 1995) *petition for review filed*, No. 95-4073 (2d Cir. May 3, 1995). While section 5(a)(2) is the predominant enforcement tool of the Secretary under the statute,[23] over the almost twenty-five year history of the Act, as a result of the lack of standards in many areas, the Secretary has placed increased reliance on section 5(a)(1).

Normally, the Secretary issues one single citation item for each standard alleged to have been violated. When the Secretary acts under the "egregious" policy, he sets forth each alleged instance of violation of a particular standard as a separate and distinct citation item with a separate penalty for each instance.

In *Caterpillar*, the Commission held that, depending on the standard involved, the Secretary may have authority under the Act to cite each instance of noncompliance with the standard as a separate violation. The Secretary there had cited individually 167 failures to record injuries in violation of 29 C.F.R. § 1904.2(a). This regulation requires employers to "enter each recordable injury or illness on the log." The Commission concluded, based on the language of the cited regulation, that every time the employer failed to enter a particular recordable injury or illness on a log, there was an "individual act" and "it was within the discretion of the Secretary to cite each failure to record as a separate violation." 15 BNA OSHC at 2173, 1991-93 CCH OSHD at p. 41,007.

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[22] *See* S.Rep. 1282, 91st Cong., 2d Sess. 9(1970), *reprinted in* Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970* ("Leg. Hist.") at 149-50 (1971); H.R. Rep. 1291, 91st Cong., 2d Sess. 21-22, Leg. Hist. at 851-52.

[23] See sections 2(b)(3), 2(b)(9), 5(a)(2), and 6(a) and (b) of the Act; 29 U.S.C. §§ 651(b)(3), 651(b)(9), 654(a)(2), 655(a) and (b); S. Rep. at 5, 10, Leg. Hist. at 145, 150; *see also Brisk Waterproofing Co.*, 1 BNA OSHC 1263, 1264, 1973-74 CCH OSHD
¶ 16,345 at p. 21,261 (No. 1046, 1973).

This holding applies even when a "single course of action," *e.g.*, a management decision not to record a particular type of injury, leads to multiple recording errors.

In *Caterpillar* the Commission assessed a separate penalty for each violation, concluding that the Act neither mandated nor prohibited separate penalties with respect to each instance of a violation of a particular standard. 15 BNA OSHC at 2172, 1991-93 CCH OSHD at p. 41,005; *cited with approval in S.A. Healy Co.,* 17 BNA OSHC 1145, 1151, 1995 CCH OSHD ¶ 30,719, p. 42,639 (No. 89-1508, 1995), *petition for review filed,* No. 95-2421 (7th Cir. June 15, 1995). The Commission also upheld the Secretary's per instance citing of the recordkeeping regulation *notwithstanding* the Secretary's "long-standing practice" of issuing a single citation and a single proposed penalty regardless of how many failures to record or mistakes in recording were discovered. 15 BNA OSHC at 2170, 1991-93 CCH OSHD at p. 41,003.[24] The Commission noted that this long-standing practice applied generally to citations brought under section 17(a) of the Act, 29 U.S.C. § 666(a), which sets penalty limits for willful or repeated violations. *Id*. Thus, the Commission in *Caterpillar* clearly recognized that the Secretary has wide prosecutorial discretion which can evolve and change. *See Cuyahoga Valley Ry.* 474 U.S. at 6; *see also Hoffman Constr. Co.*,6 BNA OSHC 1274, 1275, 1977-78 CCH OSHD ¶ 22,489. p. 27,120 (No. 4182, 1978) ("it is within his discretion as the prosecutor under the Act" to cite separate violations of the same scaffold guarding standard).

