

# NOTES

## Evidentiary Status of Payment of OSHA Fines

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Our society has become increasingly concerned about the thousands of accidental deaths and injuries which occur annually at job sites in this country.<sup>1</sup> The law has responded to this concern in the form of more numerous and stricter safety standards and codes.<sup>2</sup> These safety regulations are assuming greater importance in personal injury litigation.<sup>3</sup> The extent of their potential use in such litigation, however, has not been clearly delineated.<sup>4</sup> For example, courts disagree as to whether safety codes or standards are admissible in evidence on the issue of negligence.<sup>5</sup> Where fines are imposed upon an employer for

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1. The legislative history of the Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590-1620 (1970), may be found in SENATE COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, S. REP. NO. 91-1282, 91st Cong., 2d Sess., reprinted in [1970] U.S. CODE CONG. & AD. NEWS 5177 [hereinafter SENATE REPORT]. This report states that "14,500 persons are killed annually as a result of industrial accidents. . . ." *Id.* at 2. From 1966 to 1970, more Americans were killed at work than in the Vietnam War. *Id.* An additional 2.2 million persons are disabled on the job each year. *Id.* The resulting loss of 250 million workdays of labor is many times more than the loss due to strikes. *Id.* Over \$1.5 billion in wages are lost, and annual loss to the Gross National Product is over \$8 billion. *Id.*

2. Philo, *Use of Safety Standards, Codes and Practices in Tort Litigation*, 41 NOTRE DAME LAW. 1, 2 (1965); Comment, *Admissibility of Safety Codes, Rules and Standards in Negligence Cases*, 37 TENN. L. REV. 581, 581 (1970). In addition to discussing the evidentiary value of safety standards, the Philo article considers their potential use in pretrial discovery, trial preparation, and the initial determination as to whether there is a cause of action.

3. Philo, *supra* note 2, at 1.

4. Comment, *supra* note 2, at 581.

5. The majority of jurisdictions that have considered the issue refuse to admit safety codes

the violation of a provision of a safety code, an evidentiary problem arises as to the admissibility of such a payment in a subsequent civil action.

The latter problem, which is the focus of this Note, is illustrated by a typical hypothetical situation: A compliance officer conducts an investigation of defendant XYZ Company, and discovers several unsatisfactory conditions. XYZ Company is subsequently cited by the Secretary of Labor for several "non-serious"<sup>6</sup> violations of the Occupational Safety and Health Act [OSHA],<sup>7</sup> one of which is the failure to properly illuminate a stairwell in Company's multistory building. Rather than contest the citations, XYZ Company pays the small fines imposed and subsequently abates the hazardous conditions within the time period prescribed by the Secretary of Labor. After payment of the fines, but before abatement of the stairwell hazard, an employee of XYZ Company falls while descending the defective stairwell, breaks his neck, and dies. The employee's spouse initiates a wrongful death action against XYZ Company and seeks to introduce into evidence the fact that XYZ Company paid the fine imposed for failure to adequately illuminate the stairwell on which the deceased spouse was injured and killed. The surviving spouse offers such evidence as an admission by XYZ Company that it failed to exercise due care in lighting the stairwell.

The general rule is that criminal convictions or acquittals are not admissible in evidence in a civil action to establish the truth of the facts on which the criminal judgments were rendered.<sup>8</sup> A judgment entered

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in civil actions. Comment, *supra* note 2, at 582. See, e.g., *Hackley v. Woldorf-Hoerner Paper Co.*, 149 Mont. 286, 294, 425 P.2d 712, 716 (1967) (private organization's safety standards for construction of ladders inadmissible because merely advisory and without force of law); *Hercules Powder Co. v. DiSabatino*, 55 Del. 516, 522, 188 A.2d 529, 533 (1963) (safety code prepared and issued by government agency inadmissible as independent evidence to prove truth of statements contained in them). The Supreme Court of New Jersey, representing the minority view, resolved this issue in favor of admissibility in *McComish v. DeSoy*, 42 N.J. 274, 281-82, 200 A.2d 116, 123 (1964) (industry manuals, introduced as safety codes, distinguished from learned treatises in that the former represent an industry-wide consensus).

6. A "serious" violation is one where there is a substantial probability that death or serious physical harm will result. 29 U.S.C. § 666(j) (1976). "Nonserious" violations, on the other hand, are violations that are unlikely to cause death or serious physical harm, but have a direct or immediate relationship to the safety or health of employees. OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, FIELD OPERATIONS MANUAL, ch. XIII, ¶ 4360.2m, at 50 (1977). De minimis violations have no direct or immediate relationship to safety or health. *Id.*; 29 U.S.C. §§ 651-678 (1976 & Supp. III 1979).

7. 29 U.S.C. §§ 651-678 (1976 & Supp. III 1979).

8. See, e.g., *Dunham v. Pannell*, 263 F.2d 725, 728 (5th Cir. 1959); *Book v. Datema*, 256 Iowa 1330, 1332, 131 N.W.2d 470, 471 (1964); *Laughlin v. Lamar*, 205 Okla. 372, 373, 237 P.2d 1015, 1015-16 (1951); *Griffis, Evidence of Disposition of Related Criminal Case in Subsequent Damage Suit*, 25 INS. COUNSEL J. 480, 480 (1958); *Vestal & Coughenour, Preclusion/Res Judicata Variables: Criminal Prosecutions*, 19 VAND. L. REV. 683, 704 (1966). Courts have cited numerous reasons for this rule, such as the lack of mutuality because the parties in the two cases are not the same, *Smith v. New Dixie Lines*, 201 Va. 466, 472, 111 S.E.2d 434, 438 (1959), and the differences in the procedural and substantive rules between criminal and civil cases, *Dimmick v. Follis*, 111

on a plea of guilty, however, falls within an exception to this rule and is admissible in a subsequent civil action against the accused arising out of the same offense as an admission or a declaration against interest.<sup>9</sup> Consequently, whether payment of an OSHA fine is admissible in a subsequent civil action may depend on whether such payment is characterized as a plea of guilty.

This Note will consider the evidentiary impact in subsequent civil litigation of payment of OSHA fines without contest. Since such an inquiry would be fruitless unless subsequent civil litigation involving OSHA violations is possible, potential avenues for such litigation will first be explored. The Occupational Safety and Health Act will be examined to determine if the Act itself creates a cause of action for damages arising from a violation of OSHA standards. Workers' compensation statutes will then be examined to determine if they preclude civil litigation for violations of OSHA standards.

After concluding that civil litigation is possible in many cases, an analogy between OSHA citations and traffic citations will be utilized to explore the evidentiary status of the payment of OSHA fines. Because the analogy between OSHA citations and traffic citations is imperfect, factors unique to OSHA, as well as several courts' analyses of the issue, will also be considered. Finally, public policy considerations will be examined, and the practical effect of giving OSHA determinations evidentiary weight in civil litigation will be discussed.

## SURVEY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

The Occupational Safety and Health Act of 1970 represents a congressional response to the national need for more effective means of protecting the American worker.<sup>10</sup> OSHA was designed to assure healthful working conditions and to preserve human resources<sup>11</sup> by encouraging employers and employees to reduce the number of occupational safety and health hazards at their places of employment.<sup>12</sup> The Act authorizes the Secretary of Labor to promulgate and enforce stan-

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N.E.2d 486, 488 (Ind. Ct. App. 1953). Furthermore, the use of a criminal judgment in a civil case might induce superficial proffering of evidence in the civil case. 5 J. WIGMORE, EVIDENCE § 1671a, at 806-13 (Chadbourn rev. ed. 1974). The emerging trend, however, is to admit evidence of convictions upon a plea of not guilty. See Griffith, *supra* at 480; Vestal & Coughenour, *supra* at 704-05.

9. See, e.g., *Book v. Datema*, 256 Iowa 1330, 1332, 131 N.W.2d 470, 471 (1964); *Scogin v. Nugen*, 204 Kan. 568, 573, 464 P.2d 166, 171 (1970); *Davis v. Bankston*, 192 So. 2d 614, 617 (La. Ct. App. 1966). The exception is based on the argument that a plea of guilty is a deliberate declaration against interest and therefore distinguishable from criminal convictions or acquittals. See *Book v. Datema*, 256 Iowa at 1332-33, 131 N.W.2d at 471.

