No Harm, No Foul: The OSHRC's Authority to Label an OSH Act Violation *de minimis* and to Require No Abatement

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INTRODUCTION

An employee of a painting contractor goes to the local hardware store and purchases a standard extension ladder for her employer. The employee takes the ladder to the job site and other employees of the painting contractor use the ladder daily to complete their work. Later that week, an inspector from the Occupational Safety and Health Administration (OSHA) arrives on the job site and inspects the operation.

The painting contractor passes the inspection with flying colors until, much to the contractor's surprise, the inspector pulls out her tape measure and begins measuring the distance between the rungs of the newly purchased ladder. The inspector pulls the tape eleven, twelve, and finally thirteen inches between the rungs. She draws her clipboard and writes the employer a citation for a "non-serious" safety violation. The contractor questions the inspector on the reason for the citation and the inspector, acting under the direction of the Secretary of Labor, explains that the contractor violated a published OSHA safety standard allowing twelve inches as the maximum distance between ladder rungs. OSHA imposes a penalty of $250 and requires immediate abatement of the safety violation—meaning that the contractor must either stop using the ladder and buy one that complies with the published regulatory standard, or find a way to move each ladder rung in by one inch.[1]

The employer in the above scenario has the statutory right to contest the citation. If the employer does so, the case will be heard by an Administrative Law Judge (ALJ) under the purview of the Occupational Safety and Health Review Commission (OSHRC or Commission).[2] An OSHA official, acting under the direction of the Secretary of Labor, functions as prosecutor. The Secretary may as a function of prosecutorial discretion conclude that, although the contractor had technically violated a safety standard, the violation poses no real hazard to employees,[3] and it therefore should be reclassified as a *de minimis*[4] violation requiring no

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1. This hypothetical is derived from a hypothetical provided by the Secretary of Labor's guidelines for determining *de minimis* cases. *See* Donovan v. Daniel Constr. Co., 692 F.2d 818, 821 (1st Cir. 1982).

2. 29 U.S.C. § 661 (1994).

3. 29 U.S.C. § 655 (1994).

4. The phrase "*de minimis*" comes from the phrase "*de minimis non curat lex*" which translates as "the law cares not for trifles". *See* Wisconsin Dep't of Revenue v. Wrigley, 505 U.S. 214, 231 (1992).

penalty or abatement. It is possible, however, for the violation to be classified as *de minimis* even over the Secretary's objection. This may occur if the OSHRC, acting either directly on appeal from the ALJ's decision or indirectly by declining review of the ALJ's decision, finds that a violation has occurred but that the violation should be classified as *de minimis*.[5] This creates a problem because the Secretary has argued that only the Secretary has the statutory authority to label a charge as *de minimis*.[6]

The federal circuits are split on the issue of whether the OSHRC has the authority to label a safety and health violation *de minimis* and require no abatement even if the Secretary of Labor has issued a citation. Four Circuits hold that the OSHRC possesses this authority.[7] One other Circuit[8] and the Secretary of Labor[9] disagree, and have concluded that once the Secretary issues a citation, the Commission may not designate the violation *de minimis* and require no abatement. They believe this would transfer the Secretary's prosecutorial discretion to the Commission contrary to the provisions of the Occupational Safety and Health Act of 1970 (OSH Act or Act).[10]

This article argues that the OSHRC possesses the statutory authority to designate a safety and health violation *de minimis* and to require no abatement even if the Secretary of Labor has issued a citation. Part I of this article examines the legislative background of the OSH Act,[11] its procedural aspects, the separate prosecutorial and adjudicative roles the Act places on the Secretary of Labor and the OSHRC respectively, the three severity levels of violations, and the Commission's authority to determine the level of severity of a violation. Part II discusses the current split in the Federal Circuit Courts. Part III analyzes the issue of whether the OSHRC possesses the statutory authority to designate a safety and health violation *de minimis*. It concludes that the OSHRC does possess the authority to label a safety and health violation *de minimis* and to require no penalty or abatement, even though an OSH Act violation has technically occurred.

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5. 29 U.S.C. § 659(c) (1994).

6. *See* Reich v. Occupational Safety & Health Review Comm'n, 998 F.2d 134, 138 (3d Cir. 1993).

7. *See* Donovan v. Daniel Constr. Co., 692 F.2d 818, 821 (1st Cir. 1982); *Erie Coke Corp.*, 998 F.2d at 135; Chao v. Symms Fruit Ranch, Inc., 242 F.3d 894, 898 (9th Cir. 2001); Phoenix Roofing, Inc. v. Dole, 874 F.2d 1027, 1031-32 (5th Cir. 1989).

8. *See* Caterpillar Inc. v. Herman, 131 F.3d 666, 668 (7th Cir. 1997).

9. *See Reich*, 998 F.2d at 138.

10. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1994).

11. *Id.*

I. BACKGROUND

A. THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

A little over three decades ago, Congress, acting under its authority to provide for the general welfare[12] and to regulate interstate commerce,[13] enacted the OSH Act of 1970.[14] Congress passed this Act to assure every worker in the nation safe and healthful working conditions, and to preserve the nation's human capital.[15]

Congress wanted to decrease the number and severity of work-related injuries and illnesses that were occurring despite the efforts of employers and the government to reduce or eliminate them.[16] Congress sought to achieve this purpose by authorizing the Secretary of Labor to promulgate and develop occupational safety and health standards,[17] and to apply them uniformly to employers and employees.[18] Two policies underlie the justification for creating and administering these uniform standards. First, Congress wanted to reduce human suffering, disability, and death.[19] Second, Congress wanted to counter the economic impacts[20] of industrial deaths, injuries, and occupational illnesses resulting from emerging technologies and new processes in industry that continually introduced new hazards to workers.[21]

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12. U.S. CONST. art. I § 8, cl. 1.
13. U.S. CONST. art. I § 8, cl. 3.
14. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1994).
15. *Id.* § 651.
16. *See* S. Rep. No. 91-1282, at 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5177.
17. 29 U.S.C. § 651(b)(9) (1994).
18. *See id.* § 651(b)(10); *see also* S. Rep. No. 91-1282, at 1 (1970), *reprinted* in 1970 U.S.C.C.A.N. 5177.
19. *See* S. Rep. No. 91-1282, at 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5178.
20. *See* 29 U.S.C. § 651(a) (1994) ("personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.").
21. *See id.*

B. THE PROCEDURAL ASPECTS OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

The OSH Act authorizes the Secretary of Labor to set and enforce mandatory occupational safety and health standards.[22] The Secretary creates these standards by exercising its rulemaking[23] powers.[24] If the Secretary (or her designee), after investigation (usually an on-site inspection), finds that an employer has violated a safety or health standard, the Secretary can issue a citation,[25] impose a fine,[26] and require the employer to abate the violation.[27]

An employer may contest a citation issued by the Secretary,[28] and the OSHRC, an adjudicatory agency, must give the employer an evidentiary hearing and "thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief."[29] This hearing is conducted before an ALJ, who makes an initial determination of the merits of contested citations. Unless the OSHRC decides to review the decision, the ALJ's ruling becomes the Commission's final order.[30] Finally, both the Secretary of Labor and the adversely affected employer can seek review of an unfavorable Commission order in a United States Circuit Court, and on appeal, the court must adopt as conclusive any of the Commission's findings of fact that are "supported by substantial evidence."[31]

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22. Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 147 (1991); *see also* 29 U.S.C. §§ 651(b)(3), 659 (1994).

23. Under the Administrative Procedure Act (APA), the issuance of a federal regulation is called "rulemaking." Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1994).

24. *See* 29 U.S.C. § 665 (1994); *see also Martin*, 499 U.S. at 147.

25. 29 U.S.C. § 658 (1994).

26. *Id.* § 666; *see also Martin*, 499 U.S. at 147.

27. 29 U.S.C. § 658.

28. *Id.* § 659(c) (1994).

29. *Martin*, 499 U.S. at 148 (quoting 29 U.S.C. § 659(c)).

30. *See* 29 U.S.C. § 661(j) (1994); *see also Martin*, 499 U.S. at 148.

31. *Martin*, 499 U.S. at 148 (quoting 29 U.S.C. § 660(a)-(b)).

C. THE LEGISLATIVE, PROSECUTORIAL AND ADJUDICATIVE ROLES OF THE SECRETARY AND THE OSHRC

1. The Legislative Role of the Secretary of Labor

The OSH Act employs an atypical regulatory structure.[32] Most regulatory structures merge rulemaking, enforcement, and adjudicative functions into one administrative authority.[33] Conversely, the OSH Act divides rulemaking and enforcement authority from adjudicative authority and allocates these roles respectively to the Secretary of Labor and the OSHRC.[34]

Under the OSH Act, the Secretary acts in its legislative capacity by developing and promulgating workplace safety and health standards.[35] The Secretary also can make authoritative interpretations of occupational safety and health regulations as a "necessary adjunct" of the Secretary's powers to develop and to enforce OSH Act standards.[36] If the interpretation of a safety and health standard by the Secretary and the OSHRC conflict, a reviewing court must "defer to the Secretary's reasonable interpretation."[37] The Secretary's interpretation of the safety regulation, however, receives deference only if it is reasonable.[38] A Secretary's interpretation "is reasonable so long as it is not 'arbitrary, capricious, or manifestly contrary to the statute.'"[39]

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32. *See Martin*, 499 U.S. at 151.