In subsequent decisions the Commission has reaffirmed *Caterpillar* and upheld the Secretary's instance-by-instance citing for violations of recordkeeping and other appropriate standards, and has assessed separate penalties for each violation. *See Sanders Lead Co.,* 17 BNA OSHC 1197, 1995 CCH OSHD ¶ 30,740, pp. 42,691, 42,694 (No. 87-260,1995) *petitions for review filed*, No. 95-1327 (D.C. Cir. June 23, 1995) and No. 95-6519 (11th Cir. June 26, 1995)(medical removal protection standard, 29 C.F.R. § 1910.1025(k)(1)(i)(D), requiring employer to "remove an

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[24] The Commission acknowledged in *Caterpillar* that, prior to 1986, the Secretary had consistently interpreted and applied the regulation in question as a broad prohibition against failure to maintain a complete and accurate OSHA log. See 15 BNA OSHC at 2172-73, 1991-93 CCH OSHD at p. 41,006. Significantly, nothing in that decision suggests that the prior interpretation was incorrect or that the regulation could no longer be enforced in that manner. Rather, both interpretations are *permissible.*

employee from work having an exposure to lead at or above the action level" permits the Secretary to cite as many violations as there were failures to remove; respirator fit-test standard, 29 C.F.R. § 1926.1025(f)(3)(ii), requiring employers to "perform either quantitative or qualitative face fit tests … for each employee wearing negative pressure respirators" permits citations by the Secretary on a per employee basis); *Kohler Co.*, 16 BNA OSHC 1769, 1776, 1994 CCH OSHD ¶ 30,457, p. 42,064 (No. 88-237, 1994) (277 separate violations of the recordkeeping standard at section 1904.2(a)); *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1209, 1993 CCH OSHD ¶ 30,046, p. 41,251 (No. 89-433, 1993) (several separate recordkeeping violations of section 1904.2(a)); *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213, 1991-93 CCH OSHD ¶ 29,964. pp. 41,032-33 (No. 87-2059, 1993) (employer failed to provide fall protection at 77 discrete, individual locations where employees were exposed to a fall hazard in violation of 29 C.F.R. § 1926.500).

The Commission has also recognized that the Secretary's authority to cite some violations on an instance-by-instance basis encompasses the authority to cite violations of certain standards and regulations on an employee-by-employee basis. Thus, in *Hartford Roofing Co.*, OSHRC Docket No. 92-3855, slip op. at p. 8, which is decided this same day, my colleagues expressly acknowledge that "[s]ome standards implicate the protection, etc. of individual employees to such an extent that the failure to have the protection in place for

each employee permits the Secretary to cite on a per-instance basis." In *Hartford Roofing*, my colleagues and I disagreed as to whether the standard at issue, 29 C.F.R.§1926.500 (g)(1), is such a standard. However, in another recent case, *Sanders Lead*, we all agreed that two of the standards at issue there, 29 C.F.R. §§ 1910.1025(f)(3)(ii) and (k)(1)(i)(D) "implicate the protection, etc. of individual employees to such an extent" that it was appropriate for the Secretary to cite violations of those standards on an employee-by-employee basis. 17 BNA OSHC at 1199-1200 and 1203, 1995 CCH OSHD at pp. 42,691, 42,694.

The key to each of the decisions listed above is the *language* of the standard or regulation that has been cited. *E.g., Sanders Lead*, 17 BNA OSHC at 1200, 1995 CCH OSHD at p. 42,691 ("It is … the language of the standard that is determinative"). If that language can be interpreted in such a manner that each individually cited instance of noncompliance constitutes a separate and distinct

violation of the standard, then the Commission has held that the Secretary does not exceed his authority under the Act by citing the violations on an instance-by-instance basis rather than "grouping" them into a single citation item. Also, the issue is whether the interpretation of the standard or regulation as prohibiting "individual acts" rather than "a single course of action" is a permissible one. *See supra* note 7. Not one of the decisions listed above holds that the Secretary is *required* to issue citations under some standards on an instance-by-instance basis. Rather, in the situations noted, the Secretary has prosecutorial discretion to determine which approach he will follow and the Commission has statutory authority to assess per instance penalties when they are proposed.

I can perceive no logical reason, nor have my colleagues provided such, why the Commission's recent holding and rationale in *Caterpillar* and its progeny should not apply equally in the section 5(a)(1) context. While recognized hazards and their abatement are elements that comprise a salient part of any section 5(a)(1) violation alleged by the Secretary, they do not compel the Secretary to cite the violations on a hazard-by-hazard or abatement measure-by-abatement measure basis. Once the Secretary determines that all of the elements of a violation are present, these factors do not circumscribe the Secretary's discretion to determine the appropriate mode and scope of enforcement. The Secretary has wide prosecutorial discretion, and the ability to evolve, modify and change his enforcement mechanisms so as to best promote and advance the purposes of the statute.