10. See note 1 *supra*.

11. 29 U.S.C. § 651(b) (1976).

12. *Id.* § 651(b)(1).

dards that will achieve these legislative goals.<sup>13</sup> The coverage of the Act is extremely broad.<sup>14</sup> The Act applies, with minor exceptions,<sup>15</sup> to all employers and employees in any business that affects interstate commerce.<sup>16</sup>

OSHA imposes both general and specific duties upon employers.<sup>17</sup> The general duty clause requires employers to furnish their employees a safe place of employment free from recognized hazards.<sup>18</sup> The specific duties emanate from the Secretary of Labor's authority to promulgate detailed safety and health standards,<sup>19</sup> which are the primary method of realizing the objectives of the Act.<sup>20</sup> The Secretary is also empowered to issue temporary emergency standards after making a determination that employees are being exposed to grave danger and that an emergency standard is necessary to protect the employees from such danger.<sup>21</sup> An employer may receive a variance from a standard if certain requirements are met,<sup>22</sup> or may seek judicial review of the validity of any standard.<sup>23</sup>

Employers are required to maintain accurate records and make periodic reports of occupational accidents and diseases occurring within the scope of employment.<sup>24</sup> The Secretary may issue regulations that require employers to conduct periodic inspections to reveal poten-

13. *Id.* § 655; Comment, *Federal Common Law Remedies Under the Occupational Safety and Health Act of 1970*, 47 WASH. L. REV. 629, 630 (1972).

14. Comment, *The Occupational Safety and Health Act of 1970: A New Concern for Employers*, 34 U. PITT. L. REV. 567, 568 (1973). Congress exercised the commerce power to the fullest extent permitted by the Constitution under art. I, § 8. SENATE REPORT, *supra* note 1, at 22-23.

15. The 1970 Act does not apply to self-employed domestic employees, 29 C.F.R. § 1975.4(a) (1979), workers covered by certain other federal legislation, 29 U.S.C. §§ 653(b)(1), (2) (1976), or employees of state and local governments, *id.* § 652(5); 29 C.F.R. § 1975.5(a) (1979). Several legislative attempts to limit the coverage of the Act in order to relieve small businesses of the disproportionate financial burden of complying with OSHA have been unsuccessful. See Comment, *supra* note 14, at 568.

16. 29 U.S.C. § 652 (1976).

17. Hollis & Howell, *The Occupational Safety and Health Act: Potential Civil Remedies*, 10 FORUM 999, 1000-01 (1975).

18. 29 U.S.C. § 654(a)(1) (1976).

19. *Id.* § 655(a).

20. 116 CONG. REC. 38367 (1970) (remarks of Rep. Smith). The objectives of the Act are enumerated in 29 U.S.C. § 651(b) (1976).

21. 29 U.S.C. § 655(c)(1) (1976).

22. *Id.* § 655(b)(6)(A). To receive a variance, an employer must establish that

(i) he is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date, (ii) he is taking all available steps to safeguard his employees against the hazards covered by the standard, and (iii) he has an effective program for coming into compliance with the standard as quickly as practicable.

*Id.*

23. *Id.* § 655(f). A person adversely affected by a standard may challenge the standard by filing a petition in the United States court of appeals for the circuit where such person resides or has a principal place of business. *Id.* The determination of the Secretary, however, is conclusive "if supported by substantial evidence." *Id.*

24. *Id.* § 657(c)(3).

tial causes of occupational accidents and illnesses.<sup>25</sup> Employers are also required to keep employees informed of their rights and obligations under the Act.<sup>26</sup>

To ensure compliance with OSHA, the Secretary is authorized to enter work sites at reasonable times, but without notice, and to conduct inspections and investigations.<sup>27</sup> Such inspections may be initiated by the OSHA office or upon the request of an employee.<sup>28</sup> If upon inspection or investigation the Secretary or an authorized representative finds a violation of a section of the Act, a written citation may be issued, which informs the employer of the nature of the alleged violation and the time allowed for abatement.<sup>29</sup>

Should the Secretary issue a citation, a notice of the proposed penalty must be sent to the employer.<sup>30</sup> An employer intending to contest a citation, the time allowed for abatement, or the proposed assessment of penalty must so inform the Secretary within fifteen working days following receipt of the notice.<sup>31</sup> Unless the citation is appealed within the prescribed period, it becomes final and unappealable to any court or agency.<sup>32</sup> After notification to the Secretary of intent to appeal, the employer is granted a hearing before a hearing examiner appointed by the Occupational Safety and Health Review Commission.<sup>33</sup> The hearing examiner submits to the Commission a report of his final disposition of the proceedings.<sup>34</sup> If no Commission member requests a review by the Commission, this report becomes the final order of that body.<sup>35</sup> Although either party may petition one of the Commission members to grant review, such review is not afforded as a matter of right.<sup>36</sup> Parties dissatisfied with an order of the Commission may appeal to a United States court of appeals.<sup>37</sup>

OSHA provides penalties for violations of its provisions which include criminal sanctions<sup>38</sup> as well as civil fines.<sup>39</sup> Fines of up to \$1,000 may be assessed for each serious<sup>40</sup> or non-serious<sup>41</sup> violation of a stan-

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25. *Id.* § 657(c)(1).

26. *Id.*

27. *Id.* § 657(a)(1), (2). The Secretary must first present appropriate credentials to the owner, operator, or agent in charge. *Id.*

28. *Id.* § 657(f)(1).

29. *Id.* § 658(a).

30. *Id.* § 659(a).

31. *Id.* § 659(a), (c).

32. *Id.*

33. *Id.* § 661(i) (Supp. III 1979).

34. *Id.*

35. *Id.*

36. Hollis & Howell, *supra* note 17, at 1002.

37. 29 U.S.C. § 660(a) (1976).

38. *Id.* § 666(e)-(g).

39. *Id.* § 666(a)-(h).

40. *Id.* § 666(b). See note 6 *supra*.

41. *Id.* § 666(c). See note 6 *supra*.

dard, rule, or order under the Act, or for failure to correct a violation within the time period allowed.<sup>42</sup> A fine of up to \$20,000 and imprisonment for up to one year may be imposed for a second or subsequent willful violation resulting in death to an employee.<sup>43</sup> Specified penalties may be assessed against anyone who, without authority from the Secretary, gives advance notice of any planned inspection,<sup>44</sup> who knowingly makes false representations in any document filed or required to be maintained,<sup>45</sup> or who violates any posting requirements imposed on employers.<sup>46</sup>

In determining the amount of the fine to be levied, the Commission considers the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations.<sup>47</sup> Fines are usually insubstantial and are paid without contest.<sup>48</sup>

Thus, OSHA provides for federal enforcement of safety standards for the workplace. But civil remedies in the form of private lawsuits provide another potential mechanism to accomplish the goals of the Act. This avenue will be discussed in the next section.

#### POTENTIAL CIVIL REMEDIES BASED ON OSHA

A civil cause of action based upon violation of a federal act such as OSHA may be expressly provided in the statute<sup>49</sup> or may be based upon either the doctrine of implication<sup>50</sup> or a federal common law theory.<sup>51</sup> In enacting OSHA, Congress did not expressly provide for a private remedy within the enforcement scheme.<sup>52</sup> Even without express statutory authorization of private remedies, however, the text and legislative history of a statute may imply congressional intent to provide a cause of action.<sup>53</sup> Nevertheless, the courts have consistently held that

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42. *Id.* § 666(d).

43. *Id.* § 666(e).

44. *Id.* § 666(f) (punishable by a fine of up to \$1,000, imprisonment for up to six months, or both).

45. *Id.* § 666(g) (punishable by a fine of up to \$10,000, imprisonment for up to six months, or both).

46. *Id.* § 666(h) (punishable by a civil penalty of up to \$1,000 for each violation).

47. *Id.* § 666(i).

48. By 1972, 95% of over 30,000 initial OSHA citations were accepted by employers without appeal. Jensen, Mohr & Stern, *Administration of the OSH Act in the Face of Criticism from Industry and Labor*, 11 AM. BUS. L.J. 37, 41 (1973). Ninety-eight percent of the violations and notifications issued in 1971 were for de minimis and non-serious violations. *Id.* at 42. Early enforcement efforts were hindered by the voluminous compilation of general safety and health standards, some of which are of little relevance to current industrial conditions. *Id.*

49. Hollis & Howell, *supra* note 17, at 1005.

50. *Id.* See text & notes 53, 54 *infra*.