33. *See* Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (2000); 15 U.S.C. §§ 77(s)-77(u) (2000); 47 U.S.C. § 151 (1994)); *see also Martin*, 499 U.S. at 151; Reich v. Erie Coke Corp., 998 F.2d 134, 137 (3d Cir. 1993) (citing *Martin*, 499 U.S. at 150).

34. *See Martin*, 499 U.S. at 151.

35. *See* 29 U.S.C. § 651(b)(9) (1994).

36. *Martin*, 499 U.S. at 152.

37. Chao v. Symms Fruit Ranch, Inc., 242 F.3d 894, 897 (9th Cir. 2001) (quoting Herman v. Tidewater Pac., Inc., 160 F.3d 1239, 1241 (9th Cir. 1998) (citing *Martin*, 499 U.S. at 157-58)).

38. *See Symms Fruit Ranch*, 242 F.3d at 897 (citing *Martin*, 499 U.S. at 158).

39. *Id.* (quoting Chevron U.S.A., Inc., v. Nat. Res. Defense Council, Inc., 467 U.S. 837, 844 (1984)).

2. *The Prosecutorial Role of the Secretary of Labor*

The OSH Act charges the Secretary of Labor with enforcing occupational safety and health standards,[40] and the Secretary possesses the sole authority to decide whether to prosecute a violation of the OSH Act.[41] The OSH Act expressly gives the Secretary prosecutorial discretion to determine whether to issue a citation for an OSH Act violation or to issue a notice in lieu of a citation for certain *de minimis* violations[42]—"violations which have no direct or immediate relationship to safety or health."[43] The OSH Act gives the Secretary discretion, much like that of a criminal prosecutor, to determine whether to charge a suspected wrongdoer with a violation of a law, drop the charges altogether,[44] or issue a notice in lieu of a citation for certain *de minimis* violations, much like a warning.[45]

3. *The Adjudicative Role of the OSHRC*

The OSHRC carries out adjudicatory functions under the OSH Act.[46] An employer may contest a citation issued by the Secretary, and the Commission must give the employer an evidentiary hearing and "thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief."[47] An ALJ holds the evidentiary hearing and makes initial determinations regarding contested citations. Unless the OSHRC grants discretionary review, the ALJ's decision becomes the Commission's final order.[48] This final order is appealable to the United States Court of Appeals.[49]

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40. 29 U.S.C. § 658(a) (1994).

41. *See* Reich v. Erie Coke Corp., 998 F.2d 134, 137 (3d Cir. 1993) (citing Cuyahoga Valley Ry. v. United Transp. Union, 474 U.S. 3, 5 (1985)).

42. *See id.* at 137-38.

43. *Id.* at 138.

44. *See* Cuyahoga Valley Ry. v. United Transp. Union, 474 U.S. 3, 6-7 (1985).

45. *See generally* Chao v. Symms Fruit Ranch, Inc., 242 F.3d 894, 899 (9th Cir. 2001).

46. 29 U.S.C. § 651(b)(3) (1994); *see also*, Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 147 (1991).

47. 29 U.S.C. § 659(c); *see also Martin*, 499 U.S. at 148.

48. See 29 U.S.C. § 661(j); *see also Martin*, 499 U.S. at 148.

49. *Martin*, 499 U.S. at 148 (quoting 29 U.S.C. § 660(a)-(b) (1994)).

D. THE DISAGREEMENT ON THE LEVELS OF SEVERITY ESTABLISHED BY THE OSH ACT

Since the inception of the OSH Act in 1970, the Secretary of Labor, the courts, and the OSHRC have interpreted the Act as classifying occupational safety and health violations into three distinct categories: *serious*, *non-serious*, and *de minimis*.[50] This categorization scheme developed primarily from the courts' and Commission's interpretation of the OSH Act.[51] The Secretary of Labor acquiesced in those three classifications until 1993, when Secretary Robert Reich experienced a Damascene conversion[52] and decided that, despite his predecessor's twenty-year acquiescence to these classifications, he now viewed the *de minimis* classification as merely a preliminary charging decision of the Secretary over which the OSHRC has no independent authority.[53]

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50. *See* Reich v. Occupational Safety & Health Review Comm'n, 998 F.2d 134, 138 (3d Cir. 1993) (citing Phoenix Roofing, Inc. v. Dole, 874 F.2d 1027, 1031 (5th Cir. 1989) (stating that violations of the OSH Act may be designated as serious, not serious and *de minimis*); Fluor Constructors, Inc., v. Occupational Safety & Health Review Comm'n, 861 F.2d 936, 942 (6th Cir. 1988) (concluding the OSH Act establishes three levels of safety violations—serious, non-serious and *de minimis*); Donovan v. Daniel Constr. Co., 692 F.2d 818, 820-21 (1st Cir. 1982) (stating the OSH Act establishes three severity levels of safety violations—serious, non-serious and *de minimis* in decreasing order of seriousness); Brennan v. Butler Lime & Cement Co., 520 F.2d 1011, 1019 n.10 (7th Cir. 1975) (declaring the OSH Act provides three levels of severity for safety violations depending on the "level of gravity" of the violation—*de minimis*, non-serious, and serious); Brennan v. Occupational Safety & Health Review Comm'n, 494 F.2d 460, 463 (8th Cir. 1974) (stating the OSH Act establishes three levels of severity of safety violations, serious, non-serious, and *de minimis*)).

51. *See Reich*, 998 F.2d at 138.

52. *Acts* 9:1-8 (King James).

53. *See Reich*, 998 F.2d at 140 (Becker, J., dissenting) (stating that he agreed with the Secretary's interpretation that the OSH Act establishes only two severity levels of safety violations for adjudicatory purposes—serious and not serious). It is noteworthy that the court in *Reich* pointed out that Secretary Reich admitted in his brief that in Donovan v. Daniel Constr. Co., 692 F.2d 818 (1st Cir. 1982), his predecessor, then Secretary of Labor Raymond J. Donovan, conceded that the OSHRC had the power to classify certain violations as *de minimis*. *See Reich*, 998 F.2d at 138-39.

The OSHRC, the Secretary of Labor and the courts unanimously agree that Congress intended to create at least two severity levels under the OSH Act—serious and non-serious.[54] However, statutory ambiguity arguably exists concerning whether Congress intended to establish a third severity level for occupational safety and health violations, the *de minimis* classification.[55] Congress expressly defined serious violations within the Occupational Safety and Health Act.[56]

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54. *See Reich*, 998 F.2d at 138; Phoenix Roofing Inc. v. Dole, 874 F.2d 1027, 1031 (5th Cir. 1989); Fluor Constructors, Inc. v. Occupational Safety & Health Review Comm'n, 861 F.2d 936, 942 (6th Cir. 1988); Donovan v. Daniel Construction Co., 692 F.2d 818, 820-21 (1st Cir. 1982); Brennan v. Butler Lime & Cement Co., 520 F.2d 1011, 1019 n.10 (7th Cir. 1975); Brennan v. Occupational Safety & Health Review Comm'n, 494 F.2d 460, 463 (8th Cir. 1974); *see also Reich,* 998 F.2d at 140 (Becker, J., dissenting) (agreeing with the Secretary's interpretation that the OSH Act establishes two levels of severity of safety violations for adjudicatory purposes—serious and not serious).

55. *Compare Reich,* 998 F.2d at 138, *with Erie Coke Corp.,* 998 F.2d at 140 (Becker, J., dissenting).

56. The portion defining serious violation states:

> (k) Determination of serious violation
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> For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

29 U.S.C. § 666(k) (1994).

However, while Congress explicitly provided for citations and monetary penalties for both serious[57] and non-serious safety violations,[58] Congress failed to explicitly define non-serious safety violations.[59] Congress created further uncertainty concerning the number of severity levels it intended to create under the OSH Act by placing the Act's only reference to *de minimis* violations in a separate section of the Act concerned primarily with the Secretary of Labor's prosecutorial charging discretion.[60]

The Secretary of Labor argues that the OSH Act creates only two severity levels for health and safety violations—serious and non-serious—and that the *de minimis* classification is merely a preliminary charging decision under the Secretary's sole discretion.[61] The OSHRC argues that the OSH Act creates three severity levels for health and safety violations—serious, non-serious, and *de minimis*.[62] If the Secretary's construction of the Act is accepted, then once an employer is cited for a serious or non-serious safety or health violation, the Commission lacks the statutory authority to designate the violation *de minimis* and must require the employer to abate the violation. If the OSHRC's construction is accepted,

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57. The penalty for serious violations is as follows:
(b) Citation for serious violation

> Any employer who has received a citation for a serious violation of the requirements of section 654 of this title, of any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, shall be assessed a civil penalty of up to $7,000 for each such violation.

