

In the Supreme Court of Ohio

APPEAL FROM THE BUTLER COUNTY
COURTS OF APPEALS
TWELFTH APPELLATE DISTRICT
Case No. CA 2006 04 0089

ABBRA WALKER AHMAD,
Individually and as Special Administrator
of the Estate of Sheila A. Walker,
Appellant,

v.

AK STEEL CORP.,
Appellee.

MERIT BRIEF OF APPELLANT ABBRA WALKER AHMAD

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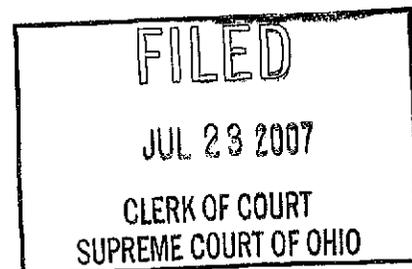


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE.....	1
ARGUMENT.....	3

Proposition of Law:

A safety or building rule violation is evidence of a land occupier’s breach of duty and precludes summary judgment on the breach of duty regardless of whether the hazard or rule violation was open or obvious

CONCLUSION.....	17
CERTIFICATE OF SERVICE	18

APPENDIX

Appx. Page

Notice of Appeal to the Supreme Court of Ohio (February 12, 2007)	1
Notice of Certified Conflict (March 8, 2007) (attachments not included).....	3
Judgment Entry of the Butler County Court of Appeals, Twelfth Appellate District (December 28, 2006).....	5
Opinion of the Butler County Court of Appeals, Twelfth Appellate District (December 28, 2006)	6
Decision and Entry Granting Defendants Joint Motion for Summary Judgment, Butler County Court of Common Pleas (March 27, 2006)	11
Entry Granting Motion to Certify Conflict, Butler County Court of Appeals, Twelfth Appellate District (February 22, 2007)	18

ADMINISTRATIVE RULES AND REGULATIONS

OSHA Standards for General Industry,
Section 1910.23, Chapter 29, Code of Federal Regulations (2003)21

Ohio Building Code §1003.3.11 (2002)25

STATUTES

R.C. 119.0328

R.C. 2125.0134

R.C. 2315.3336

R.C. 3781.0737

R.C. 3781.1038

Section 651, Title 29, U.S.Code42

Section 655, Title 29, U.S.Code44

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Armstrong v. Best Buy Co., Inc.</i> (2003), 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088.....	<i>passim</i>
<i>Arrington v. Arrington Constr., Inc.</i> (1989), 116 Idaho 887, 781 P.2d 224.....	12
<i>Bailey v. Republic Engineered Steels, Inc.</i> (2001), 91 Ohio St.3d 38, 2001-Ohio-236, 741 N.E.2d 121.....	5
<i>Beals v. Walker</i> (1976), 416 Mich. 469, 331 N.W.2d 700.....	10, 11, 17
<i>Blue Grass Restaurant Co. v. Franklin</i> (Ky.1968), 424 S.W.2d 594	10
<i>Bosnjak v. Superior Sheet Steel Co.</i> (1945), 145 Ohio St. 538, 31 Ohio Op. 188, 62 N.E.2d 305	4
<i>Carroll v. Dept. of Adm. Servs.</i> (1983), 10 Ohio App.3d 108, 10 OBR 132, 460 N.E.2d 704	8, 9
<i>Chambers v. St Mary's School</i> (1998), 82 Ohio St.3d 563, 697 N.E.2d 198	10, 13, 14
<i>Christen v. Don Vonderhaar Market and Catering, Inc.</i> 1st Dist. No. C-050125, 2006-Ohio-715.....	<i>passim</i>
<i>Conroy v. Briley</i> (Fla.App.1966), 191 So.2d 601.....	10
<i>Doyle v. Ohio Bur. Of Motor Vehicles</i> (1990), 51 Ohio St.3d 46, 554 N.E.2d 97	8, 9
<i>Farrand v. State Med. Bd.</i> (1949), 151 Ohio St.2d 222, 39 Ohio Op. 41, 85 N.E.2d 113	16
<i>Francis v. Showcase Cinema Eastgate</i> (2003), 155 Ohio App.3d 412, 2003-Ohio-6507, 801 N.E.2d 535	<i>passim</i>
<i>Gonzales v. Oregon</i> (2006), 546 U.S. 243.....	8

<i>Harris v. Niehaus</i> (Mo.1993), 857 S.W.2d 222	12
<i>Jones Metal Products Co. v. Walker</i> (1972), 29 Ohio St.2d 173, 181, 58 Ohio Op.2d 393, 281 N.E.2d 1	15
<i>Kirchner v. Shooters on the Water, Inc.</i> (2006), 167 Ohio App.3d 708, 2006-Ohio-3583, 856 N.E.2d 1026, certiorari granted, 113 Ohio St.3d 1487, 2007-Ohio-1986.....	14
<i>Konicek v. Loomis Brothers, Inc.</i> (Iowa 1990), 457 N.W.2d 614	10
<i>Lorain City School Dist. Bd. of Educ. v. State Employment Relations Bd.</i> (1988), 40 Ohio St.3d 257, 533 N.E.2d 264	15
<i>Lugo v. Ameritech Corp., Inc.</i> (2001), 464 Mich. 512, 629 N.W.2d 384.....	11
<i>Martins v. Healy</i> (Mass.Super.Ct.2002), 15 Mass.L.Rep. 42	10
<i>McCarthy v. Kunicki</i> (2005), 35 Ill.App.3d 957	12
<i>Messmore v. Monarch Machine Tool Co.</i> (1983), 11 Ohio App.3d 67, 11 OBR 117, 463 N.E.2d 108	5
<i>Micallef v. Miehle Co.</i> (1976), 39 N.Y.2d 376, 348 N.E.2d 571	12
<i>Migden-Ostrandors v. Pub. Utils. Comm. of Ohio</i> (2004), 102 Ohio St.3d 451, 2004-Ohio-3924, 812 N.E.2d 955.....	8
<i>New York, C. & S. L. R. Co. v. Ropp</i> (1907), 76 Ohio St. 449, 81 N.E. 748	17
<i>Northern Pacific RR. Co. v. Egeland</i> (1896), 163 U.S. 93, 16 S.Ct. 975, 41 L.Ed. 82.....	4
<i>Olivier v. Leaf & Vine</i> 2d Dist. No. 2004 CA 35, 2005-Ohio-1910.....	14, 15
<i>Overton Square, Inc. v. Bone</i> (Tenn.1979), 576 S.W.2d 762.....	10

<i>Parker v. Highland Park, Inc.</i> (Tex.1978) 565 S.W.2d 512.....	12
<i>Paschal v. Rite Aid Pharmacy, Inc.</i> (1985), 18 Ohio St.3d 203, 480 N.E.2d 474	5, 6, 9
<i>Porter v. Montgomery Ward & Co., Inc.</i> (1957), 48 Cal.2d 846, 313 P.2d 854	10
<i>Raflo v. Losantiville Country Club</i> (1973), 34 Ohio St.2d 1, 63 Ohio Op.2d 1, 295 N.E.2d 202	17
<i>Robinson v. Bates</i> (2006), 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195.....	6
<i>Scott v. Matlack, Inc.</i> (Colo.2002), 39 P.3d 1160.....	12, 13
<i>Sessions v. Nonnenmann</i> (Ala.2002), 842 So.2d 649.....	11
<i>Sidle v. Humphrey</i> (1968) 13 Ohio St.2d 45, 42 Ohio Op.2d 96, 233 N.E.2d 589	5, 6
<i>Simmers v. Bentley Constr. Co.</i> (1992), 64 Ohio St.3d 642, 1992-Ohio-42, 597 N.E.2d 504.....	5
<i>Souther v. Preble Cty. Dist. Library, West Elkton Branch</i> 12th Dist. No. CA2005-04-006, 2006-Ohio-1893	14
<i>State ex rel. Brown v. Dayton Malleable, Inc.</i> (1982), 1 Ohio St.3d 151, 1 OBR 185, 438 N.E.2d 120	15
<i>State ex rel. Saunders v. Indus. Comm. Of Ohio</i> (2004), 101 Ohio St.3d 125, 2004-Ohio-339, 802 N.E.2d 650	8
<i>Tharp v. Bunge Corp.</i> (Miss.1994), 641 So.2d 20.....	12
<i>Toll Brothers, Inc. v. Considine</i> (Del.1998), 706 A.2d 493	10
<i>Trans-Vaughn Dev. Corp.</i> (2005), 273 Ga.App.505, 615 S.E.2d 579.....	12

Uddin v. Embassy Suites Hotel
(2005), 165 Ohio App.3d 699, 2005-Ohio-6613, 848 N.E.2d 519,
certiorari granted, 109 Ohio St.3d 1455, 2006-Ohio-2226, 847
N.E.2d 5, case dismissed, 113 Ohio St.3d 1249, 2007-Ohio-1791,
864 N.E.2d 6382, 11, 14, 17

Uddin v Embassy Suites Hotel
(2007), 113 Ohio St.3d 1249, 2007-Ohio-1791, 864 N.E.2d 638.....11, 14

United States v. Mead Corp.
(2001), 533 U.S. 218.....8

Val D'Aosta Co. v. Cross
(1999), 241 Ga.App. 583, 526 S.E.2d 580.....12

Van Dozen Gas & Gasoline Engine Co. v. Schelies
(1899), 61 Ohio St. 298, 55 N.E. 9984

Viers v. Dunlap
(1982), 1 Ohio St.3d 173, 1 OBR 203, 438, N.E.2d 8815, 17

Virgil v. Franklin
(Colo.2004), 103 P.3d 32212

Wabash RR. Co. v. Ray
(1898), 152 Ind. 392, 51 N.E. 9204

Wal-Mart Stores, Inc. v. Seale
(Tex.App.1995), 904 S.W.2d 718.....13

Wallace v. Ohio Dept. of Commerce
(2002), 96 Ohio St.3d 266, 2002-Ohio-4210, 773 N.E.2d 1018.....3

Ward v. K-Mart Corp.
(Ill.1990), 554 N.E.2d 22312

CONSTITUTIONAL PROVISION

Section 35, Article II, Ohio Constitution.....5

STATUTES

Ky.Rev.Stat.Ann. 198B.130 (1978).....10

R.C. 101.358, 15

R.C. 119.038, 15, 16

R.C. 2125.011

R.C. 2315.195

R.C. 3781.0715

R.C. 3781.1015

Section 301, Title 21, U.S.Code7

Section 501, Title 5, U.S.Code7

Section 651, Title 29, U.S.Code15

Section 655, Title 29, U.S.Code16

Section 669, Cal.Evid.Code10

ADMINISTRATIVE RULES AND REGULATIONS

OSHA Standards for General Industry,
Section 1910.1, Chapter 29, Code of Federal Regulations (2003)16

OSHA Standards for General Industry,
Section 1910.23, Chapter 29, Code of Federal Regulations (2003)1, 9

Ohio Building Code § 1003.3.11 (2002)1, 9

OTHER AUTHORITIES

1 Koch, Administrative Law & Practice (2 Ed.1997).....7

2 Harper & James, Law of Torts (1956).....5, 6

2 Restatement of the Law 2d, Torts (1965)	5, 6, 9, 12, 13
17 Ohio Administrative Law Handbook & Agency Directory (2007)	7, 8
Pardieck & Hulbert, Is the Danger Really Open & Obvious? (1986), 19 Ind. L. Rev. 383	11
Prosser, Law of Torts (3 Ed.1964).....	6
Prosser & Keeton's The Law of Torts (5 Ed.1984).....	16

STATEMENT OF THE CASE

In late winter 2003 Sheila Walker, age 47, died from injuries suffered in a fall. That fall took place a few days before her death as she descended an outside stairway at AK Steel Corp.'s ("AK Steel's") Middletown, Ohio facility. (Appx. 7.) Sheila broke her ankle in the fall, as she left her job as a security guard for Johnson Controls, an AK Steel subcontractor. (Appx. 6-7.) The Butler County Coroner determined the cause of death to be a pulmonary embolism, a blood clot that migrated from her broken ankle and lodged itself in her lungs. (Appx. 7.) A post-accident report, completed just hours after the fall, indicated that the presence of handrails on the stairway would have prevented the fall. (Supp. 46.)