I acknowledge, as my colleagues emphasize, that the interpretation of section 5(a)(1) in this case departs from the Secretary's longstanding practice. However, the method of enforcement in *Caterpillar* was similarly contrary to a longstanding policy of issuing a single citation and proposed penalty regardless of how many recordkeeping violations were found in a particular OSHA log. 15 BNA OSHC at 2170, 1991-93 CCH OSHD at p. 41,003. Notwithstanding the clear change in practice and policy, the Commission there concluded that "it was within the discretion of the Secretary to cite each failure to record as a separate violation." 15 BNA OSHC at 1273, 1991-93 CCH OSHD at p. 41,003. Thus, consistent with the Commission's holding in *Caterpillar* that the Secretary's clear change of practice and

policy under 5(a)(2) did not affect his ability to cite on a per instance basis, the fact that the Secretary for more than 20 years after the passage of the Act had a policy of issuing a single citation and proposed penalty under section 5(a)(1) regardless of the number of employees exposed poses no bar to the Secretary subsequently citing on a per employee basis. There is no reason to deny to the Secretary under section 5(a)(1) the same prosecutorial discretion exercised in *Caterpillar* in the section 5(a)(2) context.

Furthermore, my colleagues' criticism of the Secretary's instance-by-instance citation policy in this section 5(a)(1) case, namely that it would result in the same abatement order 87 times, and would serve only to inflate penalties, is the same argument that the Commission rejected in the section 5(a)(2) context. For example, in *Kohler Co.*, the Commission noted that 202 of the recordkeeping violations before it were all attributed to a single defect in the employer's recordkeeping program. 16 BNA OSHC at 1777 n.17, 1994 CCH OSHD at p. 42,065 ("202 instances … were due solely to failure to track follow-up treatment"). A single abatement order would have sufficed in that context. Yet, the Commission upheld the issuance of 202 separate citations and it assessed 202 separate penalties. [25] Also, the Secretary's view that it is reasonable for him to be able to cite section 5(a)(1) on a per employee basis in order to deter employers from violative conduct is all the more significant because he cannot refer section 5(a)(1) cases, unlike section 5(a)(2) cases, to the Department of Justice for criminal prosecution. See section 17(e) of the Act, 29 U.S.C. § 666(e).

My colleagues also claim that it would be "incongruous" to consider anything but the hazard as the unit of prosecution in section 5(a)(1) cases in light of the definition of "occupational safety and health standard" at section 3(8) of the Act, 29 U.S.C. § 652(8). However, the majority's reliance on section 3(8) is misplaced because, although that definition provides that a standard must be directed at conditions or practices, in reality many of the conditions, practices, or methods that are required by OSHA standards focus on individual employees. *E.g., Sanders Lead* (removing each

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[25] Similarly, in *Sanders Lead*, the Commission assessed instance-by-instance penalties even though "a single management decision to apply certain criteria uniformly to all employees" was apparently the cause of each of the cited violations before it. 17 BNA OSHC at 1200, 1995 CCH OSHD at p. 42,691.

employee based on the elevated blood level and ensuring that respirator fits each employee properly); *Caterpillar* (recording of each work-related injury suffered by each employee); *Hern* (same); and *Kohler* (same). *Accord, RSR Corp.,* 11 BNA OSHC 1163, 1180, 1983-84 CCH OSHD ¶ 26,429, p. 33,558 (No. 79-3813, 1983) (consolidated) (view of Commissioner Cottine, that the lead "standards violated … were designed to maximize individual employee participation in the medical

surveillance program … and the violations are uniquely individual in nature"), *aff'd on other grounds,* 764 F.2d 355 (5th Cir. 1985).

I take strong exception to my colleagues' statement that the language and structure of section 5(a)(1) and the Act as a whole, and its legislative history, leave "no doubt" that Congress did not intend to permit the Secretary to cite section 5(a)(1) on a per employee basis. Section 5(a)(1) provides that "[e]ach 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.*" (emphases added) Also, several other provisions of the Act refer to protecting the individual employee. *See, e.g.*, 29 U.S.C. §§ 651(b)(7), 655(b)(5), 657(c)(3), 657(f), 659(c), and 660(c). The majority dismisses the phrase "to each of his employees" as a "rhetorical nicety" and finds that the intended meaning of this provision is that an employer is required to provide safe employment to "each" employee, not just some of them. However, the phrase "each of" is not needed to give section 5(a)(1) this meaning. If Congress had simply said that "[e]ach employer . . . shall furnish his employees [safe employment]," there would have been no dispute that this duty applied to all employees and not just some of them.