29 U.S.C. § 666(b) (1994).

58. The penalty for non-serious violations is as follows:
(c) Citation for violation determined not serious

> Any employer who has received a citation for a violation of the requirements of section 654 of this title, of any standard, rule, or order promulgated pursuant to section 655 of this title, or of regulations prescribed pursuant to this chapter, and such violation is specifically determined not to be of a serious nature, may be assessed a civil penalty of up to $7,000 for each such violation.

29 U.S.C. § 666(c) (1994).

59. *See* Reich v. Occupational Safety & Health Review Comm'n, 998 F.2d 134, 142 (3d Cir. 1993) (Becker, J., dissenting).

60. *See* 29 U.S.C. § 658(a); *see also Erie Coke Corp.*, 998 F.2d at 141-42 (Becker, J., dissenting).

61. *See Reich*, at 138-39 (disagreeing with the Secretary's interpretation of the OSH Act); *see also id.* at 141-42 (Becker, J., dissenting).

62. *See Reich*, 998 F.2d at 138 (discussing the Commission's interpretation of the Act).

then the OSHRC has the authority (either independently or through an ALJ) to designate a violation *de minimis* over the Secretary's objection.

E. THE COMMISSION'S AUTHORITY TO DETERMINE THE SEVERITY LEVEL OF A SAFETY VIOLATION

The Occupational Safety and Health Review Commission (OSHRC) is authorized to determine the severity level of an occupational safety and health violation.[63] Under the OSH Act, after the Secretary issues a citation and assesses a penalty, the adversely affected employer may contest the citation to the OSHRC.[64] The Commission is then authorized to afford the employer a hearing in front of an ALJ, and the Commission "shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief . . . ."[65]

Thus, under the OSH Act, the Commission is viewed as a "neutral arbiter" charged with authoritative fact finding and the mandate to apply the Secretary's standards to the facts in rendering decisions.[66] The Commission's power to determine the severity level of a violation falls within that grant of power, and even those questioning the Commission's adjudicatory power admit that, traditionally, the Commission has been seen as possessing the adjudicative power to determine the level of severity of a safety and health violation.[67]

II. THE UNEVEN SPLIT IN THE FEDERAL CIRCUIT COURTS

Currently, the federal circuit courts are unevenly split on the issue of whether the OSHRC possesses the authority to label a safety and health violation *de minimis* and require no abatement or monetary penalty even if

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63. *See* Donovan v. Daniel Constr. Co., 692 F.2d 818, 820 (1st Cir. 1982) ("[I]f judicial review is sought, the appellate court may not disturb the factual findings of the Commission as to the existence or *severity* of worksite violations if those findings are supported by substantial evidence. . . .") (emphasis added) (citing Modern Drop Forge Co. v. Sec'y of Labor, 683 F.2d 1105, 1109 (7th Cir. 1982)); Cape & Vineyard Div. v. Occupational Safety & Health Review Comm'n, 512 F.2d 1148, 1153 (1st Cir. 1975).

64. 29 U.S.C. § 659(c) (1994).

65. *Id.*

66. *See* Reich v. Occupational Safety & Health Review Comm'n, 998 F.2d 134, 139 (3d Cir. 1993) (citing Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 154 (1991)).

67. *See Reich*, 998 F.2d at 141 (Becker, J., dissenting).

the Secretary of Labor has issued a citation. Four federal circuit courts that have addressed the issue have held that the OSHRC possesses this authority.[68] However, one other circuit court[69] and the Secretary of Labor disagree.[70] They have concluded that once the Secretary issues a citation, the Commission may not designate the violation *de minimis* and require no abatement or monetary penalty. Both views will be discussed in turn.

A. THE MAJORITY VIEW OF THE FEDERAL CIRCUIT COURTS

In *Chao v. Symms Fruit Ranch Inc.*,[71] the Ninth Circuit held that the OSHRC possesses the authority to conclude that even though a safety standard has been technically violated, the violation was *de minimis* and no penalty should be imposed upon the employer.[72] In 1997, an OSHA investigator inspected Symms Fruit Ranch in Idaho and cited Symms for a serious violation.[73] The inspector cited Symms for violating an OSHA regulatory standard by using a John Deere tractor with an unguarded rear power take-off shaft, and OSHA imposed a fine.[74]

Symms contested the citation, and the ALJ ruled that Symms had indeed violated a published OSHA regulation[75] that requires tractors to have guards on their rear power take-off shafts.[76] However, the ALJ concluded that because the exposed shaft was partially guarded, was not engaged for its present purpose, and was nearly impossible to accidentally engage, the violation of the standard did not pose a true hazard to employees and bore merely a "negligible relationship to employee safety or

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68. *See* Donovan v. Daniel Constr. Co., 692 F.2d 818, 821 (1st Cir. 1982); *Reich*, 998 F.2d at 135; Chao v. Symms Fruit Ranch, Inc., 242 F.3d 894, 898 (9th Cir. 2001); *see also* Phoenix Roofing Inc. v. Dole, 874 F.2d 1027, 1031-32 (5th Cir. 1989) (concluding that a violation of a safety standard can be classified as *de minimis* resulting in a finding that even though technically a violation occurred, that no penalty should be assessed and no abatement is necessary).

69. *See* Caterpillar, Inc. v. Herman, 131 F.3d 666, 668 (7th Cir. 1997).

70. *See Reich*, 998 F.2d at 138.

71. *Symms Fruit Ranch*, 242 F.3d at 898.

72. *Id.*

73. *Id.* at 896.

74. *See id.*

75. *See id.* (quoting 29 C.F.R. § 1928.57(b)(1)(i) (2001), which regulates farming equipment and provides that "[a]ll power take-off shafts, including rear, mid or side-mounted shafts shall be guarded either by a master shield, as provided in paragraph (b)(1)(ii) of this section, or by other protective guarding.").

76. Chao v. Symms Fruit Ranch, Inc., 242 F.3d 894, 896 (9th Cir. 2001).

health . . . ."[77] Thus, the ALJ reclassified the violation as *de minimis*, threw out the fine, and did not require Symms to abate the violation.[78]

The Secretary of Labor petitioned the Commission for an administrative appeal, but no member of the Commission directed review.[79] Thus, the ALJ's decision became the OSHRC's final decision.[80] The Secretary then petitioned the United States Court of Appeals for the Ninth Circuit for review of the Commission's decision, arguing that the Commission lacked the authority to reclassify a violation as *de minimis* and require no fine or abatement.[81]

On appeal, the Ninth Circuit concluded that since the OSH Act authorizes the Commission to "issue an order . . . affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief," [82] the provision allowing the Commission to direct "other appropriate relief" gave the Commission authority to reclassify a violation as *de minimis* and require no monetary penalty or abatement.[83] The Ninth Circuit analogized the Commission's authority to the power of a criminal court to reduce a criminal offense to a lesser one than the offense charged in the indictment, stating that reducing a violation to the *de minimis* level "falls within the Commission's statutory prerogatives of effectively vacating the citation or '*directing other appropriate relief.*'"[84]

Like the Ninth Circuit in *Symms Fruit Ranch*,[85] the Third Circuit has held that the Commission is statutorily authorized to reduce the level of a safety and health violation to the *de minimis* level,[86] and that the practical effect of reducing a violation to the *de minimis* level is that no abatement is then required.[87] In that case, Erie Coke Company rejected a United Steelworkers Union request that the company insert a provision in a collective bargaining agreement requiring the company to pay for its employees' protective gloves.[88] The Union filed a complaint with the Occupational Safety and Health Administration, alleging that Erie Coke's

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77. *Id.*
78. *Symms Fruit Ranch*, 242 F.3d at 896.
79. *Id.*
80. *Id.*
81. *Id.* at 896-97.
82. *See id.* at 898-99 (emphasis omitted).
83. *Id.* at 899 (emphasis in original).
84. *Id.* (quoting 29 U.S.C. § 659(c) (1994)) (emphasis in original).
85. *Id.*
86. Reich v. Occupational Safety & Health Review Comm'n, 998 F.2d 134, 139 (3d Cir. 1993).
87. *See id.* at 137.
88. *Id.* at 135.

refusal violated a published OSH Act regulation[89] by effectively requiring its workers to pay for fire resistant gloves needed for work at the coke ovens.[90] The Secretary investigated the complaint, issued a citation for a non-serious violation, and directed the company to abate the violation. [91] The Secretary did not impose a monetary penalty upon the company.[92]

Erie Coke contested the citation and after a hearing the ALJ affirmed the citation, concluding that the company violated a published safety standard[93] requiring employers to provide protective clothing, such as flame resistant gloves, and assure the use of such protective clothing.[94] The company appealed the ALJ's findings and the OSHRC affirmed the finding of a violation.[95] However, the Commission reduced the severity level of the offense from non-serious to *de minimis,* concluding that the violation had "no direct or immediate relationship to safety or health."[96]

The Third Circuit agreed, concluding that Erie employees had not experienced any direct impairment of safety or health as a result of having to purchase their own gloves.[97] The court ruled that no evidence suggested that any "employees were wearing torn or otherwise ineffective gloves beyond their useful life in order to save money, thereby exposing their hands to possible burns and coke oven emissions."[98]

The Third Circuit found that the OSH Act creates three levels of safety violations—serious, non-serious, and *de minimis*.[99] The court criticized the Secretary for attempting to argue, after twenty years of acquiescence to the three levels, that the Act creates only two levels of safety violations—serious and non-serious—and that the *de minimis* level is merely a preliminary charging decision under the Secretary's unreviewable prosecutorial discretion over which the OSHRC has no authority. [100]

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89. 29 C.F.R. § 1910.1029(h)(1)(ii) (2001).
90. *Reich,* 998 F.2d at 135.
91. *See id.*
92. *Id.*
93. 29 C.F.R. § 1910.1029(h)(1)(ii) (2001).
94. *Reich,* 998 F.2d at 135.
95. *Id.* at 136.
96. *Id.* at 138 (citing 29 U.S.C. § 658(a) (1994)).
97. *Id.*
98. *Id.* (citing facts in Commision's record).
99. *Id.*
100. *See id.* at 138-39.