Appellant Abbra Walker Ahmad, who had been a minor child when her mother died, was later appointed Special Administrator of her mother's estate. (Supp. 1.) She timely filed statutory (R.C. 2125.01) and survivorship claims against AK Steel, asserting that AK Steel negligently caused her mother's death by failing to install handrails in accordance with the Occupational Safety and Health Administration ("OSHA") safety regulations and the Ohio Building Code ("OBC").¹ (Supp. 19.)

The trial court granted AK Steel's summary judgment motion and ordered the complaint dismissed. (Appx. 17.) While acknowledging that safety violations had occurred, the trial court held that an alleged violation of an administrative building code does "not preclude the application of the open and obvious doctrine and that the presence of building code violations do not require a denial of summary judgment." (Appx. 16.)

¹ OSHA's Standards for General Industry, 29 C.F.R. § 1910.23(d)(2003), appx. 23, and the 2002 Ohio Building Code § 1003.3.11, appx. 27, required handrails on the front stairs of the AK Steel's facility, where Sheila fell. In fact, OSHA cited AK Steel for this violation. (Supp. 44.)

Appellant Abbra Walker Ahmad timely filed her notice of appeal with the Butler County Court of Appeals, Twelfth Appellate District. (Supp. 65.) That court issued an opinion and order affirming the trial court's holding. (Appx. 10.) Finding its holding in conflict with decisions by the First and Tenth Appellate Districts,² the court below framed the certified issue as follows: “[w]hether the violation of an administrative building code prohibits application of the open and obvious doctrine and precludes summary judgment on a negligence claim.” (Appx 20.) Ahmad timely notified the Supreme Court of this ruling. (Appx. 3.)

On May 2, 2007, this Court granted Appellant Walker's motion to certify the record. In its entry, the Court ordered that the discretionary appeal and the certified conflict be consolidated. In accordance with the entry, Appellant submits this merit brief in support of its appeal from the judgment of the Butler County Court of Appeals, Twelfth Appellate District.

² *Uddin v. Embassy Suites Hotel* (2005), 165 Ohio App.3d 699, 2005-Ohio-6613, 848 N.E.2d 519, certiorari granted, 109 Ohio St.3d 1455, 2006-Ohio-2226, 847 N.E.2d 5, case dismissed, 113 Ohio St.3d 1249, 2007-Ohio-1791, 864 N.E.2d 638; *Christen v. Don Vonderhaar Market and Catering, Inc.*, 1st Dist. No. C-050125, 2006-Ohio-715; *Francis v. Showcase Cinema Eastgate* (2003), 155 Ohio App.3d 412, 2003-Ohio-6507, 801 N.E.2d 535.

ARGUMENT

This appeal presents an important question of negligence law – in particular, its interface with our public law process. Is violation of a safety rule, enabled by authorizing legislation and promulgated in accordance with due process, evidence of a duty in a negligence case and sufficient to create a genuine issue of material fact as to the property owner’s duty? Or will the Court declare that the “open and obvious” doctrine operates to exonerate a safety rule violator from tort liability? Our appellate courts are split on this question. The state courts in this nation take differing views as well, though the great majority of courts embrace the principles we advocate here.

A word as to what this appeal does *not* involve. First, it does not seek to create strict, automatic, or absolute liability. A safety rule violation only implicates the duty element of a tort. And it is not necessarily conclusive to that duty. A particular safety violation also may be inconsequential, i.e., there may not be a causal relationship between the violation and the injury; it may not even constitute an issue for a fact finder. Where there is a safety violation, all the elements of the tort must be proved, just as in any negligence case.³

And, secondly, we do not contend that this Court should jettison the “open-and-obvious” doctrine. That doctrine – apart from its intersection with a safety rule violation – is a longstanding and recently-affirmed principle of Ohio law. *Armstrong v. Best Buy Co., Inc.* (2003), 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088. We do not urge the Court to repudiate it.

³ In order to establish a claim for negligence, a claimant must show he was owed a legal duty of care, that this duty was breached, and that this breach caused the claimant’s injury. *Wallace v. Ohio Dept. of Commerce* (2002), 96 Ohio St.3d 266, 274, 2002-Ohio-4210, 773 N.E.2d 1018.

History of the Open-and-Obvious Doctrine

“Open and obvious” rubric finds its beginnings in our jurisprudence during this nation’s industrial age, mainly in railroad employee injury cases decided before the era of our workers’ compensation laws. Courts often used this terminology in determining whether a plaintiff-employee would be permitted negligence recovery from an employer or was barred by contributory negligence – because a dangerous job condition should have been “open and obvious.” See, e.g., *Northern Pacific RR. Co. v. Egeland* (1896), 163 U.S. 93, 16 S.Ct. 975, 41 L.Ed. 82 (addressing whether jumping from a moving train to a loading platform “in broad daylight” was contributory negligence as a matter of law or was question of fact for the jury); *Van Dozen Gas & Gasoline Engine Co. v. Schelies* (1899), 61 Ohio St. 298, 55 N.E. 998. From time to time, courts in other states have equated assumption-of-risk with an open-and-obvious danger. See, e.g., *Wabash RR. Co. v. Ray* (1898), 152 Ind. 392, 404, 51 N.E. 920 (holding that employee assumed risk of injury caused by dangerous employment condition that was “open and obvious”). Regardless of the terminology used, the open-and-obvious doctrine rested on contributory negligence principles.⁴ It was considered unfair to subject the employer to liability where the plaintiff knew of the risk of a dangerous job condition or assignment. Under these specific cases, often focusing on the fellow-servant rule, contributory negligence served as a complete bar to recovery.

In the employment context, application of this contributory negligence principle was largely mooted by the workers’ compensation laws, most of which were adopted

⁴ *Bosjnak v. Superior Sheet Steel Co.* (1945), 145 Ohio St. 538, 542, 31 Ohio Op. 188, 62 N.E.2d 305.

between 1911 and the early 1920s.⁵ But case law reflecting dismissal of negligence claims based on contributory negligence (for an open and obvious danger) continued through enactment of the comparative negligence statute in 1980. R.C. 2315.33 (formerly R.C. 2315.19); see *Viers v. Dunlap* (1982), 1 Ohio St.3d 173, 1 OBR 203, 438 N.E.2d 881.⁶

The Scope of the Doctrine in Ohio

Apart from the employment line of cases, this Court's first in-depth analysis on the open-and-obvious doctrine appears in *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, 42 Ohio Op.2d 96, 233 N.E.2d 589, a case the Court has since cited with approval.⁷ The *Sidle* Court held that "an occupier of premises is under no duty to protect a business invitee against dangers which are known to such invitee or are so obvious and apparent to such invitee that he may reasonably be expected to discover them and protect himself against them." *Sidle* at paragraph 1 of the syllabus. In its discussion of the open-and-obvious doctrine, the *Sidle* Court endorsed the explanation of the doctrine set forth in Prosser's Law of Torts, Harper & James' Law of Torts, and the Second Restatement of Torts. *Sidle* at 48-49. Each of these authorities notes that an open and obvious danger

⁵ Ohio's constitution was amended and the early Ohio workers' compensation statutes were adopted in 1912. Section 35, Article II, Ohio Constitution; see *Bailey v. Republic Engineered Steels, Inc.* (2001), 91 Ohio St.3d 38, 40-41, 2001-Ohio-236, 741 N.E.2d 121.

⁶ This Court has noted that the open-and-obvious doctrine historically has been lumped together with contributory negligence. *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, 645, fn.2, 1992-Ohio-42, 597 N.E.2d 504. It also noted that since Ohio's enactment of a comparative negligence statute, R.C. 2315.33 (formerly R.C. 2315.19), courts must carefully distinguish between the defendant's duty of care and the plaintiff's contributory negligence. *Simmers* at 645, fn.2. See also *Messmore v. Monarch Machine Tool Co.* (1983), 11 Ohio App.3d 67, 68, 11 OBR 117, 463 N.E.2d 108 (observing that, unlike Ohio's current comparative negligence law, contributory negligence "served as a complete bar to recovery").

⁷ See *Armstrong* at syllabus; *Simmers* at 644; *Paschal v. Rite Aid Pharmacy, Inc.* (1985),

does not always extinguish a landowner's duty. Prosser's Law of Torts states that the open-and-obvious doctrine

is certainly not a fixed rule, and all circumstances must be taken into account. In any case where the occupier, as a reasonable man, should anticipate an unreasonable risk of harm to the invitee notwithstanding his knowledge, warning, or the obvious nature of the condition, something more in the way of precautions may be required.

Prosser, Law of Torts (3 Ed. 1964) 404, Section 61. Harper & James write that "the fact that a condition is obvious – i.e., it would be clearly visible to one whose attention was directed to it – does not always remove all unreasonable danger." 2 Harper & James, Law of Torts (1956) 1491, Section 27.13. The Restatement recognizes that the possessor may be liable for an open and obvious danger if he "should anticipate the harm despite such knowledge or obviousness." 2 Restatement of the Law 2d, Torts (1965) 218, Section 343A(1). While neither *Sidle* nor any other decision by this Court reflects a detailed exegesis of the circumstances under which the open-and-obvious doctrine does not abolish the duty owed,⁸ all these authorities support the principle we propose: that the landowner or occupier's violation of a safety regulation creates a jury issue of the question of duty despite an open or obvious hazard. As explained below, not only these and other treatises but two appellate districts in this state and the solid majority of other states recognize this principle.

18 Ohio St.3d 203, 204, 18 OBR 267, 480 N.E.2d 474.

⁸ However, in *Robinson v. Bates* (2006), 112 Ohio St.3d 17, 24, 2006-Ohio-6362, 857 N.E.2d 1195, this Court recognized that the open-and-obvious doctrine does not relieve a landlord of a statutory duty to repair.

Our System of Administrative Law

The first half of the twentieth century saw the advent of not only the workers' compensation laws but of the entire administrative law process and structure.⁹ On the federal level, New Deal administrative agency creation was followed by enactment of the federal Administrative Procedure Act in 1946, Section 501 et seq., Title 5, U.S.Code; and a raft of similar state laws ushered in a new era of rule-making and regulation.¹⁰

Although the complexity of administrative regulations is well known and even the stuff of legend, the underlying principles are fairly simple: legislators lack the time and the expertise to specify regulations that they deem necessary for economic or safety regulation. See 1 Koch, *Administrative Law & Practice* (2 Ed.1997) 9-11, Section 1.2. The legislature enacts enabling legislation that delegates to an administrative agency the authority to make rules. The agency, which has a measure of expertise, then promulgates the rules or regulations after public notice and due process opportunity for public comment and judicial review. See, e.g., R.C. Chapter 119.¹¹ Rule-making is a "quasi-legislative" function; administrative rules carry the force of law and are entitled to "substantial judicial deference" when it appears that a rule was promulgated in the

⁹ It is conventionally recognized that the first administrative agency Congress created was the Interstate Commerce Commission in 1887. 17 *Ohio Administrative Law Handbook & Agency Directory* (2007) 3, Section 1:3. But administrative procedures and rulemaking did not begin in earnest until the New Deal legislation. See 1 Koch, *Administrative Law & Practice* (2 Ed.1997) 121, Section 2:31.

¹⁰ The Administrative Procedure Act is the vehicle through which more than 50 federal agencies have created a broad panoply of rules and regulations. See Koch at 121-123. Ohio's administrative procedure legislation goes back to 1943. R.C. Chapter 119 (see 120 Ohio Laws 358).