51. Hollis & Howell, *supra* note 17, at 1005. See text & notes 55, 56 *infra*.

52. Comment, *supra* note 13, at 634.

53. Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 289 (1963). The federal courts have not hesitated to find implied causes of action under federal

Congress did not intend to create a claim under OSHA for damages in favor of employees.<sup>54</sup> Thus, a civil cause of action arising from a violation of an OSHA provision would have to be based on a federal common law theory.<sup>55</sup> A federal common law claim could arguably be

statutes. The first such case was *Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33, 39-40 (1916) (employer's failure to provide secure handholds adjacent to ladders on railroad cars in violation of Federal Safety Appliance Act entitled injured employee to recover damages). The *Rigsby* Court stated: "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied. . . ." *Id.* This is commonly known as the "special benefit rule." *Hollis & Howell*, *supra* note 17, at 1005. Subsequent cases in which a private remedy was implied from a federal statute include: *Sullivan v. Little Hunting Park*, 396 U.S. 229, 238-40 (1969) (implying cause of action for damages from provision of Civil Rights Act of 1866 respecting sale of real property); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (implying cause of action under the Securities Exchange Act of 1934 for violations of proxy solicitation requirements); *Reitmeister v. Reitmeister*, 162 F.2d 691, 694 (2d Cir. 1947) (implying cause of action under the Federal Communications Act of 1934 for unlawful interception of telephone message).

54. See, e.g., *Russell v. Bartley*, 494 F.2d 334, 336 (6th Cir. 1974); *Horn v. C.L. Osborn Contracting Co.*, 423 F. Supp. 801, 806-07 (M.D. Ga. 1976); *Skidmore v. Traveler's Ins. Co.*, 356 F. Supp. 670, 671 (E.D. La.), *aff'd*, 483 F.2d 67 (5th Cir. 1973). In *Russell*, the plaintiff, who suffered injury due to the cave-in of a ditch, received workers' compensation benefits under applicable Kentucky statutes. 494 F.2d at 335. He then sued his employer for violations of OSHA. *Id.* In dismissing the complaint for want of jurisdiction, the circuit court relied upon § 654(b)(4) of the Act and affirmed the district court's decision that OSHA did not give the employee a cause of action against his employer. *Id.* at 336.

In *Skidmore*, a Louisiana federal district court noted that OSHA does not mention any private civil remedy against the employer for violations of the Act. 356 F. Supp. at 671. Moreover, the court found nothing in the legislative history of the Act that created the "slightest implication that Congress intended to create a duty to respond to the individual employee in damages." *Id.* Rather, the Act suggests a contrary congressional intent in the relevant section which provides:

Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of employment.

29 U.S.C. § 653(b)(4) (1976).

55. Despite dictum in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) that there is no general federal common law, *id.* at 78, at least two theories have been advanced which support the power of the courts to create judge-made federal law. One theory rests on the finding of a delegation of lawmaking power from Congress to the federal courts. *Hollis & Howell*, *supra* note 17, at 1009; Comment, *supra* note 13, at 655. For example, in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), the Supreme Court held that Congress, in enacting § 301(a) of the Taft-Hartley Act (current version codified at 29 U.S.C. § 185 (1976)), gave federal courts the power to create a federal common law with regard to collective bargaining contracts. 353 U.S. at 450-51. Section 301(a) (29 U.S.C. § 185 (1976)), which provides that suits for violation of contracts between an employer and a labor organization may be brought in district court, was held to be more than just a jurisdictional provision. The Court looked to the legislative history of the Act and observed that the agreement to arbitrate grievance disputes was the quid pro quo for an agreement not to strike. *Id.* at 455. Consequently, the court concluded that the federal courts were to fashion federal substantive law from the policy of national labor laws in order to enforce agreements to arbitrate grievance disputes. *Id.* at 456.

The alternative basis of federal common law rests upon judicial protection of "essentially federal" interests. Comment, *supra* note 13, at 637. For example, in *United States v. Standard Oil Co.*, 332 U.S. 301 (1947), the Supreme Court stated that "although federal judicial power to deal with common law problems was cut down [by the *Erie* decision], that power remained unimpaired for dealing independently, whenever necessary or appropriate, with essentially federal matters, even though Congress had not acted affirmatively about the specific question." *Id.* at 307. This common-law power springs from both the doctrine of federal preemption and the need for uniform national laws. Comment, *supra* note 13, at 638.

grounded on the need to protect the essentially federal interest<sup>56</sup> that job-related injuries be adequately compensated.<sup>57</sup>

Failure of the Act to provide a cause of action does not, of course, preclude civil litigation in which payment of an OSHA fine might be offered as evidence of a violation of an OSHA standard. It merely precludes recovery solely on the basis of the Act.<sup>58</sup> Tort recovery based on unsafe working conditions is not affected by OSHA.<sup>59</sup> Proof of violation of an OSHA provision could be offered as evidence of failure to exercise due care.<sup>60</sup> Workers' compensation laws, however, do limit the scope of remedies available to those injured in the course of their employment. Therefore, workers' compensation statutes will be examined

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56. There is no express delegation of lawmaking power to the judiciary in OSHA. Hollis & Howell, *supra* note 17, at 1009; Comment, *supra* note 13, at 655. Delegation cannot be implied from the text and history of the statute for the same reasons that a federal civil cause of action cannot be implied. See text & note 54 *supra*. Consequently, a federal common-law remedy, if it exists, must necessarily be based upon the protection of essentially federal interests. Hollis & Howell, *supra* note 17, at 1009; Comment, *supra* note 13, at 655.

57. Since compensation of injured employees has been a matter of local control for centuries, it is not regarded as an essentially federal interest. Hollis & Howell, *supra* note 17, at 1009; Comment, *supra* note 13, at 655. Nevertheless, the assurance that job-related injuries are adequately compensated is arguably such a federal interest. Hollis & Howell, *supra* note 17, at 1009; Comment, *supra* note 13, at 655. This contention finds support in the Act: "The Congress finds that 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." 29 U.S.C. § 651(a) (1976). Recognizing that the majority of American workers and their families are dependent on workers' compensation in the case of work-related injury or death, Congress stated that "the full protection of American workers from job-related injury or death requires an adequate, prompt, and equitable system of workers' compensation as well as an effective program of occupational health and safety regulation." *Id.* § 676(a)(1)(A). Consequently, Congress created the National Commission on State Workers' Compensation Laws, *id.* § 676, to evaluate state workers' compensation statutes "in order to determine if such laws provide an adequate system of compensation for injury or death arising out of or in the course of employment." *Id.* § 671(a)(2). The availability of private federal remedies would aid in deterring violations of the Act and thus prevent burdens upon commerce. Comment, *supra* note 13, at 655. The prevention of burdens on commerce coupled with the provisions for assuring adequate compensation under state law could arguably constitute a sufficient federal interest to justify federal common law remedies.

58. A cause of action based upon violation of the Act would be essential for a plaintiff where negligence could not be proved or where a plaintiff is statutorily precluded from recovering. See *Horn v. C.L. Osborn Contracting Co.*, 423 F. Supp. 801, 808-09 (M.D. Ga. 1976) (plaintiff, the employee of an independent contractor seeking to recover from the independent contractor's employer, unsuccessfully attempted to assert a violation of the Act to bring this case within Georgia's statutory exception to the general rule that an employer is not liable for acts of an independent contractor).

59. See text & notes 70-83 *infra*.

60. See, e.g., *Arthur v. Flota Mercante Gran Centro Americana*, 487 F.2d 561, 564 (5th Cir. 1973); *Provenza v. American Export Lines*, 324 F.2d 660, 666 (4th Cir. 1963), *cert. denied*, 376 U.S. 952 (1964). For a general discussion of the use of safety standards in tort litigation, see Philo, *supra* note 2. While OSHA does not provide a private cause of action for violations of the Act, the courts appear willing to accept OSHA violations as evidence of prima facie or per se negligence for claims grounded upon an independent statutory or common law basis. Hollis & Howell, *supra* note 17, at 1012. Consideration of specific OSHA standards in suits where they are relevant is justifiable, since these standards are presumably the result of research and deliberation by knowledgeable people. *Id.* at 1013. Also, the adoption of regulations governing the use of OSHA documents and OSHA employees as witnesses in private litigation, see 29 C.F.R. § 1906 (1979), evinces a belief that these standards are admissible in private litigation. Hollis & Howell, *supra* note 17, at 1014.

in the next section to determine whether they preclude civil litigation involving violations of OSHA standards.