The court cited a long line of Federal Circuit Court precedent to bolster its argument that three levels were indeed created by the OSH Act.[101]

The court's opinion provided a structural analysis of the Commission's authority under the OSH Act.[102] The court stated that under the Act the Commission possesses the authority to "affirm, modify, or vacate the Secretary's citation, or to *direct other appropriate relief*."[103] Under this statutory grant of authority, the court argued, the Commission should be viewed as a "neutral arbiter" charged by Congress with engaging in authoritative fact-finding, applying the Secretary's regulatory standards to those facts, and rendering final decisions.[104]

According to the court, allowing the Commission to reduce the level of a safety or health violation from serious or non-serious to *de minimis* falls within its statutory grant of power under the OSH Act.[105] The court analogized the Commission's role as a "neutral arbiter" under the Act to the power of a criminal court to reduce the criminal offense charged in an indictment to a lesser-included offense.[106] The court stated that in the criminal law context, this procedure is not seen as an appropriation of the prosecutor's discretion, but instead a "necessary prerogative of the court."[107]

The Fifth Circuit has gone even farther than the Third and Ninth Circuits, and has reversed an OSHRC decision for *failing* to enter a *de minimis* finding. In *Phoenix Roofing v. Dole*,[108] an OSHA inspector cited a roofing company, Phoenix, for failing to set up a "warning line" six feet from the edge of a roof the company was installing.[109] Phoenix admitted it had not set up a warning line, but argued that such a line was infeasible on this particular construction project, and that the company had provided even greater worker protection by employing two employees whose sole

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101. *Id.* at 138 (citing Phoenix Roofing, Inc. v. Dole, 874 F.2d 1027, 1032 (5th Cir. 1989)); Fluor Constructors, Inc. v. Occupational Safety & Health Review Comm'n, 861 F.2d 936, 942 (6th Cir. 1988); Donovan v. Daniel Construction Co., 692 F.2d 818, 820-22 (1st Cir. 1982); Brennan v. Butler Lime & Cement Co., 520 F.2d 1011, 1019 n.10 (7th Cir. 1975); Brennan v. Occupational Safety & Health Review Comm'n, 494 F.2d 460, 463 (8th Cir. 1974).

102. *Reich*, 998 F.2d at 138.

103. *Id.* at 139 (emphasis added).

104. *Id.* (quoting Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 154 (1991)).

105. *Id.*

106. *Id.*

107. *Id.*

108. Phoenix Roofing, Inc. v. Dole, 874 F.2d 1027 (5th Cir. 1989).

109. *Id.* at 1030.

responsibility was to watch the roof workers, and to warn them if they approached the edge.[110] Phoenix asked the ALJ to classify the violation *de minimis*. However, the ALJ was unpersuaded and upheld the charge.[111] The OSHRC denied review, and Phoenix appealed.[112]

The Fifth Circuit agreed with the ALJ that Phoenix had technically violated the applicable OSHA regulation. However, the court found that the safety protections Phoenix had employed "provided safety equal to or greater than that imposed by regulation."[113] Because of this the court reversed, holding that Phoenix's violation was *de minimis* as a matter of law and that the ALJ (and derivatively the OSHRC) had erred by rejecting this classification.[114] Thus, in the Fifth Circuit, not only *may* the OSHRC re-classify a charge; it *must* do so under some circumstances.

The First Circuit has stated in dicta that the OSHRC has the authority to classify a violation as *de minimis*.[115] In *Donovan v. Daniel Construction Co.*,[116] OSHA inspected a construction site and cited the construction company for failing to separate open wiring from conducting materials.[117] The company contested the citation, and the ALJ found no violation.[118] The OSHRC reversed; it found that a violation had occurred, but that the violation was *de minimis* because the wiring was well protected. The OSHRC therefore found that no abatement or penalty was warranted.[119]

The Secretary appealed to the First Circuit. The Secretary did not, however, appeal the OSHRC's assertion of authority to declare a violation *de minimis*.[120] On this issue the court, citing to the statutory definition of *de minimis* and the statutory directive to the OSHRC to direct "other appropriate relief," stated that "[t]here is no doubt (and it is agreed) that the Act gives the Commission authority, in appropriate cases, to reduce violations to the *de minimis* category."[121] The Secretary appealed only the OSHRC's finding that this particular violation was *de minimis*. The court held that it was and affirmed the OSHRC's decision.[122]

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110. *Id.* at 1030-31.
111. *Id.* at 1032.
112. *Id.* at 1029.
113. *Id* at 1032.
114. *Id.*
115. *See* Donovan v. Daniel Constr. Co., 692 F.2d 818, 821 (1st Cir. 1982).
116. 692 F.2d 818 (1st Cir. 1982).
117. *Id.* at 819.
118. *Id.* at 820.
119. *Id.*
120. *Id.* at 821.
121. *Id.*
122. *Id.* at 822.

Because the OSHRC's authority to designate a violation as *de minimis* was not at issue on appeal to the First Circuit, the court's discussion of the subject is dicta. Nonetheless, the court's language indicates a strong probability that the court, if presented squarely with the issue in the future, would rule that the OSHRC has the authority to designate a violation as *de minimis*.[123]

In summary, the First,[124] Third,[125] Fifth,[126] and Ninth[127] Circuits have concluded that the OSHRC possesses the authority to decide that, even though a safety standard was violated in a technical sense, the violation was *de minimis* and no abatement is necessary, and no monetary penalty should be imposed on the employer.[128] These Circuits have concluded that under the OSH Act's provision allowing the Commission to issue an order "*directing other appropriate relief*,"[129] the Commission is authorized to designate a violation *de minimis* and to require no penalty or abatement.[130]

B. THE MINORITY VIEW OF THE FEDERAL CIRCUIT COURTS

The minority view is that once the Secretary of Labor has issued and proven a violation, the OSHRC may not thereafter reclassify the violation as *de minimis*. This view has been advocated by the Secretary of Labor and adopted by the Seventh Circuit.[131] It also is the view adopted by the dissent in the earlier-discussed Third Circuit case of *Reich v. Occupational Safety & Health Review Commission*.[132]

In *Reich*, Judge Edward R. Becker penned a spirited dissent[133] concluding that once the Secretary of Labor issues a citation, the Commission lacks the authority to reclassify the violation as *de minimis* and require no abatement.[134] Judge Becker's argument centered on the

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123. *See id.* at 820-21.
124. *See id.* at 821.
125. *See* Reich v. Occupational Safety & Health Review Comm'n, 998 F.2d 134, 135 (3d Cir. 1993).
126. *See Phoenix Roofing, Inc. v. Dole*, 874 F.2d 1027 (5th Cir. 1989).
127. *See* Chao v. Symms Fruit Ranch, Inc., 242 F.3d 894, 898 (9th Cir. 2001).
128. *See id*; *see also Reich*, 998 F.2d at 139.
129. 29 U.S.C. § 659(c) (1994) (emphasis added).
130. *See Symms Fruit Ranch*, 242 F.3d at 899; *see also Reich*, 998 F.2d at 139.
131. Caterpillar, Inc. v. Herman, 131 F.3d 666, 668 (7th Cir. 1997).
132. *Reich*, 998 F.2d at 140 (Becker, J., dissenting). The facts and the Majority opinion were discussed *supra* Part I.D.
133. *See id.* at 139-45. The dissent's argument that the OSH Act created two severity levels for violations, serious and non-serious, was addressed *supra* Part I.D.
134. *See Reich*, 998 F.2d at 139-45.

statutory language of 29 U.S.C. § 658(a).[135] According to Judge Becker, the last clause of this section confers unreviewable prosecutorial discretion upon the Secretary to determine whether a safety or health violation is *de minimis*, and then to decide whether to issue a notice instead of a citation.[136]

Judge Becker argued that allowing the Commission to reclassify a safety or health violation as *de minimis*, after the Secretary has decided to issue a citation instead of a notice in lieu of citation, would allow the Commission to review the "unreviewable prosecutorial (charging) discretion," granted to the Secretary under the OSH Act.[137] To bolster this argument, Judge Becker cited the United States Supreme Court's holding in *Cuyahoga Valley Ry. Co. v. United Transp. Union*,[138] that under the OSH Act's division of administrative functions, the Secretary possesses unreviewable discretion to decide whether to withdraw a previously issued citation.[139] According to Judge Becker, if the Secretary has unreviewable prosecutorial discretion to determine whether to withdraw a previously issued citation, even if the Act mandates the issuance of a citation, then it is "axiomatic" that "the decision to issue a citation for a *de minimis* violation, which the Act specifically makes discretionary, must also be

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135. The statute reads as follows:

> (a) Authority to issue; grounds; contents; notice in lieu of citation for *de minimis* violations
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> If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of section 654 of this title, of any standard, rule or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, he shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to *de minimis* violations which have no direct or immediate relationship to safety or health.