¹¹ The Federal Food, Drug, and Cosmetic Act, Section 301 et seq., Title 21, U.S.Code, is a good example. The Act prohibits the sale of drugs until shown to be "safe and effective," and authorizes the administrative officer (now Secretary of Health and Human Services) through the FDA to promulgate regulations that flesh out what is necessary to market a "safe and effective" drug. *Id.*

exercise of legislative authority. *Migden-Ostrandors v. Pub. Utils. Comm. of Ohio* (2004), 102 Ohio St.3d 451, 456, 2004-Ohio-3924, 812 N.E.2d 955; *Gonzales v. Oregon* (2006), 546 U.S. 243, 255-56, 126 S.Ct. 904, 163 L.Ed.2d 748; *United States v. Mead Corp.* (2001), 533 U.S. 218, 226-27, 121 S.Ct. 2164, 150 L.Ed.2d 292. In *State ex rel. Saunders v. Indus. Comm. Of Ohio* (2004), 101 Ohio St.3d 125, 2004-Ohio-339, 802 N.E.2d 650, this Court noted that courts “must give due deference to an administrative interpretation formulated by an agency that has accumulated substantial expertise in the particular subject area and to which the General Assembly has delegated the responsibility of implementing the legislative command.” *Id.* at 130 (quoting the appellate decision in that same case). Rule-making is a manifestation of the public policy chosen by the legislature. *Doyle v. Ohio Bur. Of Motor Vehicles* (1990), 51 Ohio St.3d 46, 72, 554 N.E.2d 97.

The federal Administrative Procedure Act has various mechanisms to prevent agency rules, such as OSHA standards, from deviating from statutory authorization. In Ohio, the General Assembly has injected itself into the administrative rule-making process to prevent deviation. To that end, the General Assembly has created a Joint Committee on Agency Rule Review, consisting of five members of the House and five from the Senate. R.C. 101.35. This committee receives formal notice and the text of a proposed rule, and through this committee’s involvement, the General Assembly may invalidate any rule it determines improper based on the criteria stated in the statute. R.C. 119.03(H); see generally, 17 Ohio Administrative Law Handbook & Agency Directory (2007). Thus, “[t]he purpose of administrative rulemaking is to facilitate the administrative agency’s placing into effect the policy declared by the General Assembly

in the statutes to be administered by the agency. In other words, administrative agency rules are an administrative means for the accomplishment of a legislative end.” *Doyle* at 47 (quoting *Carroll v. Dept. of Adm. Servs.* (1983), 10 Ohio App.3d 108, 110, 10 OBR 132, 460 N.E.2d 704).

Proposition of Law: A safety or building rule violation is evidence of a land occupier’s breach of duty and precludes summary judgment on the breach of duty regardless of whether the hazard or rule violation was open or obvious.

Sheila Walker was a business invitee of AK Steel, which owed her the duty of ordinary care in maintaining its premises in a reasonably safe condition so that she was not unnecessarily or unreasonably exposed to danger.¹² *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, 18 OBR 267, 480 N.E.2d 474. In practical terms, the OSHA regulations¹³ and the Ohio Building Code¹⁴ reflect the duty owed her. A jury could rightly interpret that AK Steel breached its duty to maintain the premises in a reasonably safe condition by failing to act in accordance with these regulations. The regulatory violations, along with evidence that AK Steel’s compliance would have prevented Sheila’s fall,¹⁵ are sufficient to defeat AK Steel’s motion for summary judgment. Thus, the trial court’s grant and court of appeals’ affirmation of summary judgment should be reversed.

¹² The parties have agreed and the trial court and court of appeals have found that Sheila Walker was a business invitee. (Appx. 9, 13.)

¹³ Section 1910.23(d)(1), Chapter 29, Code of Federal Regulations (2003) states that “[e]very flight of stairs having four or more risers shall be equipped with standard railings or standard handrails ***.” (Appx. 23.)

¹⁴ 2002 Ohio Building Code § 1003.3.11 states that “[s]tairways shall have handrails on each side.” (Appx. 27.)

¹⁵ (Supp. 2.)

Pertinent Law and Policy Decisions in Jurisdictions Across the Country

State courts across the nation fall into three basic camps in analyzing the intersection between the open-and-obvious doctrine and violations of administrative safety regulations. A first group holds that a violation of administrative safety regulation is negligence *per se* regardless of the openness or obviousness of the hazard. See, e.g., *Overton Square, Inc. v. Bone* (Tenn.1979), 576 S.W.2d 762; *Blue Grass Restaurant Co. v. Franklin* (Ky.1968), 424 S.W.2d 594 (later codified by Ky.Rev.Stat. Ann. 198B.130 (1978)). This is an approach advocated to but rejected by this Court in *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563, 568, 1998-Ohio-184, 697 N.E.2d 198.

A second approach, embraced by a number of other states, holds that a safety rule violation is *evidence* of negligence, precluding summary judgment based on the open and obvious danger; it is left to the jury to determine whether all elements of negligence have been proven. See, e.g., *Toll Brothers, Inc. v. Considine* (Del.1998), 706 A.2d 493; *Craig v. Taylor* (1996), 323 Ark. 363, 915 S.W.2d 257; *Konicek v. Loomis Bros., Inc.* (Iowa 1990), 457 N.W.2d 614; *Beals v. Walker* (1976), 416 Mich. 469, 331 N.W.2d 700; *Porter v. Montgomery Ward & Co., Inc.* (1957), 48 Cal.2d 846, 313 P.2d 854 (holding that a violation of a regulation requiring a handrail creates a rebuttable presumption of negligence)(later codified at Section 669, Cal.Evid.Code); *Conroy v. Briley* (Fla.App.1966), 191 So.2d 601; *Martins v. Healy* (Mass.Super.Ct.2002), 15 Mass.L.Rep. 42.

In *Beals v. Walker*, the Michigan Supreme Court found that the court of appeals improperly ignored evidence of safety regulations when, in relying on the open-and-

obvious doctrine,¹⁶ it affirmed the grant of a directed verdict in favor of a defendant. *Beals*, 416 Mich. at 481. It found that evidence of these violations warranted a jury determination and reversed. *Id.* at 481-82. In the jurisdictions that fall into this category, evidence of the safety rule violation itself as well as the openness and obviousness of the danger are admissible and to be considered by the jury in its determination of whether the owner or occupier acted reasonably. See Pardieck & Hulbert, *Is the Danger Really Open & Obvious?* (1986), 19 Ind. L. Rev. 383 (noting that “the more recent trend considers the obviousness of the danger as only one factor in determining whether a plaintiff has assumed the risk of injury”). This second approach has been embraced by the First and Tenth Appellate Districts¹⁷ and was expressed by Justice O’Conner in her dissent from the dismissal in *Uddin v Embassy Suites Hotel* (2007), 113 Ohio St.3d 1249, 2007-Ohio-1791, 864 N.E.2d 638.

And, third, the courts of a small minority of states stand with the court below in holding safety rules are irrelevant when a risk is open and obvious. Compare the Twelfth District’s decision below with *Sessions v. Nonnenmann* (Ala.2002), 842 So.2d 649. Under this third approach, the common law open-and-obvious doctrine nullifies the force of any administrative rule and the owner or occupier has no duty to maintain the premises in a reasonable condition.

¹⁶ For the Michigan Supreme Court’s recent affirmation of the open-and-obvious doctrine, see *Lugo v. Ameritech Corp., Inc.* (2001), 464 Mich. 512, 629 N.W.2d 384.

¹⁷ *Uddin v. Embassy Suites Hotel* (2005), 165 Ohio App.3d 699, 2005-Ohio-6613, 848 N.E.2d 519, certiorari granted, 109 Ohio St.3d 1455, 2006-Ohio-2226 847 N.E.2d 5, case dismissed, 113 Ohio St.3d 1249, 2007-Ohio-1791, 864 N.E.2d 638; *Christen v. Don Vonderhaar Market and Catering, Inc.*, 1st Dist. No. C-050125, 2006-Ohio-715; *Francis v. Showcase Cinema Eastgate* (2003), 155 Ohio App.3d 412, 2003-Ohio-6507, 801 N.E.2d 535.

Admittedly, the three categories of decisions are not tightly organized. At least one jurisdiction, Georgia, has split on this same issue among its courts of appeals. Compare *Trans-Vaughn Dev. Corp.* (2005), 273 Ga.App.505, 615 S.E.2d 579 (holding that claimant's prior use of defective stairs obviates owner's duty) with *Val D'Aosta Co. v. Cross* (1999), 241 Ga.App. 583, 526 S.E.2d 580 (holding that a genuine issue of material fact exists where wheelchair ramp does not comply with building standards, despite prior use). Furthermore, many states do not fall into any of these categories because they have partially or completely abrogated the open-and-obvious doctrine. See, e.g., *Virgil v. Franklin* (Colo.2004), 103 P.3d 322; *Tharp v. Bunge Corp.* (Miss.1994), 641 So.2d 20; *Harris v. Niehaus* (Mo.1993), 857 S.W.2d 222; *Ward v. K-Mart Corp.* (Ill.1990), 554 N.E.2d 223; *Arrington v. Arrington Bros. Constr., Inc.* (1989), 116 Idaho 887, 781 P.2d 224; *Micallef v. Miehle Co.* (1976), 39 N.Y.2d 376, 348 N.E.2d 571; *Parker v. Highland Park, Inc.* (Tex.1978), 565 S.W.2d 512. In these cases, the open-and-obvious doctrine is no obstacle to admitting administrative violations as evidence of negligence. See, e.g., *Arrington*, supra; *Scott v. Matlack, Inc.* (Colo.2002), 39 P.3d 1160; *McCarthy v. Kunicki* (2005), 355 Ill. App.3d 957, 973 (finding that a code violation is "prima facie evidence of negligence"). Still, the majority view across the nation is clear: violations of administrative safety regulation serve, at least, as some evidence of negligence.¹⁸

¹⁸ The Second Restatement of Torts does not choose between the first and second categories and advocates using violations of administrative regulations either to show negligence per se or as evidence of negligence. 2 Restatement of the Law 2d, Torts (1965) 37, Section 288B. Section 286 details a four-step test to determine whether a regulation should be adopted as the standard of care. *Id.* at 25. The Restatement approves adopting the standard described in the regulations if its purposes is:

- (a) to protect a class of person which includes the one whose interest is invaded, and

Courts support this majority view with a probing analysis of the public policy at issue. For example, the Colorado State Supreme Court, in discussing the OSHA regulations, notes that the administrative scheme has been established to “reflect current ideas in the field of safety and health issue” and represent the “cumulative wisdom of the industry on what is safe and unsafe.” *Scott v. Matlack, Inc.*, 39 P.3d at 1168 (quoting *Wal-Mart Stores, Inc. v. Seale* (Tex.App.1995), 904 S.W.2d 718). Without these regulations, “the jury is left with fewer tools to determine the standard of care.” *Scott* at 1169. In line with other courts noted above, the Colorado Supreme Court allows evidence of these regulations “as some indication of the standard of care with which a reasonable person in the defendant’s position should comply.” *Id.* at 1170.

Pertinent Decisions of Ohio Appellate Courts

In *Chambers v. St Mary’s School*, (1998) 82 Ohio St.3d 563, 1998-Ohio-184, 697 N.E.2d 198, this Court ruled that violations of administrative rules may be admissible as evidence of negligence.¹⁹ The First and Tenth Appellate Districts have embraced *Chambers’* holding and interpreted it to mean that such a violation raises a genuine issue of material fact as to the property owner’s duty and breach thereof despite any open and obvious nature of the danger.

The First District’s pertinent decisions are *Francis v. Showcase Cinema Eastgate* (2003), 155 Ohio App.3d 412, 2003-Ohio-6507, 801 N.E.2d 535, and *Christen v.*

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- (b) to protect the particular interest which is invaded, and
 - (c) to protect that interest against the kind of harm which has resulted, and
 - (d) to protect that interest against the particular hazard from which the harm results.

Id.

¹⁹ The focus of the holding in *Chambers* is that violations of administrative regulations do not constitute negligence per se and the case did not discuss its effect on the open-and-obvious doctrine. *Chambers* at 568.