### WORKERS' COMPENSATION STATUTES AND PRIVATE REMEDIES

Workers' compensation statutes provide benefits and medical care to victims of work-related injuries without regard to the employer's fault or the employee's contributory negligence.<sup>61</sup> The cost of these injuries is placed on the consumer; the employer passes on the costs of insurance premiums in the form of higher prices for products.<sup>62</sup> In exchange for the assured benefits, the employee and his or her dependents give up their common-law right to sue the employer.<sup>63</sup>

While coverage by most workers' compensation acts is compulsory,<sup>64</sup> some statutes provide that either or both the employer and employee may reject coverage.<sup>65</sup> The mode for waiver of benefits varies among the states. A waiving employer may be required to serve notice of waiver personally upon the employee or to post notice in a conspicuous place prior to injury to the employee.<sup>66</sup> Where affirmative action is required for coverage,<sup>67</sup> the employer may waive benefits by not subscribing to the compensation policy. A waiving employee must either waive compensation at the time of his contract for hire<sup>68</sup> or prior to any accident resulting in injuries.<sup>69</sup>

Thus, where rights to workers' compensation have been waived and common-law remedies retained, an avenue for suit remains open.

61. 1 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 1.10, at 1 (1978).

62. *Id.* § 1.00, at 1.

63. *Id.* § 1.10, at 2. The compensation statutes in many states contain an "exclusive liability" clause, which generally falls into one of three general types. The Massachusetts type, giving dependents the broadest remedies, provides that an injured employee waives his common law rights but that common law remedies of dependents remain intact. *See* MASS. ANN. LAWS ch. 152, § 24 (Michie/Law. Co-op 1976). At the other extreme is the New York-type statute which prevents all actions by the "employee, his personal representatives, spouse, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death. . . ." N.Y. WORK. COMP. LAW § 11 (McKinney Supp. 1979-80). Intermediate clauses provide that the employer's liability under the compensation statute is exclusive as to employees and dependents. *See* CAL. LABOR CODE § 3601 (West Supp. 1980); MICH. COMP. LAWS § 418.131 (MICH. STAT. ANN. § 17.237(131)(Callaghan 1975)). Consequently, these "exclusive liability" clauses do not actually preclude all lawsuits against the employer arising from an injury to an employee.

64. *See, e.g.,* MISS. CODE ANN. § 71-3-9 (1972); MO. ANN. STAT. § 287.060 (Vernon Supp. 1980).

65. 2A A. LARSON, *supra* note 61, § 67.10, at 12-31, 12-32. *See, e.g.,* ARIZ. REV. STAT. ANN. § 23-906(A) (Supp. 1980-81) (employees have option to reject compensation); S.C. CODE § 42-1-310 (1976) (employers or employees may reject compensation); TEX. REV. CIV. STAT. ANN. art. 8308, § 7 (Vernon 1967) (eligible employers may reject compensation provisions by not subscribing to the Association).

66. S.C. CODE § 42-1-340 (1976). Notice must be given at the time of employment or 30 days prior to any accident. *Id.*

67. *See* TEX. REV. CIV. STAT. ANN. art. 8308, § 7 (Vernon 1967).

68. *Id.* art 8306, § 3a.

69. S.C. CODE § 42-1-340 (1976); ARIZ. REV. STAT. ANN. § 23-906(C) (Supp. 1980-81).

The evidentiary problem discussed in this Note is then applicable to the common-law claim.

An injury may fail to come within the protection of a workers' compensation statute for various reasons. First, if no employment relationship exists between the person injured and the employer, compensation is not allowed.<sup>70</sup> Consequently, it is important to determine whether the person injured is in fact an employee. Nonemployees, including independent contractors,<sup>71</sup> are not entitled to workers' compensation benefits and could therefore bring a common law action. Second, to be compensable injuries must result from risks distinctly associated with employment as opposed to those personal to the claimant.<sup>72</sup> Therefore, injuries resulting from an assault by a co-employee due to a personal feud are not compensable.<sup>73</sup> Third, an injury is not compensable if it arises outside the time and space limits of employment.<sup>74</sup> Finally, an injury may also be outside the act if it is not caused by an accident<sup>75</sup> or does not result in disability.<sup>76</sup> In cases where the injury is not compensable, the common-law remedy is retained.<sup>77</sup>

An employer's liability at common law may result not only from the exceptions to the exclusiveness of the workers' compensation rem-

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70. 1 A. LARSON, *supra* note 61, § 1.10, at 1.

71. An important factor in distinguishing employees from independent contractors is the right of the employer to control and direct the employee. See *Industrial Comm'n v. Farm and Home Food Service*, 5 Ariz. App. 339, 340, 426 P.2d 808, 809 (1967); *Clarksville Meat Co. v. Brooks*, 237 Ark. 717, 718-19, 375 S.W.2d 671, 672 (1964); *Bourgeois v. Cacciapuoti*, 138 Conn. 317, 320, 84 A.2d 122, 124 (1951). An independent contractor contracts to do a piece of work according to his own methods and without control by his employer except as to the final result of the work. *Id.* at 318, 84 A.2d at 123.

72. 1 A. LARSON, *supra* note 61, § 7.10, at 3-11.

73. See *McBride v. Hershey Chocolate Corp.*, 200 Pa. Super. Ct. 347, 349-50, 188 A.2d 775, 776-77 (1963) (plaintiff allowed to bring common law action against employer for failure to exercise reasonable control over co-employee).

74. In *Hines v. Superior Court of Okmulgee County*, 435 P.2d 149 (Okla. 1967), claimant was not allowed compensation since the kitchen in which she worked was not a "workshop" within the purview of the workers' compensation law. *Id.* at 150. Claimant was therefore entitled to sue at common law. *Id.* at 151-52.

75. In *Hines v. Continental Baking Co.*, 334 S.W.2d 140 (Mo. Ct. App. 1960), an employee who sustained back injuries from jerking a bread cart over a rough spot on a bakery floor was denied compensation because her injuries were not sustained in an accident. *Id.* at 143-44.

76. In *Ritter v. Allied Chem. Corp.*, 295 F. Supp. 1360 (D.S.C. 1968), *aff'd*, 407 F.2d 403 (5th Cir. 1969), an assault upon the plaintiff by a superior caused a scratch on her head. 295 F. Supp. at 1362. The plaintiff was denied compensation under the state workers' compensation act since she was not disabled. *Id.* Therefore, the tort action against the employer was not barred. *Id.* at 1362-63.

77. Wrongful death actions by the employee's dependents are also retained because of their independent nature. See *Norfolk, B. & C. Lines v. Director, Office of Workers' Compensation Programs*, 539 F.2d 378, 380 (4th Cir. 1976); *International Mercantile Marine Co. v. Lowe*, 93 F.2d 663, 664-65 (2d Cir.), *cert. denied*, 304 U.S. 565 (1938); *Magma Copper Co. v. Naglich*, 60 Ariz. 43, 51, 131 P.2d 357, 360 (1942). The dependents' right to death benefits is derived from statutes and is unaffected by compromise or release executed by the decedent. *Id.* at 46, 131 P.2d at 360; *American Steel Foundries v. Industrial Comm'n*, 361 Ill. 582, 589, 198 N.E. 687, 690 (1935); *Brown v. General Aniline & Film Corp.*, 127 N.J. Super. 93, 96, 316 A.2d 478, 480, *aff'd*, 65 N.J. 555, 325 A.2d 689 (1974).

edy, but also from noncompliance with a workers' compensation act.<sup>78</sup> For example, a penalty may be imposed for willful misconduct by an employer, such as the intentional infliction of injury on an employee.<sup>79</sup> Violations of safety regulations may also be held to be willful conduct.<sup>80</sup> At least two states give illegally hired minors an option to claim either compensation or damages.<sup>81</sup> A tort action is provided in most states for negligent failure to disclose to the employee the existence of a noncompensable disease discovered during the course of an examination in the company clinic. The common-law remedy is authorized on the theory that the injury is not work-connected.<sup>82</sup> Under Arizona's compensation act, an employer's failure to post a notice indicating that an employee is entitled to elect not to be covered by the compensation act gives the plaintiff the option of either claiming compensation under the statute or bringing a common-law suit.<sup>83</sup>

Thus, while workers' compensation statutes significantly limit the scope of remedies available to those injured in the course of their employment, the acts do not preclude all civil litigation in which a payment of an OSHA fine might be relevant. Therefore, the payment of an OSHA fine will be analyzed to determine whether it might be admitted into evidence in a subsequent civil action as a guilty plea and an admission of guilt.