29 U.S.C. § 658(a) (1994).

136. *Reich*, 998 F.2d at 142 (Becker, J., dissenting). *But see* Chao v. Symms Fruit Ranch, Inc., 242 F.3d 894, 899 (9th Cir. 2001) (criticizing Judge Becker's dissent in *Reich*).

137. *See Reich*, 998 F.2d at 140 (Becker, J., dissenting).

138. Cuyahoga Valley Ry. Co. v. United Transp. Union, 474 U.S. 3 (1985).

139. *See Reich*, 998 F.2d at 141 (Becker, J., dissenting) (citing *United Transp. Union*, 474 U.S. at 6).

unreviewable."[140] According to Judge Becker, both decisions fall within the Secretary's prosecutorial function.[141]

The Seventh Circuit has also concluded that only the Secretary may classify a charge as *de minimis*. In *Caterpillar Inc. v. Herman*,[142] the court held that the OSHRC is not authorized to designate a safety or health violation *de minimis* and disregard it.[143] Instead, the Commission must merely decide whether a safety violation occurred, and then impose an appropriate penalty.[144]

During the course of a bitter strike at Caterpillar's plant in Aurora, Illinois, the local chapter of the United Autoworkers Union (UAW or Union) requested copies of Caterpillar's injury logs.[145] These records included the names and badge numbers of Caterpillar employees who had continued to work despite the strike.[146] Fearing the Union might use this information to harass or physically harm the strikebreakers, Caterpillar provided the logs to the Union with employee names and badge numbers blacked out.[147]

The OSH Act issue arose in this case because the UAW made its request under a published safety regulation in its capacity as a representative of the Caterpillar employees. If the Union had requested the records under the National Labor Relations Act, in its capacity as the employees' collective bargaining representative, the employer would have been justified in redacting the names and badge numbers of the strikebreakers.[148] However, the Union instead requested the records pursuant to an OSHA regulation which arguably entitled an employee's "representative" to receive non-redacted copies of the records.[149] Caterpillar nonetheless refused to provide non-redacted copies of the logs. The Secretary of Labor cited Caterpillar for "willfully violating a regulation"[150] and imposed a fine of $20,000.[151]

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140. *Reich*, 998 F.2d at 141 (Becker, J., dissenting) (emphasis added).
141. *See id.*
142. Caterpillar Inc., v. Herman, 131 F.3d 666 (7th Cir. 1997).
143. *Id.* at 668.
144. *Id.*
145. *Id.* at 667.
146. *Id.*
147. *Id.*
148. *Id.* (citing Chicago Tribune Co. v. NLRB, 79 F.3d 604 (7th Cir. 1996)).
149. *See id.* at 667 (citing 29 C.F.R. § 1904/7(b)(1)).
150. *Id.*
151. *Id.*

Caterpillar contested both the citation and the fine. Caterpillar raised three defenses.[152] One of these defenses was that the violation was too trivial to justify a monetary penalty – i.e., that the ALJ should designate the violation *de minimis* and withdraw the fine.[153] The ALJ dismissed two of Caterpillar's defenses on the pleadings, and dismissed the *de minimis* defense after a hearing.[154] The ALJ ruled that Caterpillar had violated a published safety and health regulation, but concluded that Caterpillar's redaction of employee names and badge numbers did not diminish the employee's level of protection.[155] The ALJ found the $20,000 penalty excessive and reduced the fine to $5,000.[156] The Commission chose not to review the ALJ's decision, thereby adopting it as the final agency decision. Caterpillar appealed to the Seventh Circuit, again asserting all three defenses.[157]

The Seventh Circuit opinion was authored by Judge Frank Easterbrook, Judge Richard Posner and Judge Michael Kanne joined the opinion. The court ultimately found that the ALJ should have considered one of the defenses that had been dismissed on the pleadings, and the court remanded for further findings of fact on that defense.[158] The court rejected outright, however, Caterpillar's *de minimis* defense. Instead, the court "accept[ed] the Secretary's view that the Commission cannot label a violation *de minimis* and disregard it; that would transfer the Secretary's discretion . . . to the Commission."[159] The Seventh Circuit recognized that "[t]rivial violations deserve trivial fines,"[160] but, like Shylock invoking the law in support of his demand for a pound of flesh,[161] the court held that the Secretary "is entitled to insist on *some* exaction even for the equivalent of jaywalking."[162]

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152. *Id.*
153. *See id.*
154. *Id.* at 667-68.
155. *Id.* at 668.
156. *Id.*
157. *Id.*
158. *Id.* at 669-70.
159. *Id.* at 668 (citation omitted).
160. *Id.*
161. WILLIAM SHAKESPEARE, MERCHANT OF VENICE act 4, sc.1.
162. *Caterpilla,r Inc.*, 131 F.3d at 668.

III. ANALYSIS

The remainder of this article focuses on the narrow legal question of whether the OSHRC can designate an occupational safety and health violation as *de minimis* and declare that, even though an OSH Act violation has occurred in a technical sense, no penalty is warranted and no abatement is necessary. Currently, the federal circuit courts are divided on this question.[163] Resolution of this issue requires consideration of four sub-issues, each of which will be addressed in turn: (1) whether the OSH Act creates three levels of severity for safety and health violations—*serious, non-serious, and de minimis*; (2) whether the Commission possesses the statutory authority under the OSH Act to label a safety and health violation *de minimis*; (3) whether the Secretary's interpretation of the OSH Act is unreasonable; and (4) whether public policy favors extending authority to the OSHRC to designate safety and health violations *de minimis* and require no abatement.

A. THE OSH ACT ESTABLISHES THREE LEVELS OF SEVERITY: SERIOUS, NON-SERIOUS, AND DE MINIMIS

The majority of the circuits that have considered the issue have concluded that Congress intended to establish three severity levels for occupational safety and health violations—serious, non-serious, and *de*

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163. *See* Chao v. Symms Fruit Ranch, Inc., 242 F.3d 894, 898 (9th Cir. 2001) (concluding that the OSHRC can designate an occupational safety and health violation as *de minimis* and declare that even though an OSH Act violation has occurred in a technical sense, that no penalty is warranted); Reich v. Occupational Safety & Health Review Comm'n, 998 F.2d 134, 138-39 (3d Cir. 1993) (stating that the OSH Act gives the Commission authority to reduce safety violations to the *de minimis* level); Donovan v. Daniel Constr. Co., 692 F.2d 818, 821 (1st Cir. 1982) ("[t]here is no doubt (and it is agreed) that the Act gives the Commission authority, in appropriate cases, to reduce violations to the *de minimis* category."); Phoenix Roofing, Inc. v. Dole, 874 F.2d 1027, 1031-32 (5th Cir. 1989) (stating that a violation of a safety standard can be classified *de minimis* resulting in a finding that, even though technically a violation occurred, no penalty should be imposed and no abatement is necessary). *But see* Caterpillar, Inc. v. Herman, 131 F.3d 666, 668 (7th Cir. 1997) (holding that the Commission lacks the authority to reduce violations to a *de minimis* category once the Secretary has issued a citation and further stating that this would transfer the Secretary's prosecutorial discretion to the Commission); *Reich*, 998 F.2d at 140 (Becker, J., dissenting) (stating that the OSH Act grants the Secretary unreviewable prosecutorial discretion either to issue a citation or a notice in lieu of citation for *de minimis* violations and that the Commission lacks the authority to reduce a safety violation to a *de minimis* level once the Secretary has issued a citation for a serious or non-serious offense).

minimis.[164] The minority view is that *de minimis* safety and health violations were intended as a mere subset of non-serious violations, and as such, only two severity levels—serious and non-serious, were created by the OSH Act.[165]