Vonderhaar Market & Catering, Inc., 1st Dist. No. C-050125, 2006-Ohio-715. *Francis* was a case factually foursquare with the instant one. Francis fell on a stairwell outside Showcase Cinemas and sustained injuries. *Francis* at 413. The stairwell lacked a handrail, which violated the Ohio Building Code. *Id.* at 414. The First District noted the viability of the open-and-obvious doctrine in Ohio, *id.* at 415, but looked to *Chambers*' language that "violations of the [OBC] are evidence that the owner has breached a duty to the invitee." *Id.* (citing *Chambers* at syllabus). Consequently, it held that "evidence of the [OBC] violation raised a genuine issue of material fact regarding Showcase's duty and breach of duty, and that summary judgment was improperly granted." *Id.* at 416. In *Christen*, the First District reiterated this holding. *Id.* at ¶¶ 12, 20.

The Tenth District, in *Uddin v. Embassy Suites Hotel* (2005), 165 Ohio App.3d 699, 2005-Ohio-6613, 848 N.E.2d 519, reached the similar conclusion regarding the Ohio Building Code and a pool drowning: the rule violation presents a genuine issue of material fact on the existence of the duty. This Court granted the motion to certify the record in *Uddin*, 109 Ohio St.3d 1455, 2006-Ohio-2226, but later dismissed for jurisdiction improvidently accepted, 113 Ohio St.3d 1249, 2007-Ohio-1791. We submit that the Tenth District's opinion is well-grounded, as indicated in Justice O'Conner's dissenting opinion from the Court's decision to dismiss.

Along with the court below, Ohio Courts of Appeals for the Second, Fifth, and Eighth Districts have rejected such an approach.²⁰ They read this Court's decision in *Armstrong v. Best Buy Co., Inc.* (2003), 99 Ohio St.3d 79, 2003-Ohio-

²⁰ See *Kirchner v. Shooters on the Water, Inc.*, (2006), 167 Ohio App.3d 708, 2006-Ohio-3583, 856 N.E.2d 1026, certiorari granted, 113 Ohio St.3d 1487, 2007-Ohio-1986; *Souther v. Preble Cty. Dist. Library, West Elkton Branch*, 12th Dist. No. CA2005-04-006, 2006-Ohio-1893; *Olivier v. Leaf & Vine*, 2d Dist. No. 2004 CA 35, 2005-Ohio-

2573, 788 N.E.2d 1088, to effectively absolve the property owner of all duty when a danger is open and obvious;²¹ or, to put it another way, the property owner has no duty to rid the premises of any danger, no matter how unsafe, if the danger is open and obvious. Violations of any administrative regulations are irrelevant and do not give rise to a genuine issue of material fact.

Public Policy Issues

The fundamental question presented in this appeal centers on the respect to be afforded and the deference given a legislature's decision to express its will through the administrative process. In contexts other than tort law, this Court has held the administrative process in high regard as a vehicle for expressing public policy. *Jones Metal Products Co. v. Walker* (1972), 29 Ohio St.2d 173, 181, 58 Ohio Op.2d 393, 281 N.E.2d 1 (holding that courts are required to give due deference to an administrative interpretation formulated by an agency which has accumulated substantial expertise). See also *Lorain City School Dist. Bd. of Educ. v. State Employment Relations Bd.* (1988), 40 Ohio St.3d 257, 533 N.E.2d 264; *State ex rel. Brown v. Dayton Malleable, Inc.* (1982), 1 Ohio St.3d 151, 155, 1 OBR 185, 438 N.E.2d 120.

Here, the Ohio General Assembly has by statute formed the Ohio Board of Building Standards and given it the task of formulating and adopting "standards relating to the conservation of energy and the safety and sanitation" of buildings in Ohio. R.C. 3781.07; R.C. 3781.10(A)(1). In accordance with this legislative grant of power, the Board of Building Standards creates and maintains the Ohio Building Code. And, as

1910.

²¹ It should be noted that *Armstrong* did not involve any allegations that the premises violated any safety regulations.

discussed before, the General Assembly has oversight over this rule-making process.

R.C. 101.35; R.C. 119.03(H).

Similarly, Congress created the Occupational Safety and Health Administration (OSHA) in 1970 to assure “safe and healthful working conditions.” Section 651(b), Title 29, U.S.Code. The Occupational Safety and Health Act requires the secretary to promulgate national consensus standards and establish Federal standards as occupational safety or health standards. Section 655, Title 29, U.S.Code. This legislation has resulted in the OSHA Standards for General Industry. Section 1910.1, Chapter 29, Code of Federal Regulations. These administrative agencies have specialized knowledge and technical expertise that assist them in the creation of these standards. *Farrand v. State Med. Bd.* (1949), 151 Ohio St.2d 222, 39 Ohio Op. 41, 85 N.E.2d 113.

We submit there is nothing about tort law that counsels diminished respect for the legislature’s will where that legislative choice is to use the administrative process. This is especially so in Ohio, where the legislature exercises a formal and continuing watchdog function over the rule-making process. R.C. 119.03(H). It may be that this Court’s choice is to place a safety duty expressed by statute on a higher level (violation means negligence per se) than one enacted through the administrative process. But it is consistent with sound respect for the judgment of the coordinate branch of government, that violation of a safety rule, administratively promulgated pursuant to statute, should be sufficient to create a genuine question of material fact for a jury in a negligence action regardless of the open-and-obvious doctrine.

Prosser & Keeton’s *The Law of Torts* (5 Ed.1984) 231, Section 36, promotes using such violations as evidence of negligence, rather than the “arbitrary classification

of * * * negligence per se or no negligence at all,” which “leaves too little flexibility for the standard of reasonable care.” Furthermore, by this Court’s decisions and by statute, we have moved far beyond the days when contributory negligence (no matter how minor) served as a complete bar to recovery. See, e.g., *Viers v. Dunlap* (1982), 1 Ohio St.3d 173, 1 OBR 203, 438 N.E.2d 881; *Rafto v. Losantiville Country Club* (1973), 34 Ohio St.2d 1, 63 Ohio Op.2d 1, 295 N.E.2d 202; *New York, C. & S. L. R. Co. v. Ropp* (1907), 76 Ohio St. 449, 81 N.E. 748. This Court should embrace the majority view, expressed by the First and Tenth Appellate Districts²² and by the Michigan Supreme Court²³ that a violation of an administrative rule is sufficient to create a genuine issue of material fact on the element of duty in a negligence action.

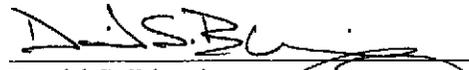
CONCLUSION

AK Steel had a duty to maintain its premises in a reasonably safe condition and not to expose Sheila Walker to unnecessary or unreasonable dangers. Its failure to comply with OSHA safety regulations and the OBC, which required the company to install a handrail on the front stairs of its facility, is evidence that it did not maintain the premises in a reasonably safe condition. AK Steel must not be permitted to ignore the regulations based on the open and obvious nature of its violations. A jury should be allowed to determine whether, given evidence of this violation and the openness of the danger, AK Steel maintained its premises in a reasonably safe condition.

²² *Uddin v. Embassy Suites Hotel* (2005), 165 Ohio App.3d 699, 2005-Ohio-6613, 848 N.E.2d 519, certiorari granted, 109 Ohio St.3d 1455, 2006-Ohio-2226 847 N.E.2d 5, case dismissed, 113 Ohio St.3d 1249, 2007-Ohio-1791, 864 N.E.2d 638; *Christen v. Don Vonderhaar Market and Catering, Inc.*, 1st Dist. No. C-050125, 2006-Ohio-715; *Francis v. Showcase Cinema Eastgate* (2003), 155 Ohio App.3d 412, 2003-Ohio-6507 , 801 N.E.2d 535.

²³ *Beals v. Walker* (1976), 416 Mich. 469, 331 N.W.2d 700.

Respectfully submitted,


David S. Blessing

COUNSEL FOR APPELLANT,
ABBRA WALKER AHMAD

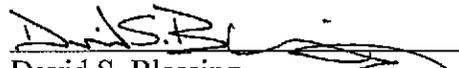
CERTIFICATE OF SERVICE

I certify that a copy of this Merit Brief was sent by ordinary U.S. mail to counsel,

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on this 23rd day of July, 2007.


David S. Blessing

COUNSEL FOR APPELLANT,
ABBRA WALKER AHMAD

IN THE SUPREME COURT OF OHIO

ABBRA WALKER AHMAD,

Appellant,

v.

AK STEEL CORP.,

Appellee.

07-0288

On Appeal from the Butler
County Court of Appeals,
Twelfth Appellate District

Court of Appeals
Case No. CA 2006 04 0089

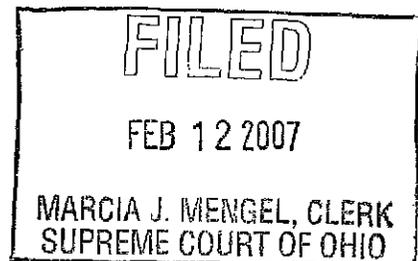
NOTICE OF APPEAL OF APPELLANT ABBRA WALKER AHMAD

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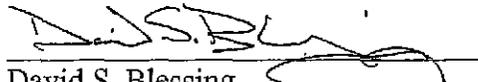


Notice of Appeal of Appellant Abbra Walker Ahmad

Appellant Abbra Walker Ahmad hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Butler County Court of Appeals, Twelfth Appellate District, entered in Court of Appeals case no. CA2006-04-0089 on December 28, 2006.

This case raises a question of public or great general interest.

Respectfully submitted,


David S. Blessing

COUNSEL FOR APPELLANT,
ABBRA WALKER AHMAD

CERTIFICATE OF SERVICE

I certify that a copy of this document was sent by first class mail to counsel of appellee, Monica H. McPeck, Attorney for Defendant, Frost Brown Todd LLC, 2200 PNC Center, 201 East Fifth Street, Cincinnati, Ohio 45202-4182, on this 9th day of February, 2007.



IN THE SUPREME COURT OF OHIO

07 - 0410

ABBRA WALKER AHMAD,

Appellant,

v.

AK STEEL CORP.,

Appellee.

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On Appeal from the Butler
County Court of Appeals,
Twelfth Appellate District

Court of Appeals
Case No. CA 2006 04 0089

NOTICE OF CERTIFIED CONFLICT

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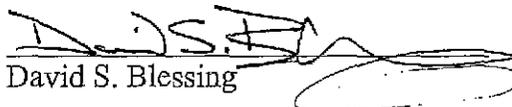
COUNSEL FOR APPELLEE, AK STEEL CORP.

FILED
MAR 08 2007
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

Notice of Certified Conflict

Appellant Abbra Walker Ahmad hereby gives notice that the Butler County Court of Appeals, Twelfth Appellate District, granted Appellant's Motion to Certify Conflict in Court of Appeals case no. CA2006-04-0089 on February 22, 2007. The order of the Twelfth District Court of Appeals certifying the conflict is attached under Tab A. Copies of the conflicting court of appeals opinions are attached under Tab B.

Respectfully submitted,


David S. Blessing

COUNSEL FOR APPELLANT;
ABBRA WALKER AHMAD

CERTIFICATE OF SERVICE

I certify that a copy of this document was sent by first class mail to counsel of appellee, Monica H. McPeck, Attorney for Defendant, Frost Brown Todd LLC, 2200 PNC Center, 201 East Fifth Street, Cincinnati, Ohio 45202-4182, on this 5th day of March, 2007.



Blessing

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

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CLERK OF COURTS

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COURT OF COMMON PLEAS
DEC 28 2006
GANDY ZIMMERMAN
CLERK OF COURTS

ABBRA WALKER AHMAD, et al.

Plaintiffs-Appellants,

CASE NO. CA2006-04-089

- vs -

JUDGMENT ENTRY

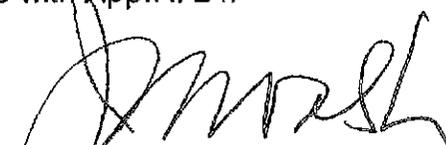
AK STEEL CORP.,

Defendant-Appellee.

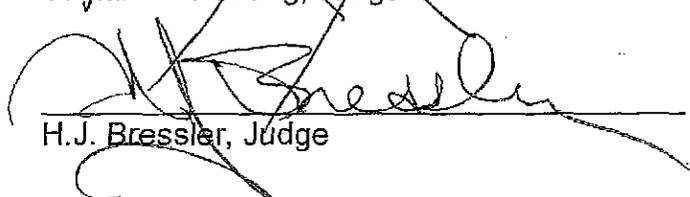
The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.