78. 2A A. LARSON, *supra* note 61, ch. XIII, at 13-1 to 13-58. Several states provide an election to sue at common law to receive a percentage increase in compensation as the penalty for employer misconduct. *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-1022(A), (B) (Supp. 1980-81) (option to sue at common law for employer's willful misconduct); CAL. LABOR CODE § 4553 (West Supp. 1980) (increased awards of 50%, not to exceed \$10,000, for serious and willful misconduct of the employer); TEX. REV. CIV. STAT. ANN. art. 8306, § 5 (Vernon 1967) (option to sue at common law for willful act of gross negligence causing death).

79. There are two theories advanced to support this result. One theory asserts that the employer is estopped to allege that the injury was "accidental" and thus within the exclusive provisions of the workers' compensation act. *See, e.g.*, Magliulo v. Superior Court, 47 Cal. App. 3d 760, 767-68, 121 Cal. Rptr. 621, 627 (1975); Readinger v. Gottschall, 201 Pa. Super. Ct. 134, 135-36, 191 A.2d 694, 695-96 (1963); Le Pochat v. Pendleton, 187 Misc. 296, 298, 63 N.Y.S. 2d 313, 315-16 (1946). Another theory is that the employer severed the employment relation by the willful act. Under this theory, an employee assaulted by an employer may elect either to continue the employment and sue under the workers' compensation statute or to consider the willful and malicious assault as a termination of employment and sue on a common law cause of action. *See, e.g.*, Heskett v. Fisher Laundry & Cleaners Co., 217 Ark. 350, 354, 230 S.W.2d 28, 32 (1950); Boek v. Wong Hing, 180 Minn. 470, 471, 231 N.W. 233, 234 (1930).

80. *See* Rogers Materials Co. v. Industrial Accident Comm'n, 63 Cal. 2d 717, 723, 408 P.2d 737, 742-43, 48 Cal. Rptr. 129, 134-35 (1965) (employer's failure to provide guard on drive chain of cement truck held to be serious and willful misconduct); Wolters v. Industrial Accident Comm'n, 223 Cal. App. 2d 136, 143, 35 Cal. Rptr. 549, 553 (1963) (employer's use of ladder jack scaffolding over eighteen feet in height held to be serious and willful misconduct).

81. ILL. ANN. STAT. ch. 48, § 138.8(i) (Smith-Hurd Supp. 1980-81); *id.* § 172-43(i) (1966); N.J. STAT. ANN. § 34:15-10 (West Supp. 1980-81).

82. *See* Reid v. United States, 224 F.2d 102, 105 (5th Cir. 1955) (action under Federal Tort Claims Act held to lie for employer's failure to reveal symptoms of tuberculosis); Wojeik v. Aluminum Co. of America, 18 Misc. 2d 740, 747, 183 N.Y.S.2d 351, 354-55 (1959) (tort action allowed for employer's failure to disclose that x-ray revealed tuberculosis). *But see* Tourville v. United Aircraft Corp. 262 F.2d 570, 571 (2d Cir. 1958) (negligent failure to warn of tubercular symptoms not actionable because workers' compensation provided exclusive remedy).

83. ARIZ. REV. STAT. ANN. § 23-906(E) (1971).

## PAYMENT OF OSHA FINE AS ADMISSION OF GUILT OR PLEA OF NOLO CONTENDERE

The discussion now turns to the admissibility in a civil action of an employer's uncontested payment of an OSHA fine. First, general rules of admissibility of a plea of guilty or nolo contendere are discussed. Then, because OSHA citations are similar to traffic citations in many respects, an analogy will be drawn in an attempt to determine whether payment of an OSHA fine constitutes a plea of guilty or nolo contendere.

### *General Rules of Admissibility of Plea of Guilty or Nolo Contendere*

The general rule of evidence regarding admissibility of a guilty plea is that such a plea is an admission and is competent evidence in a subsequent civil action involving the same subject matter.<sup>84</sup> In the traffic safety context, for example, a guilty plea to a criminal charge arising out of an automobile accident is usually admissible in civil litigation arising from the same accident.<sup>85</sup> Hence, if payment of an OSHA fine constitutes a guilty plea, the fact of payment will be admissible in evidence in a subsequent civil action as an admission.

A policy that a guilty plea may be admitted in a subsequent civil action places the defendant in a dilemma in deciding what plea to make. While a guilty plea may avoid the possibility of conviction of a charge with greater penalties,<sup>86</sup> it subjects the defendant to the risk that the plea may be introduced as an admission in a subsequent civil

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84. *Konshuk v. Hayes*, 150 Wash. 565, 567, 273 P. 957, 958 (1929). The court reasoned: A plea of guilty to a charge of crime is in the nature of an admission. It is an admission of wrong on the part of a defendant so pleading. The jury are therefore entitled to consider it as it considers any other admission; they must view it in connection with the surrounding circumstances, and give it such weight as in their judgment the circumstances warrant.

*Id.*

85. See, e.g., *Book v. Datema*, 256 Iowa 1330, 1332-33, 131 N.W.2d 470, 471 (1964); *Scogin v. Nugen*, 204 Kan. 568, 573, 464 P.2d 166, 171 (1970); *Davis v. Bankston*, 192 S.2d 614, 617 (La. Ct. App. 1966). Since a plea of guilty is a deliberate declaration against interest, the plea is admitted. *Book v. Datema*, 256 Iowa at 1332, 131 N.W.2d at 471. The general rule of the admissibility of guilty pleas to traffic offenses in subsequent civil cases was extended to informal pleas in *Eschelbock v. William S. Scull Co.*, 293 F.2d 599 (3d Cir. 1961). In that case, the plaintiff, who was charged with careless driving, signed and returned to the magistrate a traffic summons which bore the charge against plaintiff as well as the following language: "I do hereby plead guilty to said offense as charged, waive my right to a hearing by the court, and agree to pay the penalty prescribed for my offense." *Id.* at 602. In a subsequent negligence action, the trial court admitted the summons as relevant to the issue of the plaintiff's contributory negligence. *Id.* at 602-03. This action was held proper by the court of appeals. *Id.* at 603. *Accord*, *Waldron v. Hardwick*, 406 F.2d 86, 90 (7th Cir. 1969).

86. Plea bargaining, for example, ordinarily involves a charge reduction in exchange for a guilty plea. D. NEWMAN, CONVICTION, THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 9 (1966). Other situations in which a guilty plea may result in a lesser penalty occur in jurisdictions where, although the judge and jury have the same range of sentencing power, the judge has a reputation for being more lenient than the jury, or where the judge is generally more lenient with defendants who plead guilty. See *Brady v. United States*, 397 U.S. 742, 751 (1970).

case.<sup>87</sup> Nevertheless, the choice of plea is one for the defendant to make in the face of the advantages and risks involved.<sup>88</sup>

Despite the "general rule" of admissibility of guilty pleas to criminal charges in subsequent civil cases, courts have acknowledged that these pleas are not necessarily the result of actual belief in guilt on the part of the defendant.<sup>89</sup> Rather, guilty pleas are often entered for reasons of convenience, without regard to guilt and collateral consequences. It may be easier and less expensive to pay the fine than to contest the charge. This situation has led some courts to exclude such pleas from evidence.<sup>90</sup> Although the majority rule favors admissibility of the pleas, such pleas are not conclusive and the party is free to explain that the guilty plea was motivated by convenience and expediency.<sup>91</sup> These mitigating factors go to the weight of the evidence, however, and not to admissibility.<sup>92</sup>

Guilty pleas are generally admissible as an admission in a subsequent civil action. The use of a plea of *nolo contendere*, however, is limited to the case in which such a plea is entered.<sup>93</sup> Consequently, a plea of "no contest" is not admissible in subsequent civil proceedings based on the same facts.<sup>94</sup> It is merely an implied admission of guilt and does not preclude a defendant in a civil action from contesting the facts charged in the indictment.<sup>95</sup>

Since guilty pleas are generally admissible in a subsequent civil

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87. *Ryan v. Westgard*, 12 Wash. App. 500, 509, 530 P.2d 687, 695 (1975).