We believe that *de minimis* safety violations are *sui generis* and are mutually exclusive of the set of either serious safety violations or non-serious safety violations.[166] This argument finds support in the structure of the OSH Act itself. The Act separately defines *de minimis* safety violations as those "violations which have no direct or immediate relationship to safety or health."[167]

This argument can be illustrated in terms of a Venn diagram. Imagine the three separate classifications—serious, non-serious, and *de minimis*, as three separate eccentric circles.[168]

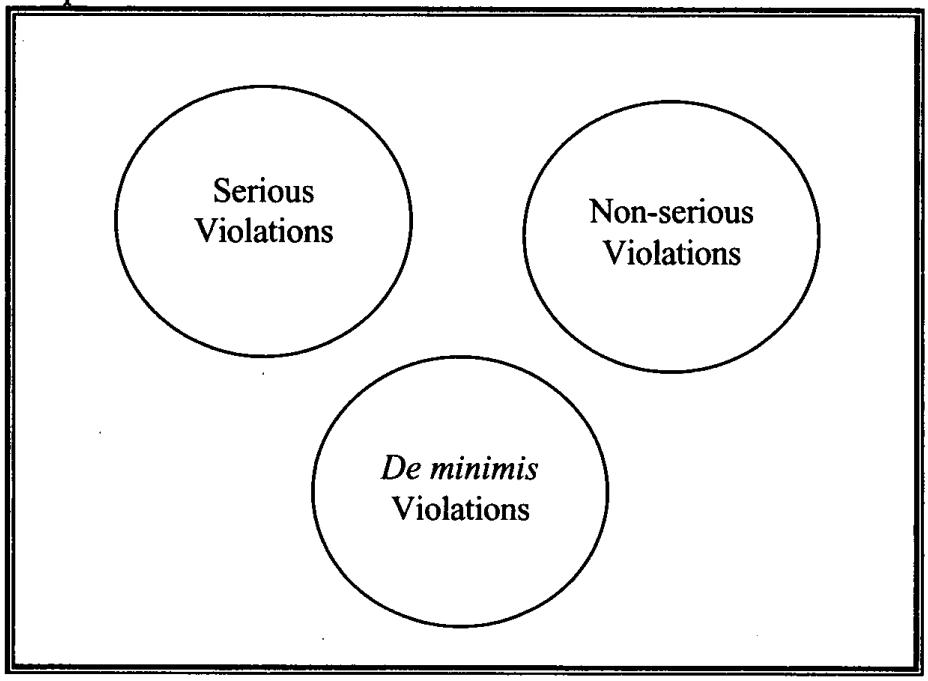

Figure 1

164. *See* cases cited *supra* note 163.
165. *See Reich*, 998 F.2d at 141-42 (Becker, J., dissenting).
166. *But see id.* at 142 (Becker J., dissenting).
167. 29 U.S.C. § 658(a) (1994).
168. *See* Figure 1.

Serious safety violations, since they are defined in the Act, occupy the first separate circle unto themselves. Non-serious safety violations, since they are not separately defined within the Act consist of the set of safety violations that do not fit within the serious violation definition,[169] and occupy a second separate circle. Finally, *de minimis* violations, since they have their own separate and distinct definition within the Act,[170] occupy a third separate circle. Thus, in finite terms, serious, non-serious, and *de minimis* safety violations exist either by express inclusion in an OSH Act definition, or by implication by omission. Whether these levels of severity can be viewed as mutually exclusive of one another depends upon whether they are defined in the Occupational Safety and Health Act or not.

In *Reich v. Occupational Safety & Health Review Commission*,[171] Judge Edward R. Becker argued in dissent that Congress created only two severity levels—serious and non-serious—under the OSH Act.[172] Judge Becker argued that *de minimis* violations were intended merely as a subset of non-serious violations over which the Secretary has sole discretion to decide whether to cite an employer for a violation or to instead issue a notice in lieu of a citation for *de minimis* violations.[173]

This interpretation cannot be justified under the OSH Act. According to Judge Becker, whether Congress intended to establish separate severity levels depends upon whether Congress defined a severity level, or by negative implication failed to define a severity level, within the OSH Act.[174] Judge Becker correctly noted that Congress expressly defined what comprises a serious safety violation, but either intentionally or inadvertently failed to define non-serious safety violations.[175] Judge Becker inferred from this that, by implication, non-serious violations are comprised of the set of all violations not fitting within the set definition of serious violations[176]— *i.e.*, non-serious violations are, "as their name implies, all of those violations that are not serious."[177]

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169. *See* Reich v. Occupational Safety & Health Review Comm'n, 998 F.2d 134, 142 (3d Cir. 1993) (Becker, J., dissenting).

170. 29 U.S.C. § 658 (a).

171. 998 F.2d 134 (3d Cir. 1993).

172. *Id.* at 141-42 (Becker, J., dissenting).

173. *Id.* at 142.

174. *See generally Reich*, 998 F.2d at 142 (Becker, J., dissenting).

175. *See id.* at 141-142 (3d Cir. 1993) (Becker, J., dissenting) (citing 29 U.S.C. § 666(b) (1994)).

176. *Id.* at 142 (Becker, J., dissenting).

177. *Id.*

However, Judge Becker went a step further. He argued that because the OSH Act definition of *de minimis* violations is found only in a provision that gives the Secretary discretion in making charging decisions, Congress must not have intended to create a separate severity level.[178] Judge Becker concluded from this that the statute creates only two severity levels—serious and non-serious—and that *de minimis* violations were merely intended to be a subset of non-serious violations.[179]

As Judge Becker acknowledges, the OSH Act expressly defines *de minimis* safety violations.[180] The Act describes *de minimis* violations as "violations which have no direct or immediate relationship to safety or health."[181] This description itself "determine[s] or identif[ies] the essential meaning of"[182] the term *de minimis violation.* The fact that Congress placed the definition in a somewhat odd location within the statute does not mean that Congress did not intend to create a third category of violations. Additionally, because a *de minimis* violation has its own definition,[183] it presumably was not intended to be within a subset of non-serious violations. *De minimis* violations, therefore, must be a severity level unto

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178. *Id.* at 141-142 (Becker, J., dissenting). Judge Becker argued:

> The Acts only *reference* to a *de minimis* violation, and the reference on which the traditional view relies, is found in § 658(a), a provision that by its terms is concerned solely with the Secretary's prosecutorial charging decisions. In contrast, the definitions for serious and not serious violations are located in § 666, a provision that governs the assessment of civil and criminal penalties and which expressly provides a role for the Commission in assessing those penalties. From a purely structural standpoint, it seems unlikely that if Congress intended to establish three severity levels it would have established them in completely separate sections, sections that are dissimilar in terms of their location within the Act and their subject matter. Moreover, it seems unlikely that Congress would place a definition for one of the primary issues in adjudication in a section which, in all other aspects, concerns only conduct by the Secretary that is wholly unreviewable. Congress never intended *de minimis* to serve as a level of severity for purposes of adjudication. Rather, as I read the Act, it establishes only two severity levels for a cited violation: (1) "serious violation" and (2) "violation determined not serious."

Id. (citations omitted) (emphasis added).

179. *Reich*, 998 F.2d 134, 141-42 (Becker, J., dissenting).

180. *See id.* at 142. Webster's Dictionary defines the word *define* as "to determine or identify the essential qualities or meaning of . . . [or] to discover and set forth the meaning of (as a word)." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, 333 (9th ed. 1983).

181. 29 U.S.C. § 658(a) (1994).

182. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 333 (9th ed. 1983).

183. 29 U.S.C. § 658(a) (1994).

themselves, mutually exclusive of either serious or non-serious violations.[184] Thus, the OSH Act creates three levels of severity—serious, non-serious, and *de minimis*.

B. THE COMMISSION POSSESSES THE STATUTORY AUTHORITY UNDER THE OSH ACT TO LABEL A SAFETY AND HEALTH VIOLATION DE MINIMIS

The OSHRC possesses the statutory authority to designate a safety and health violation *de minimis* and require no penalty or abatement even though an OSH Act violation has technically occurred.[185] The structure of the OSH Act itself compels this conclusion.

Under the OSH Act, the Commission is authorized 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*."[186] The Commission's authority to direct *other appropriate relief* has been referred to as the Commission's residual remedial power.[187] It is under this statutory grant of power that the Commission is authorized to reduce the severity level of a safety violation from serious or non-serious to *de minimis*.[188] The power of the Commission to reduce a violation to the *de minimis* category can best be analogized to the power of a court to reduce a criminal offense charged in the indictment to a lesser-included offense.[189]

The Occupational Safety and Health Act requires employers to provide their employees with a worksite that is "free from recognized hazards that are causing or are likely to cause death or serious physical

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184. Figure 1, *supra* note 168.

185. Chao v. Symms Fruit Ranch, Inc., 242 F.3d 894, 898 (9th Cir. 2001).

186. *Id.* at 898-99 (citing 29 U.S.C. § 659(c) (1994)).

187. *See* Reich v. Occupational Safety & Health Review Comm'n, 998 F.2d 134, 143 (3d Cir. 1993) (Becker, J., dissenting) (emphasis added).