James E. Walsh, Presiding Judge


William W. Young, Judge


H.J. Bressler, Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

ABBRA WALKER AHMAD, et al., :
 :
 Plaintiffs-Appellants, : CASE NO. CA2006-04-089
 :
 - vs - : OPINION
 : 12/28/2006
 :
 AK STEEL CORP., :
 :
 Defendant-Appellee. :

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2005-02-0415

David S. Blessing, 119 East Court Street, Suite 500, Cincinnati, Ohio 45202, for plaintiffs-appellants

Frost Brown Todd LLC, Monica H. McPeck, 201 East Fifth Street, Suite 2200, Cincinnati, Ohio 45202, for defendant-appellee

WALSH, P.J.

{¶1} Plaintiff-appellant, Abbra Walker Ahmad, appeals the decision of the Butler County Court of Common Pleas granting summary judgment in favor of defendant-appellee, AK Steel Corp. We affirm the trial court's decision.

{¶2} Appellant's mother, Sheila Walker ("decedent"), was employed by Johnson Controls, a security company that contracted with appellee to provide security services. She had worked as a security guard at appellee's Middletown headquarters for several years.

Around 5:00 p.m. on February 4, 2003, as appellant's decedent left work, she fell down the front stairway outside of the building. There was no handrail along the concrete steps that led up to the building. She was taken to the hospital and diagnosed with a broken left ankle. Less than two weeks later, she died of a pulmonary embolism.

{¶3} Appellant, individually and as special administrator of the estate, brought suit against appellee alleging negligence. Appellee filed a motion for summary judgment. On March 27, 2006, the trial court granted the motion and dismissed the action ruling that appellant failed to establish that appellee owed a duty to decedent. Appellant timely appealed, raising one assignment of error:

{¶4} "THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT."

{¶5} Appellant argues in her sole assignment of error that the trial court erred by failing to consider the necessary factors in finding that appellee did not owe a duty, finding that the stairs were open and obvious, and that the violation of a safety regulation does not raise a genuine issue of material fact.

{¶6} We review a trial court's decision granting summary judgment under a *de novo* standard of review. *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 296. Summary judgment is proper when: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can only come to a conclusion adverse to the party against whom the motion is made, construing the evidence most strongly in that party's favor. Civ.R. 56(C). See, also, *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. In order to establish a claim in negligence, appellant must show that appellee owed decedent a legal duty of care, that this duty was breached, and that this breach proximately caused decedent's injury. *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2002-Ohio-4210, ¶ 22. Appellant's failure to prove any

element is fatal to the negligence claim. *Whiting v. Ohio Dept. of Mental Health* (2001), 141 Ohio App.3d 198, 202.

{¶7} Appellant argues the trial court did not correctly consider the absence of a handrail along the steps as a violation of the Ohio Building Code ("OBC") and OSHA standards. A review of the record reveals that the trial court did consider the absence of the handrail. The trial court stated for the purposes of its decision that "[t]his court will assume, arguendo, that the lack of stair railings did violate the OBC." The court concluded that even though there was a violation, the absence of the handrail was open and obvious. Decedent was familiar with the stairs and used them regularly for several years. Additionally, appellant offered no evidence regarding the cause of the fall or how decedent fell.

{¶8} Appellant's second issue presented for review is that the trial court erred in ruling that the stairs were open and obvious and, as a result, appellee had no duty to decedent. The open and obvious doctrine concerns the first prong of a negligence claim, the existence of a duty. Where the danger is open and obvious, a property owner owes no duty of care to individuals lawfully on the premises. *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, ¶14. Open and obvious hazards are not concealed and are discoverable by ordinary inspection. *Parsons v. Lawson Co.* (1989), 57 Ohio App.3d 49, 50-51. The dangerous condition at issue does not actually have to be observed by the claimant to be an open and obvious condition under the law. *Lydic v. Lowe's Cos., Inc.*, Franklin App. No. 01AP-1432, 2002-Ohio-5001, ¶10. Rather, the determinative issue is whether the condition is observable. *Id.*

{¶9} We addressed this issue in *Souther v. Preble County District Library, West Elkton Branch*, Preble App. No. CA2005-04-006, 2006-Ohio-1893. In *Souther*, a library patron fell off a step located inside the library, injuring his hip. *Id.* at ¶3. There was no handrail located along the step. *Id.* He underwent hip replacement surgery. *Id.*

Approximately six months later decedent died due to an infection from the surgery. *Id.* The trial court granted summary judgment in favor of the library. *Id.* at ¶4. In affirming the trial court we ruled that an alleged violation of an administrative building code does not prohibit the application of the open and obvious doctrine nor does it preclude summary judgment on a negligence claim. *Id.* at ¶38. "The open and obvious nature of a condition is one of many facts to be considered on summary judgment in a negligence claim." *Id.* The only difference between *Souther* and the case at bar is that the decedent in *Souther* was a licensee and the decedent in this case was a business invitee. *Id.* at ¶15. This distinction does not change our analysis.

¶10 Like *Souther*, the absence of the handrail in this case was open and obvious. Prior usage alone may not be conclusive as to the knowledge of a hazard, but decedent's knowledge of the steps can be inferred from the fact that she used the staircase for several years prior to the accident as an employee at AK Steel. *Id.* citing *Olivier v. Leaf & Vine*, Miami App. No. 2004 CA 35, 2005-Ohio-1910.

¶11 In her final argument, appellant urges us to revisit and overturn our decision in *Souther*. Citing the split among Ohio jurisdictions on this issue, appellant argues that any violation of a federal or state administrative safety regulation raises a genuine issue of material fact regarding a property owner's duty and breach thereof. See *Christen v. Don Vonderhaar Market & Catering*, Hamilton App. No. C-050125, 2006-Ohio-715; and *Uddin v. Embassy Suites Hotel*, 165 Ohio App.3d 699, 2005-Ohio-6613, certiorari granted, 109 Ohio St.3d 1455, 2006-Ohio-2226 (both holding a genuine issue of material fact exists where a safety regulation is violated). See, also, *Olivier v. Leaf & Vine*, Miami App. No. 2004 CA 35, 2005-Ohio-1910; and *Ryan v. Guan*, Licking App. No. 2003CA00110, 2004-Ohio-4032 (both holding an alleged administrative safety violation does not preclude application of the open and obvious doctrine). We decline to revisit our decision in *Souther*.

{¶12} In view of the preceding, we conclude that appellant failed to show there were any genuine issues of material fact for trial. Accordingly, the trial court properly granted summary judgment in favor of appellee. Appellant's sole assignment of error is overruled.

Judgment affirmed.

YOUNG and BRESSLER, JJ., concur.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>

MAR 27 2006

CINDY CARPENTER
CLERK OF COURTS

**IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO**

ABBRA WALKER AHMAD, et al.,	:	CASE NO.:CV2005 02 0415
	:	
Plaintiffs,	:	Judge Spaeth
	:	
-vs-	:	<u>DECISION AND ENTRY</u>
	:	<u>GRANTING DEFENDANTS</u>
AK STEEL CORPORATION,	:	<u>JOINT MOTION FOR</u>
	:	<u>SUMMARY JUDGMENT</u>
Defendant.	:	
	:	<u>FINAL APPEALABLE ORDER</u>

This matter comes before the court on defendant's, AK Steel Corporation (hereinafter "AK Steel"), motion for summary judgment filed on January 20, 2006. Plaintiff, Abbra Walker Ahmad (Individually and as Special Administrator of the Estate of Sheila A. Walker), filed her memorandum in opposition to defendant's motion for summary judgment on March 8, 2006. AK Steel filed its reply in support of said motion on March 16, 2006. The Court has considered the applicable law, the memorandums filed in support of, and in opposition to, said motion.

Under Civ. R. 56, summary judgment is proper when: 1) no genuine issue as to any material fact remains to be litigated; 2) the moving party is entitled to judgment as a matter of law; and 3) that it appears from the evidence that reasonable minds can come but to one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. See Ohio Rule of Civil Procedure 56(C); see also *Welco Industries, Inc., v. Applied Companies* (1993), 67 Ohio St. 3d 344, 346, 617 N.E.2d 1129, 1132. In the summary judgment context, a "material" fact is one that might affect the outcome of the suit under the applicable substantive law. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340, 617 N.E.2d 1123. When

Judge Keith M. Spaeth
Common Pleas Court
Butler County, Ohio

determining what is a "genuine issue," the court decides if the evidence presents a sufficient disagreement between the parties' positions. *Id.*

Further, when a motion for summary judgment has been supported by proper evidence, the nonmoving party may not rest on the mere allegations of the pleading, but must set forth specific facts, by affidavit or otherwise, demonstrating that there is a genuine triable issue. *Jackson v. Alert Fire & Safety Equip., Inc.* (1991), 58 Ohio St.3d 48, 52, 567 N.E.2d 1027 see also, *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798, 801. If the nonmoving party does not demonstrate a genuine triable issue, summary judgment shall be entered against that party. Civ.R. 56(E).

The elements of negligence are duty, breach of duty, and causation. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318, 544 N.E.2d 265 see also, *Hunter v. Wal-Mart Stores, Inc.* 2002 WL 1058191, 2002-Ohio-2604 (Ohio App. 12th Dist., May 28, 2002). Whether one owes a duty of care to another is a question of law. *Id.* To prevent an adverse summary judgment in a negligence action, the plaintiff must show the existence of a duty and sufficient evidence from which reasonable minds could infer a breach of duty and an injury resulting proximately therefrom. *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75,77, 472 N.E.2d 707.

In Ohio, the status of the person who enters upon another's land determines the scope of the legal duty the landowner owes to the entrant. *Gladon v. Regional Transit Auth.* (1996), 75 Ohio St.3d 312, 315, 662 N.E.2d 287. An invitee is one who enters the premises of another by express or implied invitation for some purpose that is beneficial to the owner. *Id.* It is undisputed that Sheila Walker was a business invitee for all purposes pertinent to this matter. See *Motion for Summary Judgment and Memorandum in Opposition*. An owner or

occupier of premises owes a business invitee a duty of ordinary care in maintaining the premises in a reasonably safe condition so that its customers are not unnecessarily and unreasonably exposed to danger. *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, 480 N.E.2d 474. However, an owner or occupier is not an insurer of the customer's safety. An occupier of premises is under no duty to protect a business invitee against dangers which are known to such invitee or are so obvious and apparent to such invitee that he may reasonably be expected to discover them and protect himself against them. *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, 233 N.E.2d 589.

In this case *sub judice*, Sheila Walker fell while leaving work at AK Steel's corporate headquarters, 703 Curtis Street, Middletown, Ohio on or about February 4, 2003. *Plaintiff's complaint*, ¶ 4. Sheila Walker was taken to the Emergency Room at Middletown Regional Hospital, where she was diagnosed with a fractured left ankle. *Id.* ¶ 5. Tragically, Sheila Walker died on February 17, 2003 due to a bilateral pulmonary embolism. *Id.* ¶ 6.

"The existence of a duty is fundamental to establishing actionable negligence, without which there is no legal liability." *Adelman v. Timman* (1997), 117 Ohio App.3d 544, 549, 690 N.E.2d 1332. A business has no duty to protect an invitee, such as Sheila Walker, from dangers "[that] are known to such invitee or are so obvious and apparent to such invitee that [s]he may reasonably be expected to discover them and protect [her]self against them." *Paschal*, supra; *Kidder v. The Kroger Co.*, 2004 WL 1802050 (Ohio App. 2 Dist.), 2004-Ohio-4261, at ¶ 7. "The rationale behind the [open-and-obvious] doctrine is that the open-and-obvious nature of the hazard itself serves as a warning. The open-and-obvious doctrine concerns the first element of negligence, whether a duty exists. Therefore, the open-and-obvious doctrine obviates any duty to warn of an obvious hazard and bars negligence claims

for injuries related to the hazard." *Henry v. Dollar General Store*, 2003 WL 139773 (Ohio App. 2 Dist.), 2003-Ohio-206, at ¶ 7. The supreme court reaffirmed the viability of the open and obvious doctrine in *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 788 N.E.2d 1088.