88. *Id.*

89. *See Gregorie v. Hartford Accident and Indem. Co.*, 348 So. 2d 186, 189 (La. Ct. App. 1977); *Ryan v. Westgard*, 12 Wash. App. 500, 511 n.4, 530 P.2d 687, 695 n.4 (1975).

90. C. McCORMICK, EVIDENCE § 265, at 636 (2d ed. E. Cleary 1972); *see text & notes 118-20 infra*.

91. *See Nassif v. Pipkin*, 178 N.W.2d 334, 335-36 (Iowa 1970); *Scogin v. Nugen*, 204 Kan. 568, 572, 464 P.2d 166, 170 (1970); *David v. Bankston*, 192 So. 2d 614, 617 (La. Ct. App. 1966). The traditional rule is articulated by the court in *Dimmick v. Follis*, 123 Ind. App. 701, 111 N.E.2d 486 (1953). In a civil action arising out of the same situation a plea of guilty is admissible as an admission against interest and for testing credibility, but not for the purpose of establishing facts. "Like any other admission its probative value may be destroyed by the circumstances under which it was given or by satisfactory explanation." *Id.* at 705, 111 N.E.2d at 488. *Accord*, *Kelch v. Courson*, 103 Ariz. 576, 579, 447 P.2d 550, 553 (1968).

92. *Scogin v. Nugen*, 204 Kan. 568, 572, 464 P.2d 166, 170 (1970); *Gregorie v. Hartford Accident and Indem. Co.*, 348 So. 2d 186, 189 (La. Ct. App. 1977); *Ryan v. Westgard*, 12 Wash. App. 500, 511, 530 P.2d 687, 695 (1975) (quoting *Konshuk v. Hayes*, 150 Wash. 565, 567, 273 P. 957, 958 (1929)).

93. *Scogin v. Nugen*, 204 Kan. 568, 572, 464 P.2d 166, 170-71 (1970).

94. *See United States v. Engelhard-Hanovia, Inc.*, 252 F. Supp. 605, 607 (S.D.N.Y. 1964); *State Dental Council and Examination Bd. v. Friedman*, 27 Pa. Commw. Ct. 546, 550, 367 A.2d 363, 365 (1976). The court may accept or decline a plea of *nolo contendere* in its discretion. *State Dental Council and Examination Bd. v. Friedman*, 27 Pa. Commw. Ct. 546, 548, 367 A.2d 363, 365 (1976).

95. *State Dental Council and Examination Bd. v. Friedman*, 27 Pa. Commw. Ct. 546, 550, 367 A.2d 363, 365 (1976). It has been stated that the principle utility of the *nolo contendere* plea is to prevent the introduction of the plea in civil actions founded on the same facts. *Duffy v. Cuyler*, 581 F.2d 1059, 1062 (3d Cir. 1978).

action while nolo contendere pleas are not, characterization of an OSHA fine is critical.

### *Analogy to Traffic Citations*

Payment of an OSHA citation can be analogized to the payment of a traffic fine. A number of similarities between OSHA violations and traffic citations justify the analogy. In both the traffic<sup>96</sup> and OSHA<sup>97</sup> situations, for example, the cited party is given the option of contesting the citation or paying a fine and terminating the action. Furthermore, in either situation, the cited party may determine, after weighing the costs of litigation against the potential fine, that challenging the citation is of little value.<sup>98</sup> Finally, the cited party in either context faces the possibility of civil litigation where injury to third parties has resulted from the conduct leading to the citation.<sup>99</sup> Thus, authority relating to the admissibility of traffic fines in subsequent litigation should prove helpful in analyzing the evidentiary status of the payment of OSHA fines.

The courts have taken three different positions regarding the evidentiary status of the payment of traffic fines in subsequent litigation. The majority position that payment of a fine does not constitute a guilty plea was articulated by the Connecticut Supreme Court in *Casalo v. Claro*.<sup>100</sup> The plaintiff sued the defendant for damages arising out of an automobile accident allegedly caused by defendant's negligence.<sup>101</sup> During the trial, the plaintiff contended that payment of a fine on a specific criminal charge is an admission, regardless of whether any plea is made.<sup>102</sup> The supreme court affirmed the trial court's exclusion of

96. See *Commonwealth v. Jensen*, 9 Pa. Commw. Ct. 451, 452, 307 A.2d 476, 477 (1973).

97. 29 U.S.C. § 659(a) (1976).

98. While individual penalties can be enormous, the proposed penalties per establishment cited during the calendar year 1971 averaged \$125. *Jensen, Mohr & Stern, supra* note 48, at 43. Actual penalties paid were even lower in many cases because of the employer's option to receive a 50% credit if the violation is abated within the required time period. U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, OFFICE OF COMPLIANCE, COMPLIANCE OPERATIONS MANUAL, X1-3 (Jan. 1972). By 1972, 95% of more than 30,000 initial OSHA citations were paid by employers without contest, as most traffic tickets are by motorists. *Jensen, Mohr & Stern, supra* note 48, at 41.

99. For a general discussion of the role of OSHA in civil litigation, see Comment, *The Occupational Safety and Health Act of 1970: Its Role in Civil Litigation*, 28 Sw. L.J. 999, 1013-20 (1974).

100. 147 Conn. 625, 632, 165 A.2d 153, 157 (1960).

101. *Id.* at 627, 165 A.2d at 155.

102. *Id.* at 631, 165 A.2d at 157. The plaintiff claimed in *Casalo* that the defendant had admitted liability by his conduct under the rule of cases such as *Cashman v. Terminal Taxi Co.*, 131 Conn. 31, 33, 37 A.2d 613, 613-14 (1944). In *Cashman*, the defendant driver of a taxicab showed a police officer how he had driven the cab during an accident in which he struck a pedestrian. The court held that the testimony by the police officer regarding this demonstration was improperly excluded in the lower court. *Id.* at 33, 37 A.2d at 614. The court stated:

An admission may be made by conduct as well as orally or in writing. " . . . conduct of a party to the proceedings, in respect to the matter in dispute, whether by acts, speech, or writing, which is clearly inconsistent with the truth of his contention, is a fact relevant to the issue." (citations omitted)

the evidence stating that mere payment of a traffic fine does not constitute an admission.<sup>103</sup> A similar conclusion was reached by the New Mexico Court of Appeals in *Turner v. Silver*.<sup>104</sup> In *Turner*, the defendant driver was cited for obstructing traffic.<sup>105</sup> He paid the fine, admitting that he understood he was pleading guilty to the charge.<sup>106</sup> The court of appeals upheld admission of the evidence in the subsequent civil action but carefully distinguished between payment of a fine and a true admission of guilt. The court observed that mere payment of a fine is not an admission and thus is not admissible in evidence in a civil case involving the offense.<sup>107</sup> According to the court's analysis, to be accepted into evidence as an admission, payment of a fine must be accompanied by a manifestation of the defendant's belief in his own culpability.<sup>108</sup>

The minority view, as expressed in *Commonwealth v. Jensen*,<sup>109</sup> states that payment of a traffic fine constitutes a plea of guilty.<sup>110</sup> Jensen was cited for speeding. After being notified of an opportunity for a hearing, Jensen mailed in the fine accompanied by a letter of protest disclaiming commission of the violation.<sup>111</sup> In a subsequent license suspension proceeding, Jensen objected to the admission of payment of the traffic fine as evidence and contended that he was not exceeding the speed for which he was charged and convicted.<sup>112</sup> The lower court overruled the defendant's objection and affirmed the suspension of Jensen's driver's license.<sup>113</sup> The appellate court affirmed this ruling, stating that payment of the fine was tantamount to a plea of guilty and an admission of conviction.<sup>114</sup>

The intermediate position, which provides that payment of a traffic fine is admissible only for impeachment purposes, was advanced by

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*Id.*

103. *Casalo v. Claro*, 147 Conn. 625, 632, 165 A.2d 153, 157 (1960).