188. *See Symms Fruit Ranch*, 242 F.3d at 899 (quoting 29 U.S.C. § 659(c) (1994)) (emphasis added).

189. *See id.* (quoting Reich v. Occupational Safety & Health Review Comm'n, 998 F.2d 134, 139 (3d Cir. 1993)). The majority in *Reich* crystallized its reasoning by concluding:

> The Commission has the statutory authority to affirm, modify, or vacate the Secretary's citation, or to direct other appropriate relief. Its action in reducing the violation to *de minimis* status clearly falls within that grant of power. The reduction of the offense level is analogous to the power of a court to reduce a criminal offense to a lesser level than the one charged in an indictment. That traditional procedure has not been considered to be a usurpation of prosecutorial discretion, but rather a necessary prerogative of the court.

Id.

harm to [their] employees . . . [and] comply with occupational safety and health standards promulgated under [the OSH Act] . . . ."[190] If the Secretary issues a citation to an employer for a *serious* violation for failing to provide its employees with a safe place of employment, or for failing to comply with an occupational safety and health standard, the statute provides that the employer *must* be assessed a monetary penalty for each separate violation.[191] Conversely, if the Secretary issues a citation to an employer for a *non-serious* failure to provide its employees with a safe worksite, or for failure to comply with a safety and health standard, the statute provides that the employer *may* be assessed a monetary penalty.[192] Thus, in the case of *serious* violations, there is no discretion. If the employer is cited for seriously violating a safety or health standard, the employer *must* be assessed a fine.[193] Alternatively, if the employer is cited for a *non-serious violation*, there is discretion, and the employer *may* be assessed a fine.[194]

Under the OSH Act, the Secretary (or his designee) is authorized to conduct inspections or investigations and, thereafter, to issue citations to employers who are violating safety standards or regulations under the Act.[195] This provision states that "the citation *shall* fix a reasonable time for the abatement of the violation."[196] Additionally, the section states that the Secretary "*may* prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health."[197]

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190. 29 U.S.C. § 654(a) (1994).

191. *See* Chao v. Symms Fruit Ranch, Inc., 242 F.3d 894, 897-98 (9th Cir. 2001) (citing 29 U.S.C. § 666(b) (1994)).

192. *Id.* (citing 29 U.S.C. § 666(c)).

193. *See generally id.*

194. *See id.*

195. *See id.* at 898 (citing 29 U.S.C. § 658(a) (1994)).

196. 29 U.S.C. § 658(a) (emphasis added).

197. *Id.*

The Secretary argues that under the OSH Act, once a citation is issued for a violation of a health or safety standard and the violation is established, the Commission lacks the authority to designate the violation *de minimis* and require no penalty or abatement.[198] The problem with the Secretary's interpretation becomes readily apparent when sections 666 and 658(a) are juxtaposed.[199] If an employer is cited for a non-serious violation under section 666(c), there is no discretion to allow the employer to forego abatement of the violation.[200] As long as the Secretary has issued a citation to the employer instead of a notice in lieu of citation, the employer must abate the violation under section 658(a),[201] no matter how trivial the violation.[202] Thus, unless the OSHRC is authorized to reduce the severity level of the violation to the *de minimis* status, the employer must always abate the violation, and no discretion exists to allow non-abatement even

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198. Chao v. Symms Fruit Ranch, Inc., 242 F.3d 894, 895, 898 (9th Cir. 2001).

199. *Id.* at 898.

200. The statute states:

> (c) Citation for violation determined not serious
>
> Any employer who has received a citation for a violation of the requirements of section 654 of this title, of any standard, rule, or order promulgated pursuant to section 655 of this title, or of regulations prescribed pursuant to this chapter, and such violation is specifically determined not to be of a serious nature, may be assessed a civil penalty of up to $7,000 for each such violation.

29 U.S.C. § 666(c) (1994). *See also* Chao v. Symms Fruit Ranch, Inc., 242 F.3d 894, 897-98 (9th Cir. 2001).

201. The relevant portion of the statute reads:

> (a) Authority to issue; grounds; contents; notice in lieu of citation for *de minimis* violations
>
> If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of section 654 of this title, of any standard, rule or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, he shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated. In addition, the citation *shall fix a reasonable time for the abatement of the violation.* The Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to *de minimis* violations which have no direct or immediate relationship to safety or health.

29 U.S.C. § 658(a) (emphasis added); *see also* Chao v. Symms Fruit Ranch, Inc., 242 F.3d 894, 898 (9th Cir. 2001).

202. *See Symms Fruit Ranch*, 242 F.3d 894 at 898.

for *de minimis* violations that the Commission finds "have no direct or immediate relationship to safety or health."[203]

The Commission is statutorily authorized to adjudicate contested citations involving alleged violations of the OSH Act.[204] Under this authorization, the Commission must possess the authority to rule that the OSH Act was not violated even if, in some purely technical or literal sense, an employer violated an occupational safety or health standard.[205] Accepting the Secretary's view "would mean that once she issues a citation for a violation of a safety standard and establishes such a violation, the Commission has no authority to hold that the violation was so negligible or harmless that remediation is unnecessary."[206] Accepting this position would require employers to abate any violation for any citation that an OSHA inspector issued and proved, no matter how insignificant.

A return to the ladder hypothetical in this article's introduction is illustrative. In this situation, the moment the Secretary (compliance investigator) issued a citation and established that a non-serious violation of an occupational safety and health regulation occurred, the employer's only options would be either to contest the finding of a violation or abate the violation. The employer would not have the option of admitting a technical violation but arguing that the violation was insignificant and put no employees at risk. This is because under the Secretary's interpretation, the Commission lacks the authority to later reduce the violation to the *de minimis* status and allow the employer to forego abatement of the violation.

This result is contrary to the structure and purpose of the OSH Act. If after an evidentiary hearing the OSHRC finds that a technical violation occurred, but that the violation bore no discernible relation to workplace safety, the OSHRC should be empowered to find a *de minimis* violation and to decline to order abatement. Ordering abatement under these circumstances is a waste of resources – it imposes a cost upon employers but delivers no safety benefit to employees. Whether the technical violation is a thirteen-inch ladder rung or a partially guarded, unengaged power take-off shaft, the OSHRC should be permitted to say, in effect, "No harm, no foul."

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203. 29 U.S.C. § 658(a).
204. 29 U.S.C. § 659(c).
205. *See Symms Fruit Ranch*, 242 F.3d at 898.
206. *Id.*

C. THE SECRETARY'S INTERPRETATION OF THE OCCUPATIONAL SAFETY AND HEALTH ACT IS UNREASONABLE

1. The Reasonableness Standard

The Secretary of Labor's argument that the Commission lacks the authority to characterize a safety violation as *de minimis* and to order no penalty or abatement is unreasonable.[207] The Secretary argues one interpretation of the OSH Act while the OSHRC advances an interpretation that directly contradicts the Secretary's interpretation.[208] In situations where the statutory interpretations of the Secretary and the Commission conflict, the court must defer to the Secretary's *reasonable interpretation.*[209] In addressing these types of cases, courts apply the *Chevron* test.[210]

Ordinarily, if an agency is entrusted to administer a statute, a court reviewing the agency's construction of the statute must first give effect to the "unambiguously expressed intent of Congress."[211] If the court finds that Congress has not directly addressed the precise question presented, a court may not substitute its own interpretation of the statute for the reasonable interpretation of the agency's administrator.[212] Instead, the court should defer to the agency's construction of the statute as long as that interpretation is reasonable.[213] If a court finds that an agency's construction of its own regulation is reasonable, then the agency's interpretation is entitled to "substantial deference,"[214] but such deference is required only if the Secretary's statutory construction is reasonable.[215] An interpretation is unreasonable if it is "'arbitrary, capricious, or manifestly contrary to statute.'"[216]

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207. *Id.* at 896-97.

208. *See id.* at 897.

209. *See id.* (quoting Herman v. Tidewater Pac., Inc., 160 F.3d 1239, 1241 (9th Cir. 1998)) (emphasis added).

210. Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837 (1984). For a discussion of the judicial and academic reaction to *Chevron*, see Richard A. Bales, *Compulsory Employment Arbitration and the EEOC*, 27 PEPP. L. REV. 1, 26-28 (1999).

211. Chao v. Symms Fruit Ranch, Inc., 242 F.3d 894, 897 (9th Cir. 2001) (quoting *Chevron*, 467 U.S. at 842-23).

212. *Id.* (citing *Chevron*, 467 U.S. at 844).

213. *Id.* (citing *Chevron*, 467 U.S. at 843-44).

214. *Id.* (citing *Martin*, 499 U.S. at 150).

215. *Id.* (citing *Martin*, 499 U.S. at 158) (emphasis added).

216. *Id.* (citing *Chevron*, 467 U.S. at 844).