Plaintiff argues that the open and obvious doctrine does not apply when the condition violates the Ohio Building Code (hereinafter "OBC"). At the outset, the first question this court must consider, is whether Section 1910.23(d)(1) of the Occupation Safety and Health Administration's (hereinafter "OSHA") requirement that stairs having four or more risers ... be equipped with standard stair railings." The stairs upon which Sheila Walker fell did not have railings. See Plaintiff's Memorandum in Opposition, Exhibit A. This court will assume, *arguendo*, that the lack of stair railings did violate the OBC.

Plaintiff maintains that the existence of building code violations constitutes strong evidence that the defendant breached its duty of care to Sheila Walker. She asserts that the violation of a building code or some similar statutory violation is either considered evidence of negligence or will support a finding of negligence *per se*, depending upon the degree of specificity with which the particular duty is stated in the statute. She thus asserts, relying on *Francis v. Showcase Cinema Eastgate*, 155 Ohio App.3d 412, 414, 801 N.E.2d 535, and *Christen v. Don Vonderhaar Market & Catering, Inc.*, 2006 WL 367107, 2006-Ohio-715 that the open and obvious doctrine does not apply when building code violations are present.

This court disagrees. In *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563, 697 N.E.2d 198 the supreme court addressed whether a violation of the OBC may constitute negligence *per se*. The court explained the difference between negligence and negligence *per se*, stating: "The distinction between negligence and 'negligence *per se*' is the means and method of ascertainment. The first must be found by the jury from the facts, the conditions

and circumstances disclosed by the evidence; the latter is a violation of a specific requirement of law or ordinance, the only fact for determination by the jury being the commission or omission of the specific act inhibited or required.' . . . Negligence *per se* is tantamount to strict liability for purposes of proving that a defendant breached a duty." *Id.* at 565-66, 697 N.E.2d 198 quoting *Swoboda v. Brown* (1935), 129 Ohio St. 512, 522, 196 N.E.2d 274). The supreme court held that violations of the OBC do not constitute negligence *per se*, but that they may be admissible as evidence of negligence.

In *Francis*, the First District interpreted *Chambers* to indicate that an OBC violation "showed both that the defendant had a duty toward the plaintiff and that the defendant breached that duty." *Francis*, 155 Ohio App.3d at 415, 801 N.E.2d 535. The *Francis* court then rejected the application of the open and obvious doctrine when an OBC violation was at issue, reasoning:

Thus, while the Supreme Court of Ohio has reaffirmed the principle that a landowner owes no duty to protect an invitee from open and obvious dangers, it has also held that violations of the OBBC are evidence that the owner has breached a duty to the invitee. In this case, Showcase suggests that this court should simply ignore the evidence of the OBBC violation, but we believe it would be improper to do so. To completely disregard the OBBC violation as a nullity under the open-and-obvious doctrine would be to ignore the holding in *Chambers* and to render the provisions of the OBBC without legal significance. We hold, then, that the evidence of the OBBC violation raised a genuine issue of material fact regarding Showcase's duty and breach of duty, and that summary judgment was improperly granted.

Id. at 415-16, 801 N.E.2d 535.

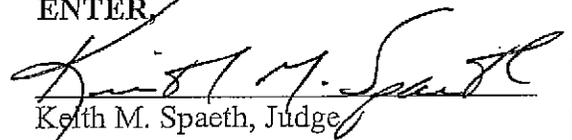
This court disagrees with the *Francis* court's application of *Chambers*. The *Chambers* court was not asked to address the open and obvious doctrine, and it did not do so. Yet, the supreme court recognized that strict compliance with a multitude of administrative rules was

"virtually impossible" and that treating violations as negligence *per se* would, in effect, make those subject to such rules the insurer of third parties who are harmed by any violation of such rules. *Chambers*, 82 Ohio St.3d at 568, 697 N.E.2d 198. In a footnote, the supreme court noted that it would be virtually impossible for a premise owner to strictly comply with the requirement mandating the removal of snow from steps without reference to exceptions or a reasonableness standard. In this court's view, the supreme court has implied that building code violations may be considered in light of the circumstances, including whether the condition was open and obvious to an invitee. The fact that a condition violates the building code may support the conclusions that the condition was dangerous and that the landowner had breached its duty to its invitee. However, such violations may be obvious and apparent to an invitee. If the violation were open and obvious, the open and obvious nature would "obviate[] the duty to warn." *See Armstrong*, 99 Ohio St.3d at 80, 788 N.E.2d 1088; *see Ryan v. Guan*, 2004 WL 1728519 (Ohio App. 5 Dist.) 2004-Ohio-4032 (the open and obvious doctrine applied, despite the fact that the plaintiff had lost her balance on a curb ramp flare that was one and one-half times steeper than allowed by the applicable building codes); *Duncan v. Capitol South Comm. Urban Redev. Corp.*, 2003 WL 1227586 (Ohio App. 10 Dist.), 2003-Ohio-1273 (unreasonably high curb was an open and obvious danger); *see also Quinn v. Montgomery Cty. Educ. Serv. Ctr.*, 2005 WL 435214 (Ohio App. 2 Dist.), 2005-Ohio-808. (open and obvious doctrine applied to defect in the sidewalk, which municipality had a duty to maintain under R.C. 2744.02(B)(3)). Therefore, this court concludes that the OBC did not preclude the application of the open and obvious doctrine and that the presence of building code violations do not require a denial of summary judgment.

The second question is whether the lack of standard stair railings to the steps in front of AK Steel's building was an open and obvious hazard. The evidence demonstrates that Sheila Walker had traveled up and down the steps without incident for the last several years while she was employed by Johnson Controls. Sheila Walker was familiar with the steps and the absence of a handrail. Furthermore, the exact cause of Sheila Walker's fall can not be ascertained by any evidence. Considering this evidence, reasonable minds can only conclude that the condition of the steps was open and obvious.

For the reasons stated herein, this court finds defendant's motion for summary judgment is hereby **GRANTED**. Plaintiff's complaint is dismissed with prejudice at plaintiff's cost. There is no just cause for delay. **SO ORDERED.**

ENTER,



Keith M. Spaeth, Judge

cc:

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Blessing

IN THE COURT OF APPEALS OF BUTLER COUNTY, OHIO

ABBRA WALKER AHMAD, et al., : CASE NO. CA2006-04-089

Appellants,

FILED BUTLER CO. :
COURT OF APPEALS :

ENTRY GRANTING MOTION TO
CERTIFY CONFLICT

vs.

FEB 22 2007 :

AK STEEL CORP.,

CINDY CARPENTER :
CLERK OF COURTS :

Appellee.

The above cause is before the court pursuant to a motion to certify a conflict to the Supreme Court of Ohio filed by counsel for appellants, Abbra Walker Ahmad, individually and as Special Administrator of the Estate of Sheila Walker, on January 9, 2007, and a memorandum in opposition filed by counsel for appellee, AK Steel Corp., on or about February 13, 2007.

Ohio courts of appeal derive their authority to certify cases to the Ohio Supreme Court from Section 3(B)(4), Article IV of the Ohio Constitution, which states that whenever judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by another court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination. For a conflict to warrant certification, it is not enough that the reasoning expressed in the opinions of the two courts is inconsistent; the judgments of the two courts of appeal must be in conflict. *State v. Hankerson* (1989), 52 Ohio App.3d 73.

The motion for certification contends that this court's decision is in conflict with decisions by the First and Tenth Appellate Districts, i.e., *Uddin v. Embassy Suites Hotel*, 165 Ohio App.3d 699, 2005-Ohio-6613, leave to appeal granted, 109 Ohio St.3d 1455, 2006-Ohio-2226 (Tenth App. District); *Christen v. Don Vonderhaar Market and Catering*, Hamilton App. No. C-050125, 2006-Ohio-715 (First App. District); and *Francis v. Showcase Cinema Eastgate*, 155 Ohio App.3d 412, 2003-Ohio-6507 (First App. District).

In *Uddin*, a case currently before the Ohio Supreme Court, the Tenth District held that a breach of an administrative regulation raises a genuine issue of material fact as to an owner's duty and breach thereof. In *Christen* and *Francis*, the First District held that evidence of an Ohio Basic Building Code violation raises a genuine issue of material fact precluding summary judgment.

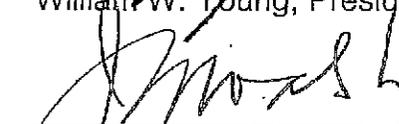
In the present case, Shelia Walker, a security guard at AK Steel, fell down a stairway, breaking her ankle. There was no handrail along the stairway. Two weeks later, she died of a pulmonary embolism. The trial court granted summary judgment in favor of AK Steel and dismissed the action. The court found that even assuming, arguendo, that the lack of a railing was a violation of the Ohio Building Code, the absence of a handrail was open and obvious. This court affirmed the trial court's decision, acknowledging a prior decision, *Souther v. Preble Cty. Dist. Library, West Elkton Branch*, Preble App. No. CA2005-04-006, 2006-Ohio-1893, holding that an alleged violation of an administrative building code does not prohibit application of the open and obvious doctrine and does not preclude summary judgment on a negligence claim.

Upon consideration of the foregoing, the court finds that its decision is in conflict with the decisions by the First District in *Christen* and *Francis* and the Tenth District's decision in *Uddin*. Accordingly, the motion for certification is GRANTED. The issue for certification is whether the violation of an administrative building code prohibits application of the open and obvious doctrine and precludes summary judgment on a negligence claim.

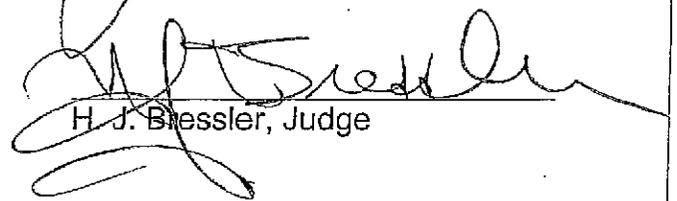
IT IS SO ORDERED.