104. 92 N.M. 313, 587 P.2d 966 (Ct. App. 1978).

105. *Id.* at 315, 587 P.2d at 968.

106. *Id.* at 316, 587 P.2d at 969.

107. *Id.*

108. *Id.*

109. 9 Pa. Commw. Ct. 451, 307 A.2d 476 (1973).

110. *Id.* at 454, 307 A.2d at 477.

111. *Id.* at 452, 307 A.2d at 477.

112. *Id.* at 453, 307 A.2d at 477.

113. *Id.*

114. *Id.* at 454, 307 A.2d at 477. The court cited *Preston Motor Vehicle Operator License Case*, 216 Pa. Super. Ct. 415, 268 A.2d 134 (1970), which held that payment of a fine and costs even under protest constitutes a plea of guilty and an admission. *Id.* at 417-18, 168 A.2d at 135. The fact situation in *Jensen* differs somewhat from the case where a plaintiff sues the driver of a vehicle for injuries resulting from an accident caused by the driver's negligence. In the license suspension case, the parties to both proceedings are identical, and, under the Pennsylvania Vehicle Code, the accumulation of a specified number of points automatically results in a suspension hearing. 9 Pa. Commw. Ct. at 453, 307 A.2d at 477. In the auto accident situation, on the other hand, the potential civil suit plaintiff is not a party to the initial confrontation, and the civil suit, of course, is not automatically filed.

the Fifth Circuit Court of Appeals in *Dunham v. Pannell*.<sup>115</sup> The *Dunham* court considered the evidentiary effect of paying a fine and entering an informal plea of guilty.<sup>116</sup> Acknowledging that a guilty plea to a criminal charge is generally admissible in evidence in subsequent civil litigation,<sup>117</sup> the court nevertheless refused to allow admission of the informal plea to a traffic offense as evidence of the truth of the facts alleged;<sup>118</sup> however, the court upheld admission of the evidence for the limited purpose of impeaching the credibility of the witness-driver.<sup>119</sup> The *Dunham* court recognized that a traffic fine is generally so small and the stigma attached to conviction so minimal that a plea of guilty is simply not trustworthy as an admission.<sup>120</sup>

The majority view with respect to traffic citations suggests that uncontested OSHA citations should not be admissible as an admission of guilt in subsequent civil litigation. Because of the diversity of views taken by the courts with respect to the evidentiary status of the payment of traffic fines, however, no clear conclusion can be drawn from the traffic analogy to determine the evidentiary status of the payment of an OSHA fine. Furthermore, there is a basic difference between traffic and OSHA fines that diminishes the validity of the analogy. Traffic citations normally result in criminal proceedings while ordinary, nonwillful OSHA violations result in civil proceedings.<sup>121</sup> Federal courts have uniformly held that Congress intended OSHA penalties to be regulatory rather than punitive. Consequently, penalties are civil rather than criminal in nature.<sup>122</sup> In addition, while a traffic offender

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115. 263 F.2d 725 (5th Cir. 1959).

116. In addition to paying the fine, the defendant signed a docket sheet which contained this printed notation: "I understand the nature of the charge against me and wish to plead guilty, therefore I direct the Clerk to enter my plea of guilty before the Corporation Court Judge." *Id.* at 727.

117. *Id.* at 728 n.4.

118. *Id.* at 730-31.

119. The court stated:

We consider that on the face of these facts the payment of the fine and the signing of the statement constituted, not an admission against interest of the defendant as it would have been if a formal plea of guilty had been entered, but an admission against interest bearing on the credibility of [the driver] as a witness.

*Id.*

120. *Id.* at 730. The *Dunham* court also cited with approval an earlier Fifth Circuit case, *Johnson v. Empire Machinery*, 256 F.2d 479 (5th Cir. 1958), for the proposition that mere payment of a traffic fine is admissible only for impeachment purposes. 263 F.2d at 730.

121. For a discussion of the cases dealing with this issue, see Levin, *OSHA and the Sixth Amendment: When is a "Civil" Penalty Criminal in Effect?*, 5 HASTINGS CONST. L.Q. 1013, 1054-65 (1978). It should be remembered that criminal penalties in the form of imprisonment may also be imposed under specified circumstances. See text & notes 38, 43 *supra*.

122. See, e.g., *Mohawk Excavating v. Occupational Safety and Health Review Comm'n*, 549 F.2d 859, 863 (2d Cir. 1977); *Frank Irey Jr., Inc. v. Occupational Safety and Health Review Comm'n*, 519 F.2d 1200, 1204-05 (3d Cir.), *aff'd on rehearing*, 519 F.2d 1215 (3d Cir. 1975) (en banc), *aff'd sub nom. on other grounds*, *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 460-61 (1977); *Beall Const. Co. v. Occupational Safety and Health Review Comm'n*, 507 F.2d 1041, 1044 (8th Cir. 1974).

may be required to enter a plea when cited for a traffic citation,<sup>123</sup> an employer is not required to enter a plea when cited for an OSHA violation. If the employer chooses to contest the citation, the Secretary of Labor files a complaint and the employer is required to respond as in other civil litigation.<sup>124</sup> These considerations suggest that additional authority should be examined and that analysis of factors unique to OSHA merit consideration.

### *OSHA Authority: Effect of Payment of Fine*

Several factors unique to OSHA support the position that payment of an OSHA fine constitutes an admission. It can be argued on the basis of several federal court decisions<sup>125</sup> that failure to contest an OSHA citation constitutes evidence of a violation. In *Marshall v. B.W. Harrison Lumber Co.*,<sup>126</sup> an employer failed to contest several OSHA citations. The Fifth Circuit Court of Appeals stated that failure to contest a citation forecloses litigation of the fact of violation.<sup>127</sup> The final order resulting from a citation establishes the violation and the time period for correction.<sup>128</sup> Since the order is dispositive, the employer may not later protest the fact of the violation.<sup>129</sup>

Similarly, in *National Independent Coal Operators' Ass'n v. Morton*,<sup>130</sup> the District of Columbia Circuit Court of Appeals hinted at the effect of failure to contest a citation for violation of a provision of the Federal Coal Mine Health and Safety Act,<sup>131</sup> which contains provisions similar to those in OSHA.<sup>132</sup> The court stated that by failing to request

123. See *Dunham v. Pannell*, 263 F.2d 725, 727 (5th Cir. 1959).

124. See generally *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977); *Brennan v. Winters Battery Mfg. Co.*, 531 F.2d 317 (6th Cir. 1975).

125. See *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 447 (1977); *Marshall v. B.W. Harrison Lumber Co.*, 569 F.2d 1303, 1306-07 (5th Cir. 1978); *National Independent Coal Operator's Ass'n v. Morton*, 494 F.2d 987, 991 (D.C. Cir. 1974) *aff'd sub nom.*, *National Independent Coal Operators' Ass'n v. Kleppe*, 423 U.S. 388 (1976). In *Atlas Roofing*, the Court stated: "if the employer fails to pay the assessed penalty, the Secretary may commence a collection action in a federal district court in which neither the fact of the violation nor the propriety of the penalty assessed may be retried." *Id.* at 447.

126. 569 F.2d 1303 (5th Cir. 1978).

127. *Id.* at 1306-07.

128. *Id.*

129. It should be noted, however, that the court did not make this finding in the context of a civil suit between two private parties. Rather, this decision was made in a review of a decision by an Administrative Law Judge that a citation issued under OSHA had inadequately described the violations alleged. *Id.* at 1305. This factor may diminish the precedential value of this case to a plaintiff seeking to foreclose objection to the fact of violation in a civil action against another private party.

130. 494 F.2d 987 (D.C. Cir. 1974), *aff'd sub nom.*, *National Independent Coal Operators' Ass'n v. Kleppe*, 423 U.S. 388 (1976).