2. Why the Secretary's Interpretation of the OSH Act is Unreasonable

The Secretary's interpretation of the OSH Act is unreasonable for three reasons. First, the Secretary's construction of the Act would require finding that the OSH Act establishes only two severity levels for safety violations – *serious and non-serious* – thereby excluding the *de minimis* classification altogether from consideration by the Commission.[217] Second, this interpretation would call into question the Commission's authority to determine the severity level of a safety violation at all: if the Commission cannot downgrade a violation from non-serious to *de minimis*, then it is unclear whether the Commission has the statutory authority to downgrade a serious violation to a non-serious violation. Third, and most importantly, acceptance of this position would mean that once the Secretary cites an employer for violation of a safety standard and establishes the violation, the OSHRC is powerless to then hold that the violation was so "negligible or harmless that remediation is unnecessary."[218] This is inconsistent with the text of the OSH Act, the purpose of which is to promote workplace safety. If abatement of a technical violation does not enhance workplace safety, there is no statutory justification for ordering abatement.

In *Cuyahoga Valley Railway v. United Transportation Union*,[219] a per curiam summary disposition, the United States Supreme Court ruled that the Secretary of Labor possesses unreviewable prosecutorial discretion to drop a citation for a safety violation once issued.[220] In the Third Circuit case of *Reich v. Occupational Safety & Health Review Commission*,[221] Judge Edward R. Becker argued in dissent that the *Cuyahoga* Court interpreted the OSH Act as granting the Secretary unreviewable prosecutorial discretion to either issue a citation for a safety violation or issue a notice in lieu of a citation.[222] Further, Judge Becker argued that to give the Commission the authority to reduce the level of a safety violation to the *de minimis* level would allow the Commission to review the

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217. *See* Reich v. Occupational Safety & Health Review Comm'n, 998 F.3d 134, 142-43 (3d Cir. 1993) (Becker, J., dissenting).

218. Chao v. Symms Fruit Ranch, Inc., 242 F.3d 894, 898 (9th Cir. 2001).

219. Cuyahoga Valley Ry. Co. v. United Transp. Union, 474 U.S. 3 (1985).

220. *See Symms Fruit Ranch*, 242 F.3d at 899 (citing *Cuyahoga Valley*, 474 U.S. at 6-7).

221. Reich v. Occupational Safety & Health Review Comm'n, 998 F.2d 134 (3d Cir. 1993).

222. *See Symms Fruit Ranch*, 242 F.3d 894, 898 (9th Cir. 2001) (quoting *Reich*, 998 F.2d at 142 (3d Cir. 1993) (Becker, J., dissenting)).

Secretary's unreviewable decision, and usurp the Secretary's prosecutorial discretion. Judge Becker argued this should not be allowed.[223]

However, the Ninth Circuit has distinguished *Cuyahoga* by finding it merely stands for the proposition that the Secretary of Labor's discretion to withdraw a citation is analogous to a civil plaintiff's discretion to withdraw her claim, or a criminal prosecutor's discretion to drop charges.[224] In other words, just because Congress gave the Secretary the authority to drop a charge or to label a charge *de minimis* does not necessarily mean that Congress intended to deprive the OSHRC of the authority to label a finding *de minimis*. Moreover, the Ninth Circuit compared the Secretary's discretion in these circumstances to the "unremarkable general proposition" that a court cannot require a civil plaintiff to continue to prosecute a case against her will.[225] Therefore, Judge Becker's reliance on the *Cuyahoga* decision for the proposition that the OSH Act grants the Secretary unreviewable prosecutorial discretion to either issue a citation for a safety violation, or issue a notice in lieu of a citation, is misplaced. The case is neither on point nor analogous.

D. PUBLIC POLICY FAVORS EXTENDING AUTHORITY TO THE COMMISSION

As stated in this article's background section, two policies justified Congress' enactment of the Occupational Safety and Health Act. First, Congress wanted to reduce human suffering and death from workplace injuries and illnesses.[226] Second, Congress wanted to counteract the economic impacts resulting from occupational injuries and illnesses.[227]

1. Extending Authority to the Commission Will Not Increase Workplace Injuries

First, allowing the Commission to reduce safety and health violations from serious or non-serious to *de minimis* will not increase workplace injuries. Empowering the Secretary to cite employers for serious and non-

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223. *Id.* at 899.
224. *See id.*
225. *See id.*
226. *See* S. REP. NO. 91-1282, at 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5178.
227. *See* 29 U.S.C. § 651(a) (1994) ("personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.").

serious violations serves as a deterrent to employers who would otherwise violate the OSH Act regulations. It is only under limited circumstances that an employer may violate safety standards and avoid both penalty and abatement under the *de minimis* defense.[228] *De minimis* safety violations, by definition, have no "direct or immediate relationship to safety or health."[229] Allowing the Commission to reduce a certain limited number of safety and health violations to the *de minimis* level such that no penalty or abatement is required will not encourage employers who would otherwise abide by the letter of the regulation to violate the regulation.

Employers who fail to abide by the regulation risk being found liable for a serious or non-serious safety violation, paying a penalty, abating the violation, and having their safety records history diminished. These sanctions are sufficient deterrents to employers to prevent them from violating safety regulations. Just knowing that they may, in a certain limited number of situations, be absolved from liability under a *de minimis* defense will not increase safety violations or workplace injuries. Thus, allowing the Commission to classify certain safety violations *de minimis*, even though technically an OSH Act standard has been violated, will not result in an increase in workplace injuries.

2. *Extending Authority to the Commission Makes Economic Sense*

One congressional purpose for enacting the Occupational Safety and Health Act was to counteract the economic impacts resulting from occupational injuries and illnesses.[230] Some of these economic impacts included lost production, wages, medical expenses, and disability compensation payments. From an economic efficiency standpoint it follows that, if an employer violates a technical safety standard and is cited by the Secretary for the violation, but that the violation has "no direct or immediate relationship to safety or health,"[231] to nevertheless impose a fine or require abatement is counterproductive and, derivatively, contrary to the purpose of the statute.

An abatement requirement in instances where abatement does not improve workplace safety can only be viewed as punitive in nature. This makes little sense, because *de minimis* violators are by definition the *least* deserving, among categories of violators, of punishment. Moreover, as

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228. *See* Phoenix Roofing, Inc. v. Dole, 874 F.2d 1027, 1034 (5th Cir. 1989).
229. 29 U.S.C. § 658(a) (1994).
230. *See* 29 U.S.C. § 651 (1994).
231. 29 U.S.C. § 658(a).

discussed in Part III-B above, abatement in this context results in a deadweight loss in productivity: the employer must pay for the abatement and absorb the lost opportunity costs associated with implementation of the abatement, but there is no corresponding benefit to employees in the form of enhanced workplace safety.

Additionally, allowing the OSHRC to affirm a citation for a safety violation but to designate it as *de minimis* reduces litigation expenses for both employers and the Department of Labor. In fact, the Secretary's own regulation indicates that reducing litigation expenses is worthwhile.[232] Pursuant to 29 C.F.R. §§ 2200.200 - .211, employers with cases involving non-complex issues of law or fact that fall under an aggregate proposed penalty of less than $10,000 can opt for an "E-Z Trial."[233] This E-Z Trial does not allow complaints, answers, pleadings, discovery (except in certain limited circumstances), or interlocutory appeals.[234] Hearings are informal and parties argue their case orally before a Judge instead of submitting written briefs, and the Judge usually delivers oral decisions from the bench.[235]

The informal adjudicatory process contained in the E-Z Trial demonstrates that it makes economic sense to allow the OSHRC to affirm a citation for a safety violation but to designate it as *de minimis*. In such an instance, the E-Z Trial method operates at its optimum. Usually, these cases involve non-complex issues of law or fact and almost by definition fall well under the statutory maximum $10,000 for qualification for E-Z Trial use.[236] Thus the Secretary's own regulation allowing a simplified adjudicatory model demonstrates the economic benefits to both the Department of Labor and employers from allowing the Commission to affirm a citation for a safety violation but to designate it as *de minimis*.

CONCLUSION

Currently, a split exists in the Federal Circuit Courts concerning whether the Occupational Safety and Health Review Commission possesses the authority to designate a safety and health violation *de minimis* and require no abatement, even after the Secretary of Labor has issued a citation for the violation. Indeed, the majority of Federal Circuit Courts to

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232. *See* 29 C.F.R. § 2200.200(a) (2001).
233. *Id.* § 2200.202.
234. *Id.* § 2200.200.
235. *Id.*
236. *See id.* § 2200.202.

address this issue have concluded that the Commission does in fact possess this authority.

This article demonstrates that the Occupational Safety and Health Review Commission has the statutory authority to designate an occupational safety and health violation as *de minimis* and declare that, even though an OSH Act violation has occurred in a technical sense, no penalty is warranted and no abatement is necessary though the Secretary has issued a citation. Moreover, there are sound policy reasons for recognizing the OSHRC's authority in this regard. Requiring an abatement that will not enhance workplace safety and imposes a deadweight loss on employers is inefficient. The OSHRC should have the authority to find: "No harm, no foul."