William W. Young, Presiding Judge



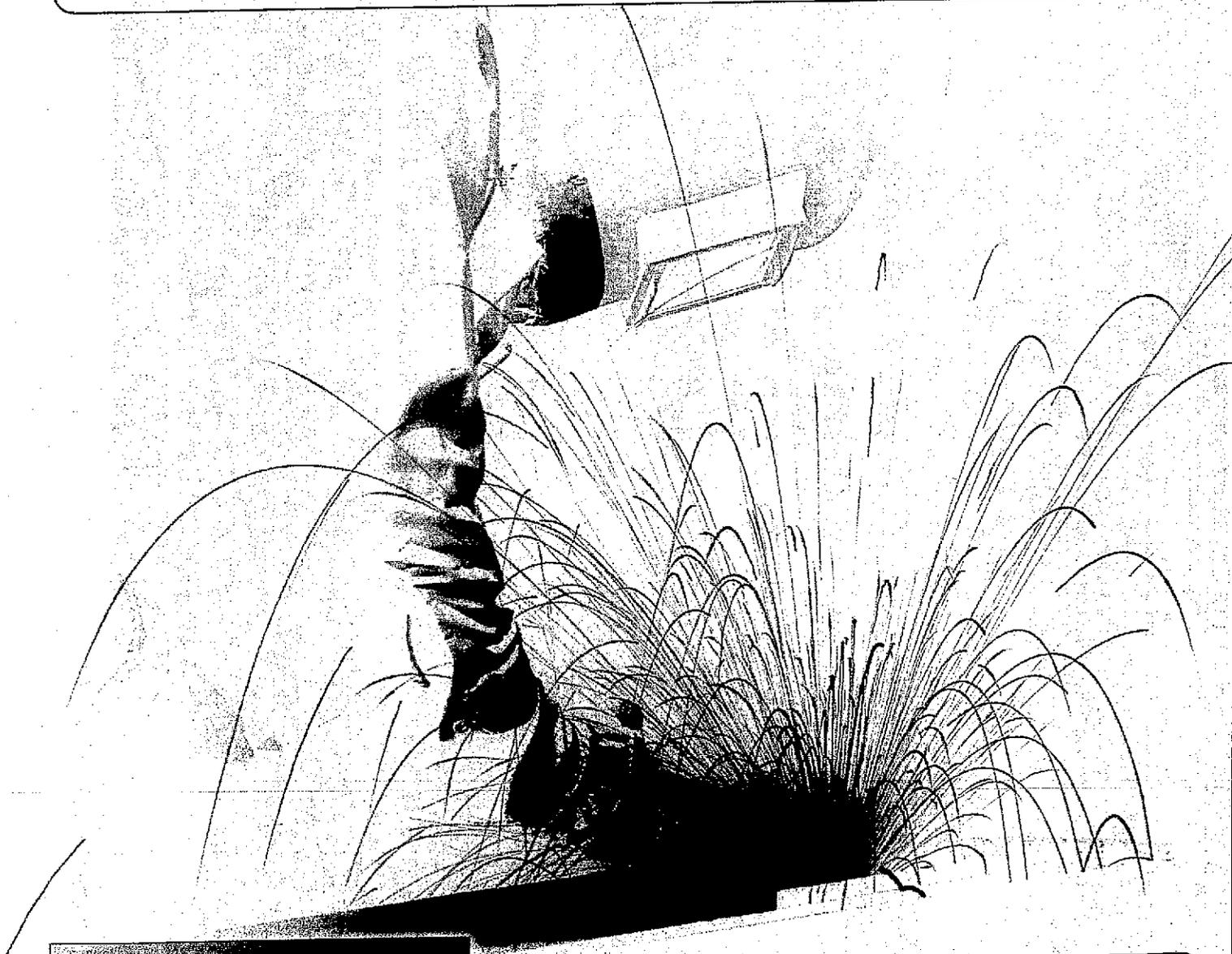
James E. Walsh, Judge



H. J. Bressler, Judge

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§1910.22 General requirements.

This section applies to all permanent places of employment, except where domestic, mining, or agricultural work only is performed. Measures for the control of toxic materials are considered to be outside the scope of this section.

1910.22(a) Housekeeping. (1) All places of employment, passageways, storerooms, and service rooms shall be kept clean and orderly and in a sanitary condition.

1910.22(a)(2) The floor of every workroom shall be maintained in a clean and, so far as possible, a dry condition. Where wet processes are used, drainage shall be maintained, and false floors, platforms, mats, or other dry standing places should be provided where practicable.

1910.22(a)(3) To facilitate cleaning, every floor, working place, and passageway shall be kept free from protruding nails, splinters, holes, or loose boards.

1910.22(b) Aisles and passageways. (1) Where mechanical handling equipment is used, sufficient safe clearances shall be allowed for aisles, at loading docks, through doorways and wherever turns or passage must be made. Aisles and passageways shall be kept clear and in good repairs, with no obstruction across or in aisles that could create a hazard.

1910.22(b)(2) Permanent aisles and passageways shall be appropriately marked.

1910.22(c) Covers and guardrails. Covers and/or guardrails shall be provided to protect personnel from the hazards of open pits, tanks, vats, ditches, etc.

1910.22(d) Floor loading protection. (1) In every building or other structure, or part thereof, used for mercantile, business, industrial, or storage purposes, the loads approved by the building official shall be marked on plates of approved design which shall be supplied and securely affixed by the owner of the building, or his duly authorized agent, in a conspicuous place in each space to which they relate. Such plates shall not be removed or defaced but, if lost, removed, or defaced, shall be replaced by the owner or his agent.

1910.22(d)(2) It shall be unlawful to place, or cause, or permit to be placed, on any floor or roof of a building or other structure a load greater than that for which such floor or roof is approved by the building official.

§1910.23 Guarding floor and wall openings and holes.

1910.23(a) Protection for floor openings. (1) Every stairway floor opening shall be guarded by a standard railing constructed in accordance with paragraph (e) of this section. The railing shall be provided on all exposed sides (except at entrance to stairway). For infrequently used stairways where traffic across the opening prevents the use of fixed standard railing (as when located in aisle spaces, etc.), the guard shall consist of a hinged floor opening cover of standard strength and construction and removable standard railings on all exposed sides (except at entrance to stairway).

1910.23(a)(2) Every ladderway floor opening or platform shall be guarded by a standard railing with standard toeboard on all exposed sides (except at entrance to opening), with the passage through the railing either provided with a swinging gate or so offset that a person cannot walk directly into the opening.

1910.23(a)(3) Every hatchway and chute floor opening shall be guarded by one of the following:

1910.23(a)(3)(i) Hinged floor opening cover of standard strength and construction equipped with standard railings or permanently attached thereto so as to leave only one exposed side. When the opening is not in use, the cover shall be closed or the exposed side shall be guarded at both top and intermediate positions by removable standard railings.

1910.23(a)(3)(ii) A removable railing with toeboard on not more than two sides of the opening and fixed standard railings with toeboards on all other exposed sides. The removable railings shall be kept in place when the opening is not in use.

Where operating conditions necessitate the feeding of material into any hatchway or chute opening, protection shall be provided to prevent a person from falling through the opening.

1910.23(a)(4) Every skylight floor opening and hole shall be guarded by a standard skylight screen or a fixed standard railing on all exposed sides.

1910.23(a)(5) Every pit and trapdoor floor opening, infrequently used, shall be guarded by a floor opening cover of standard strength and construction.

While the cover is not in place, the pit or trap opening shall be constantly attended by someone or shall be protected on all exposed sides by removable standard railings.

1910.23(a)(6) Every manhole floor opening shall be guarded by a standard manhole cover which need not be hinged in place. While the cover is not in place, the manhole opening shall be constantly attended by someone or shall be protected by removable standard railings.

1910.23(a)(7) Every temporary floor opening shall have standard railings, or shall be constantly attended by someone.

1910.23(a)(8) Every floor hole into which persons can accidentally walk shall be guarded by either:

1910.23(a)(8)(i) A standard railing with standard toeboard on all exposed sides, or

1910.23(a)(8)(ii) A floor hole cover of standard strength and construction. While the cover is not in place, the floor hole shall be constantly attended by someone or shall be protected by a removable standard railing.

1910.23(a)(9) Every floor hole into which persons cannot accidentally walk (on account of fixed machinery, equipment, or walls) shall be protected by a cover that leaves no openings more than 1 inch wide. The cover shall be securely held in place to prevent tools or materials from falling through.

1910.23(a)(10) Where doors or gates open directly on a stairway, a platform shall be provided, and the swing of the door shall not reduce the effective width to less than 20 inches.

1910.23(b) Protection for wall openings and holes. (1) Every wall opening from which there is a drop of more than 4 feet shall be guarded by one of the following:

1910.23(b)(1)(i) Rail, roller, picket fence, half door, or equivalent barrier. Where there is exposure below to falling materials, a removable toe board or the equivalent shall also be provided. When the opening is not in use for handling materials, the guard shall be kept in position regardless of a door on the opening. In addition, a grab handle shall be provided on each side of the opening with its center approximately 4 feet above floor level and of standard strength and mounting.

1910.23(b)(1)(ii) Extension platform onto which materials can be hoisted for handling, and which shall have side rails or equivalent guards of standard specifications.

1910.23(b)(2) Every chute wall opening from which there is a drop of more than 4 feet shall be guarded by one or more of the barriers specified in paragraph (b)(1) of this section or as required by the conditions.

1910.23(b)(3) Every window wall opening at a stairway landing, floor, platform, or balcony, from which there is a drop of more than 4 feet, and where the bottom of the opening is less than 3 feet above the platform or landing, shall be guarded by standard slats, standard grill work (as specified in paragraph (e)(11) of this section), or standard railing.

Where the window opening is below the landing, or platform, a standard toe board shall be provided.

1910.23(b)(4) Every temporary wall opening shall have adequate guards but these need not be of standard construction.

1910.23(b)(5) Where there is a hazard of materials falling through a wall hole, and the lower edge of the near side of the hole is less than 4 inches above the floor, and the far side of the hole more than 5 feet above the next lower level, the hole shall be protected by a standard toeboard, or an enclosing screen either of solid construction, or as specified in paragraph (e)(11) of this section.

1910.23(c) Protection of open-sided floors, platforms, and runways. (1) Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a toeboard wherever, beneath the open sides,

1910.23(c)(1)(i) Persons can pass,

1910.23(c)(1)(ii) There is moving machinery, or

1910.23(c)(1)(iii) There is equipment with which falling materials could create a hazard.

1910.23(c)(2) Every runway shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides 4 feet or more above floor or ground level. Wherever tools, machine parts,

or materials are likely to be used on the runway, a toeboard shall also be provided on each exposed side.

Runways used exclusively for special purposes (such as oiling, shafting, or filling tank cars) may have the railing on one side omitted where operating conditions necessitate such omission, providing the falling hazard is minimized by using a runway of not less than 18 inches wide. Where persons entering upon runways become thereby exposed to machinery, electrical equipment, or other danger not a falling hazard, additional guarding than is here specified may be essential for protection.

1910.23(c)(3) Regardless of height, open-sided floors, walkways, platforms, or runways above or adjacent to dangerous equipment, pickling or galvanizing tanks, degreasing units, and similar hazards shall be guarded with a standard railing and toe board.

1910.23(d) **Stairway railings and guards.** (1) Every flight of stairs having four or more risers shall be equipped with standard stair railings or standard handrails as specified in paragraphs (d)(1)(i) through (v) of this section, the width of the stair to be measured clear of all obstructions except handrails:

1910.23(d)(1)(i) On stairways less than 44 inches wide having both sides enclosed, at least one handrail, preferably on the right side descending.

1910.23(d)(1)(ii) On stairways less than 44 inches wide having one side open, at least one stair railing on open side.

1910.23(d)(1)(iii) On stairways less than 44 inches wide having both sides open, one stair railing on each side.

1910.23(d)(1)(iv) On stairways more than 44 inches wide but less than 88 inches wide, one handrail on each enclosed side and one stair railing on each open side.

1910.23(d)(1)(v) On stairways 88 or more inches wide, one handrail on each enclosed side, one stair railing on each open side, and one intermediate stair railing located approximately midway of the width.

1910.23(d)(2) Winding stairs shall be equipped with a handrail offset to prevent walking on all portions of the treads having width less than 6 inches.

1910.23(e) **Railing, toe boards, and cover specifications.** (1) A standard railing shall consist of top rail, intermediate rail, and posts, and shall have a vertical height of 42 inches nominal from upper surface of top rail to floor, platform, runway, or ramp level. The top rail shall be smooth-surfaced throughout the length of the railing. The intermediate rail shall be approximately halfway between the top rail and the floor, platform, runway, or ramp. The ends of the rails shall not overhang the terminal posts except where such overhang does not constitute a projection hazard.

1910.23(e)(2) A stair railing shall be of construction similar to a standard railing but the vertical height shall be not more than 34 inches nor less than 30 inches from upper surface of top rail to surface of tread in line with face of riser at forward edge of tread.

1910.23(e)(3) [Reserved]

1910.23(e)(3)(i) For wood railings, the posts shall be of at least 2-inch by 4-inch stock spaced not to exceed 6 feet; the top and intermediate rails shall be of at least 2-inch by 4-inch stock. If top rail is made of two right-angle pieces of 1-inch by 4-inch stock, posts may be spaced on 8-foot centers, with 2-inch by 4-inch intermediate rail.

1910.23(e)(3)(ii) For pipe railings, posts and top and intermediate railings shall be at least 1 1/2 inches nominal diameter with posts spaced not more than 8 feet on centers.

1910.23(e)(3)(iii) For structural steel railings, posts and top and intermediate rails shall be of 2-inch by 2-inch by 3/8-inch angles or other metal shapes of equivalent bending strength with posts spaced not more than 8 feet on centers.