The Secretary, on the other hand, argues that the plain language of section 5(a)(1) creates a duty owed by an employer "to each of his employees" and thus supports a general duty clause citation on a per employee basis. However, this provision on its face also refers to "recognized hazards that are causing or are likely to cause death or serious physical harm to *his employees*." Thus, section 5(a)(1) itself refers to both "each employee" and "employees."

While the language of section 5(a)(1) can be read as being compatible with and supporting the Secretary's interpretation, it does not resolve the question of Congressional intent. Nor does the Act's legislative history. There is no evidence that Congress even considered the matter at issue here

-- whether section 5(a)(1) may be cited on a per employee basis. In short, the ambiguous language and structure of section 5(a)(1) and the Act as a

whole and the non-existent legislative history on this point do not establish that the Secretary's per employee citing of section 5(a)(1) is unreasonable, much less "patently unreasonable" as my colleagues find. I therefore conclude that the Act neither mandates nor prohibits the Secretary from citing section 5(a)(1) on a per employee basis. Significantly, there is nothing in the Act or its legislative history to suggest that Congress contemplated instance-by-instance citations and penalties for section 5(a)(2) violations when the Act was passed or for that matter that Congress contemplated them in section 5(a)(2) cases but not in section 5(a)(1) cases. Yet my colleagues found such instance-by-instance citations appropriate in *Caterpillar*.

In the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3101 (1990), which amended section 17 of the Act, Congress increased by sevenfold to $70,000 the maximum penalty for willful and repeat violations and established a $5,000 minimum penalty for willful violations. This sharp rise in penalties, more than double the increase needed to keep pace with inflation, was enacted to "deter violations and ensure adequate enforcement by OSHA." The new $5,000 mandatory minimum penalty for willful violations was adopted "to ensure that the most egregious violators" are effectively penalized. H.R. Conf. Rep. No. 964, *reprinted in* 1990 U.S. Code Cong. & Admin. News 2393. The Omnibus bill and its legislative history clearly reflects an intent by Congress to enhance the Secretary's ability to use higher penalties to enforce the provisions of the Act. However, even though this action by Congress occurred at a time when the Secretary's "egregious"

case policy involving mega-fines, *i.e.*, fines of more than a million dollars, was well known to Congress, the Omnibus bill and its legislative history does not constitute an "express" endorsement by Congress of the Secretary's instance-by-instance policy, either under section 5(a)(2) or 5(a)(1).

In short, the Secretary's interpretation of section 5(a)(1) so as to permit the Secretary to cite an employer separately for each employee willfully exposed to a hazard is reasonable because it is consistent with the Commission's holding in *Caterpillar* which approves instance-by-instance citing in the 5(a)(2) context, and because it is compatible with the terms and purposes of the Act and it is not in conflict with the plain language of section 5(a)(1).

Turning to the issue of deference, I share my colleague's view that, in general, the Commission need not defer under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the Secretary's interpretation of a statute created by Congress as opposed to a regulation that the Secretary himself drafted and promulgated. However, it is necessary to consider the nature of the particular statutory provision. Here, whether or how to cite under section 5(a)(1) relates directly to the Secretary's prosecutorial discretion and goes to the heart of his enforcement authority. *See Cuyahoga Valley Ry.*, 474 U.S. at 6-7 (necessary adjunct of the Secretary's authority to determine if a citation should be issued (under section 9(a) of the Act) is the unreviewable discretion to withdraw a citation and settle a case); *Martin v. Pav-Saver Mfg. Co.*, 933 F.2d 528, 531 (7th Cir. 1991) ("the Secretary's multifaceted--and delicate--enforcement responsibilities [under section 10 of the

Act] during this fifteen-day period make reasonable her regulatory interpretation of the Act as requiring written notice of contest" and thus "we owe deference to her interpretation of the statute"). Accordingly, the inapplicability of *Chevron* notwithstanding, in this context the Secretary's interpretation of section 5(a)(1), if reasonable, is entitled to deference. Moreover, given the silence in the legislative history, the Secretary's broad discretion in enforcing the Act and the Secretary's previous application of its egregious policy in enforcing standards (which the Commission has endorsed), I would find the Secretary's interpretation here is reasonable as a matter of law.