131. 30 U.S.C. §§ 801-962 (1976 & Supp. III 1979).

132. 494 F.2d at 991. The Coal Mine Health and Safety Act authorizes the Secretary of Health, Education, and Welfare to promulgate safety and health standards for the protection of life and prevention of injuries in coal mines. 30 U.S.C. § 811(a) (Supp. III 1979). Civil penalties are imposed for violations of provisions of the Act. *Id.* § 819. A person charged with a violation of the Act is given an opportunity for a public hearing. *Id.* § 819(a)(3).

a hearing, an operator suggests that he does not dispute the fact of the violation nor object to the specific penalty proposed.<sup>133</sup> The United States Supreme Court agreed with the analysis of the circuit court and stated that by failing to request a hearing, the operator "thereby indicates no disagreement with the Secretary's proposed determination."<sup>134</sup>

The argument that an uncontested citation constitutes a finding of a violation is further supported by an express OSHA regulation providing that citations must state that the issuance of the citation does not constitute a finding of a violation unless there is a failure to contest.<sup>135</sup> This position is even stronger where the notice of violation also informs the employer of the effect of failure to contest.<sup>136</sup> In cases where the employer has paid the maximum fine, and especially where criminal sanctions have been imposed,<sup>137</sup> the argument for use of the fact of payment in subsequent civil litigation is persuasive. Thus, on the basis of this OSHA authority it may be quite reasonable to equate the payment of an uncontested OSHA fine with a guilty plea.

On the other hand, since an employer who does not contest an OSHA fine is not required to expressly admit culpability, a strong argument can be made that payment of a fine is at most an implied confession of guilt. Thus, it may be more reasonable to consider such payment as equivalent to a plea of *nolo contendere*. It can be argued that by paying the fine, the employer has not done anything inconsistent with a claim of innocence; the payment of the fine is essentially a plea of "no contest."<sup>138</sup> An employer could strengthen the no-contest argument if a statement disclaiming the validity of the citation and stating alternative reasons for failure to contest accompanied payment of the fine. The Occupational Safety and Health Review Commission has acknowledged that such reasons exist.<sup>139</sup> Thus, the best analogy is to

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133. 494 F.2d at 991.

134. *National Independent Coal Operators' Ass'n v. Kleppe*, 423 U.S. 388, 399 (1976).

135. 29 C.F.R. § 1903.14 (1979).

136. For example, the citation issued to the employer in *Brennan v. Winters Battery Mfg. Co.*, 531 F.2d 317 (6th Cir. 1975) contained this language:

YOU ARE FURTHER NOTIFIED that the aforesaid Citation(s), this Notification, and the proposed assessment shall be deemed to be the final order of the Occupational Safety and Health Review Commission and not subject to review by any court or agency, *unless*, within 15 working days from the date of receipt of this notice, you notify the official named below in writing that you intend to contest the Citation or this Notification of Proposed Penalty before the Review Commission. The Review Commission is an independent quasi-judicial agency with authority to issue decisions regarding citations and proposed penalties.

*Id.* at 320.

137. See text & notes 38-43 *supra*.

138. This position is espoused by at least one commentator: "Just as traffic offenders who enter a plea of *nolo contendere* are not treated as having made admissions for purposes of subsequent civil actions, so should those employers who pay fines not have to fear that such payment will be taken as evidence of negligence." Comment, *supra* note 99, at 1013.

139. "An employer may have any one of several reasons why it failed to contest the original

view an uncontested payment of an OSHA fine as a plea of nolo contendere.

Nevertheless, several problems exist with the nolo position. A plea of nolo contendere is not available as a matter of right but is allowable only under leave of the court.<sup>140</sup> The court may require that a nolo plea be accompanied by a protestation of the defendant's innocence.<sup>141</sup> Moreover, court decisions and federal regulations suggest that payment of an OSHA fine without contest constitutes a finding of violation.<sup>142</sup> Thus, to the extent that payment of an OSHA fine is not accompanied by an exculpatory statement, a court may reject the argument that payment of the fine without contest constitutes a plea of nolo contendere.

### *Public Policy Considerations*

It has been suggested that violation of duties under OSHA should be admitted as evidence of negligence.<sup>143</sup> This argument is based on the assertion that the mandatory safety regulations constitute the norm for reasonably prudent behavior.<sup>144</sup> Thus, an employer who fails to comply with OSHA regulations is acting negligently.<sup>145</sup> Where such unreasonable conduct results in the type of harm that the safety regulation was designed to prevent to the type of person intended to be protected, evidence of violation may be treated as negligence per se.<sup>146</sup> In addition, the existence of specific standards implies that an employer knew or should have known of the hazard the regulation was designed to eliminate.<sup>147</sup>

The position that citations issued under the Act be admitted as evidence of negligence should be viewed with caution.<sup>148</sup> Such use of OSHA determinations would encourage employers to contest and perhaps appeal each citation, even when the fine imposed is small and warranted.<sup>149</sup> The resulting increase in contests of citations could tax

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citation and paid the penalty, although believing it had meritorious defenses." *Arvin Millwork Co.*, [1973-74] OSH Dec. (CCH) ¶ 18, 159.

140. *Federal Deposit Ins. Corp. v. Cloonan*, 165 Kan. 68, 90, 193 P.2d 656, 670 (1948); *Commonwealth v. Ferguson*, 44 Pa. Super. Ct. 626 (1910) *quoted in* *State Dental Council and Examination Bd. v. Friedman*, 27 Pa. Commw. Ct. 546, 550, 367 A.2d 363, 365 (1976).

141. *See* *State Dental Council and Examination Bd. v. Friedman*, 27 Pa. Commw. Ct. 546, 548, 367 A.2d 363, 365 (1976).

142. *See* text & notes 125-134 *supra*.

143. Miller, *The Occupational Safety and Health Act of 1970 and the Law of Torts*, 38 LAW & CONTEMP. PROB. 612, 630 (1974).

144. Comment, *supra* note 2, at 582.

145. Miller, *supra* note 143, at 630. This is a minority view. *See* note 5 *supra*.

146. *See* *Arthur v. Flota Mercante Gran Centro Americana*, 487 F.2d 561, 563 (5th Cir. 1973) (violation of OSHA standard held to be negligence per se).

147. Miller, *supra* note 143, at 630-31. An employer should be able to counter this presumption, however, by showing special circumstances, such as inadequate notice, that would justify ignorance of the hazard. *Id.* at 631.

148. *Id.* at 631.

149. *Id.*

the system beyond its capacity<sup>150</sup> and thereby severely impair the OSHA enforcement scheme.<sup>151</sup> On the other hand, those employers unaware of possible evidentiary uses would be unlikely to contest even unwarranted citations where only light penalties are involved.<sup>152</sup> It would be unfair to give OSHA determinations evidentiary weight in such cases.<sup>153</sup> Similarly, the admission of the fact of payment of an OSHA fine in a subsequent civil litigation as an admission of guilt would discourage the payment of such fines and encourage contests of citations issued.

### CONCLUSION

The analogy to traffic citations suggests that uncontested OSHA citations should not be admissible as an admission of guilt in subsequent civil litigation. Although there is authority to support the position that mere payment of a traffic fine constitutes a plea of guilty, the majority position is to the contrary. Since mere payment of an OSHA fine does not constitute an express acknowledgment of culpability, it should not be viewed as a guilty plea. Nevertheless, it can be argued that failure to contest an OSHA citation and payment of a fine evidence the fact of violation and are inconsistent with a later claim of innocence. Thus, payment of a fine could be viewed as an admission, which is an act or statement of a party inconsistent with the party's position adopted at trial.

The most appropriate analogy would be to view a payment of an OSHA citation as a plea of *nolo contendere*, since it is only an implied confession of guilt. Consequently, evidence of payment of the fine could not be used against the defendant as an admission in subsequent civil litigation. Employers are generally not aware of the consequences of payment of a fine in subsequent civil actions. Therefore, it would be more equitable to limit the effects of such payments to the initial citation proceedings. This would preclude a flood of unwarranted contests of OSHA fines and prevent severe impairment of the OSHA enforcement scheme.

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150. Comment, *supra* note 99, at 1013.

151. Miller, *supra* note 143, at 631.

152. *Id.* at 631-32.

153. *Id.* at 632.