Therefore, in my view the Secretary is not precluded as a matter of law from citing an employer under section 5(a)(1) on a per employee basis. However, as the Commission noted in *Caterpillar* "[n]ot all violations of the Act, standards, or regulations lend themselves to multiple citations." 15 BNA OSHC at 2173, 1991-93 CCH OSHD at p. 41,006. Similarly not all general duty clause violations lend themselves to multiple citations. Thus, while it is reasonable for the Secretary to be able to cite section 5(a)(1) on a per employee basis as a matter of law, whether the Secretary's per employee citing is *reasonable as applied to a particular case* is another matter.

While the Secretary has considerable prosecutorial discretion under the Act, I would hold that the Secretary is nevertheless obligated to show why instance-by-instance citations are warranted in the particular section 5(a)(1) case. In determining whether instance-by-instance citations are warranted in a particular case, I would look to the following factors.

In *Caterpillar*, the Commission held that separate penalties with respect to each instance of a violation of a particular standard would be permissible where the "unit of prosecution" under the standard was an individual act rather than an overall course of conduct. Thus, in section 5(a)(2) cases the Commission looks to the language of the standard to determine whether it permits the Secretary to cite violations of the standard instance-by-instance. Section 5(a)(1) cases may similarly require the Commission to look at the action or conduct giving rise to the general duty clause violation to determine whether the employer's failure to protect its employees against recognized hazards manifests itself through acts or omissions that are uniquely individual in nature. For example, in *Waldon Healthcare Center,* rather than citing the employer just once under section 5(a)(1) for failing to vaccinate employees against hepatitis B, the Secretary might have cited the employer separately for each employee not vaccinated.[26] Such a case would have been on all fours with *Caterpillar* and *Sanders Lead*, in which the Commission found that a single employer policy decision precipitated multiple violative failures to act and accordingly could result in multiple citations. Thus, the Secretary may show under section 5(a)(1) that the violation involves acts uniquely individual in nature, *e.g.*, failure to vaccinate each employee against hepatitis B virus.

Alternatively, the Secretary may show that such a unit of prosecution, per exposed employee, is reasonable based on evidence showing the circumstances in the case to be extraordinary, *i.e.*, that the Secretary is warranted in using this extraordinary means of enforcement.[27] On review the Secretary argues that he has cited Arcadian for 87 violations of section 5(a)(1) because this is an extraordinary case. During oral argument in this case the Secretary argued that Arcadian's violations were so flagrantly willful as to be nearly unprecedented in the agency's experience, so much so as to set this employer apart from other employers and indeed, other willful violators of the Act (Tr.

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[26] 16 BNA OSHC 1052, 1993 CCH OSHD ¶ 30,021 (No. 89-2804, 1993)(consolidated).

[27] My colleagues assert that allowing "per employee" citations will open the door to "virtually limitless citation authority." On the contrary, the number of employees exposed to a hazard is a clearly defined and absolutely limited measure of the danger posed to employees by employer action or inaction. It allows the Secretary to differentiate between an employer willfully exposing 1, 20, or 87 employees to a hazard. And we need not address here or even speculate whether this somehow opens the door for the Secretary to issue "orders" for each day or each hour that a violative condition exists, as the majority suggests.

of Oral Arg. 5,11). In other words, the Secretary contends this is the type of case envisioned in his written policy on "egregious willful" violations. Thus, the inquiry must be: do the facts in this case warrant the extraordinary remedy afforded by citing on a "per employee" basis? Therefore,

I would remand this case for the judge to determine whether the facts support the Secretary's view that this is such an extraordinary case and whether the Secretary reasonably and appropriately exercised his prosecutorial discretion in charging Arcadian with 87 separate violations of section 5(a)(1).

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STUART E. WEISBERG
Chairman

Dated: _____