1910.23(e)(3)(iv) The anchoring of posts and framing of members for railings of all types shall be of such construction that the completed structure shall be capable of withstanding a load of at least 200 pounds applied in any direction at any point on the top rail.

1910.23(e)(3)(v) Other types, sizes, and arrangements of railing construction are acceptable provided they meet the following conditions:

1910.23(e)(3)(v)(a) A smooth-surfaced top rail at a height above floor, platform, runway, or ramp level of 42 inches nominal;

1910.23(e)(3)(v)(b) A strength to withstand at least the minimum requirement of 200 pounds top rail pressure;

1910.23(e)(3)(v)(c) Protection between top rail and floor, platform, runway, ramp, or stair treads, equivalent at least to that afforded by a standard intermediate rail;

1910.23(e)(4) A standard toeboard shall be 4 inches nominal in vertical height from its top edge to the level of the floor, platform, runway, or ramp. It shall be securely fastened in place and with not more than 1/4-inch clearance above floor level. It may be made of any substantial material either solid or with openings not over 1 inch in greatest dimension.

Where material is piled to such height that a standard toeboard does not provide protection, paneling from floor to intermediate rail, or to top rail shall be provided.

1910.23(e)(5)(i) A handrail shall consist of a lengthwise member mounted directly on a wall or partition by means of brackets attached to the lower side of the handrail so as to offer no obstruction to a smooth surface along the top and both sides of the handrail. The handrail shall be of rounded or other section that will furnish an adequate handhold for anyone grasping it to avoid falling. The ends of the handrail should be turned in to the supporting wall or otherwise arranged so as not to constitute a projection hazard.

1910.23(e)(5)(ii) The height of handrails shall be not more than 34 inches nor less than 30 inches from upper surface of handrail to surface of tread in line with face of riser or to surface of ramp.

1910.23(e)(5)(iii) The size of handrails shall be: When of hardwood, at least 2 inches in diameter; when of metal pipe, at least 1 1/2 inches in diameter. The length of brackets shall be such as will give a clearance between handrail and wall or any projection thereon of at least 3 inches. The spacing of brackets shall not exceed 8 feet.

1910.23(e)(5)(iv) The mounting of handrails shall be such that the completed structure is capable of withstanding a load of at least 200 pounds applied in any direction at any point on the rail.

1910.23(e)(5) All handrails and railings shall be provided with a clearance of not less than 3 inches between the handrail or railing and any other object.

1910.23(e)(7) Floor opening covers may be of any material that meets the following strength requirements:

1910.23(e)(7)(i) Trench or conduit covers and their supports, when located in plant roadways, shall be designed to carry a truck rear-axle load of at least 20,000 pounds.

1910.23(e)(7)(ii) Manhole covers and their supports, when located in plant roadways, shall comply with local standard highway requirements if any; otherwise, they shall be designed to carry a truck rear-axle load of at least 20,000 pounds.

1910.23(e)(7)(iii) The construction of floor opening covers may be of any material that meets the strength requirements. Covers projecting not more than 1 inch above the floor level may be used providing all edges are chamfered to an angle with the horizontal of not over 30 degrees. All hinges, handles, bolts, or other parts shall set flush with the floor or cover surface.

1910.23(e)(8) Skylight screens shall be of such construction and mounting that they are capable of withstanding a load of at least 200 pounds applied perpendicularly at any one area on the screen. They shall also be of such construction and mounting that under ordinary loads or impacts, they will not deflect downward sufficiently to break the glass below them. The construction shall be of grillwork with openings not more than 4 inches long or of slatwork with openings not more than 2 inches wide with length unrestricted.

1910.23(e)(9) Wall opening barriers (rails, rollers, picket fences, and half doors) shall be of such construction and mounting that, when in place at the opening, the barrier is capable of withstanding a load of at least 200 pounds applied in any direction (except upward) at any point on the top rail or corresponding member.

1910.23(e)(10) Wall opening grab handles shall be not less than 12 inches in length and shall be so mounted as to give 3 inches clearance from the side framing of the wall opening. The size, material, and anchoring of the grab handle shall be such that the completed structure is capable of withstanding a load of at least 200 pounds applied in any direction at any point of the handle.

1910.23(e)(11) Wall opening screens shall be of such construction and mounting that they are capable of withstanding a load of at least 200

pounds applied horizontally at any point on the near side of the screen. They may be of solid construction, of grillwork with openings not more than 8 inches long, or of slatwork with openings not more than 4 inches wide with length unrestricted.

[39 FR 23502, June 27, 1974, as amended at 43 FR 49744, Oct. 24, 1978; 49 FR 5321, Feb. 10, 1984]

§1910.24 Fixed industrial stairs.

1910.24(a) Application of requirements. This section contains specifications for the safe design and construction of fixed general industrial stairs. This classification includes interior and exterior stairs around machinery, tanks, and other equipment, and stairs leading to or from floors, platforms, or pits. This section does not apply to stairs used for fire exit purposes, to construction operations to private residences, or to articulated stairs, such as may be installed on floating roof tanks or on dock facilities, the angle of which changes with the rise and fall of the base support.

1910.24(b) Where fixed stairs are required. Fixed stairs shall be provided for access from one structure level to another where operations necessitate regular travel between levels; and for access to operating platforms at any equipment which requires attention routinely during operations. Fixed stairs shall also be provided where access to elevations is daily or at each shift for such purposes as gauging, inspection, regular maintenance, etc., where such work may expose employees to acids, caustics, gases, or other harmful substances, or for which purposes the carrying of tools or equipment by hand is normally required. (It is not the intent of this section to preclude the use of fixed ladders for access to elevated tanks, towers, and similar structures, overhead traveling cranes, etc., where the use of fixed ladders is common practice.) Spiral stairways shall not be permitted except for special limited usage and secondary access situations where it is not practical to provide a conventional stairway. Winding stairways may be installed on tanks and similar round structures where the diameter of the structure is not less than five (5) feet.

1910.24(c) Stair strength. Fixed stairways shall be designed and constructed to carry a load of five times the normal live load anticipated but never of less strength than to carry safely a moving concentrated load of 1,000 pounds.

1910.24(d) Stair width. Fixed stairways shall have a minimum width of 22 inches.

1910.24(e) Angle of stairway rise. Fixed stairs shall be installed at angles to the horizontal of between 30° and 50°. Any uniform combination of rise/tread dimensions may be used that will result in a stairway at an angle to the horizontal within the permissible range. Table D-1 gives rise/tread dimensions which will produce a stairway within the permissible range, stating the angle to the horizontal produced by each combination. However, the rise/tread combinations are not limited to those given in Table D-1.

TABLE D-1

Angle to horizontal	Rise (in inches)	Tread run (in inches)
30° 35'	6 1/2	11
32° 08'	6 3/4	10 3/4
33° 41'	7	10 1/2
35° 16'	7 1/4	10 1/4
36° 52'	7 1/2	10
38° 29'	7 3/4	9 3/4
40° 08'	8	9 1/2
41° 44'	8 1/4	9 1/4
43° 22'	8 1/2	9
45° 00'	8 3/4	8 3/4
46° 38'	9	8 1/2
48° 16'	9 1/4	8 1/4
49° 54'	9 1/2	8

1910.24(f) Stair treads. All treads shall be reasonably slip-resistant and the nosings shall be of nonslip finish. Welded bar grating treads without nosings are acceptable providing the leading edge can be readily identified by personnel descending the stairway and provided the tread is serrated or is of definite nonslip design. Rise height and tread width shall be uniform throughout any flight of stairs including any foundation structure used as one or more treads of the stairs.

1910.24(g) Stairway platforms. Stairway platforms shall be no less than the width of a stairway and a minimum of 30 inches in length measured in the direction of travel.

1910.24(h) Railings and handrails. Standard railings shall be provided on the open sides of all exposed stairways and stair platforms. Handrails shall be provided on at least one side of closed stairways preferably on the right side descending. Stair railings and handrails shall be installed in accordance with the provisions of §1910.23.

1910.24(i) Vertical clearance. Vertical clearance above any stair tread to an overhead obstruction shall be at least 7 feet measured from the leading edge of the tread.

[39 FR 23502, June 27, 1974, as amended at 43 FR 49744, Oct. 24, 1978; 49 FR 5321, Feb. 10, 1984]

§1910.25 Portable wood ladders.

1910.25(a) Application of requirements. This section is intended to prescribe rules and establish minimum requirements for the construction, care, and use of the common types of portable wood ladders, in order to insure safety under normal conditions of usage. Other types of special ladders, fruitpicker's ladders, combination step and extension ladders, stockroom step ladders, aisle-way step ladders, shelf ladders, and library ladders are not specifically covered by this section.

1910.25(b) Materials—(1) Requirements applicable to all wood parts. (i) All wood parts shall be free from sharp edges and splinters; sound and free from accepted visual inspection from shake, wane, compression failures, decay, or other irregularities. Low density wood shall not be used.

1910.25(b)(1)(ii) [Reserved]

1910.25(b)(2) [Reserved]

1910.25(c) Construction requirements.

1910.25(c)(1) [Reserved]

1910.25(c)(2) Portable stepladders. Stepladders longer than 20 feet shall not be supplied. Stepladders as hereinafter specified shall be of three types:

Type I—Industrial stepladder, 3 to 20 feet for heavy duty, such as utilities, contractors, and industrial use.

Type II—Commercial stepladder, 3 to 12 feet for medium duty, such as painters, offices, and light industrial use.

Type III—Household stepladder, 3 to 6 feet for light duty, such as light household use.

1910.25(c)(2)(i) General requirements.

1910.25(c)(2)(i)(a) [Reserved]

1910.25(c)(2)(i)(b) A uniform step spacing shall be employed which shall be not more than 12 inches. Steps shall be parallel and level when the ladder is in position for use.

1910.25(c)(2)(i)(c) The minimum width between side rails at the top, inside to inside, shall be not less than 11 1/2 inches. From top to bottom, the side rails shall spread at least 1 inch for each foot of length of stepladder.

1910.25(c)(2)(i)(d)-(e) [Reserved]

1910.25(c)(2)(i)(f) A metal spreader or locking device of sufficient size and strength to securely hold the front and back sections in open positions shall be a component of each stepladder. The spreader shall have all sharp points covered or removed to protect the user. For Type III ladder, the pail shelf and spreader may be combined in one unit (the so-called shelf-lock ladder).

1910.25(c)(3) Portable rung ladders.

1910.25(c)(3)(i) [Reserved]

1910.25(c)(3)(ii) Single ladder. (a) Single ladders longer than 30 feet shall not be supplied.

1910.25(c)(3)(ii)(b) [Reserved]

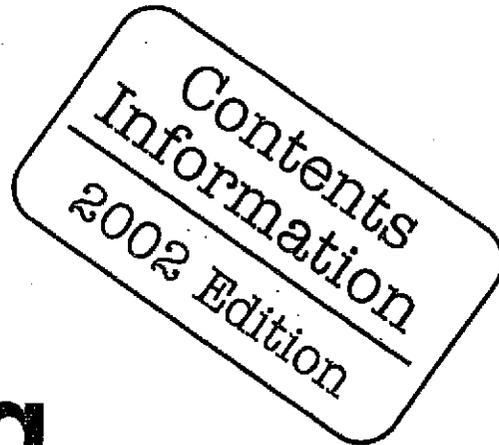
1910.25(c)(3)(iii) Two-section ladder. (a) Two-section extension ladders longer than 60 feet shall not be supplied. All ladders of this type shall consist of two sections, one to fit within the side rails of the other, and arranged in such a manner that the upper section can be raised and lowered.

1910.25(c)(3)(iii)(b) [Reserved]

1910.25(c)(3)(iv) Sectional ladder. (a) Assembled combinations of sectional ladders longer than lengths specified in this subdivision shall not be used.

2002 Ohio Building Code

And Related Codes



*A unit of Baldwin's Ohio Administrative Code,
Approved Edition*



WEST GROUP
A THOMSON COMPANY

NOSING. The leading edge of treads of stairs and of landings at the top of stairway flights.

OCCUPANT LOAD. The number of persons for which the means of egress of a building or portion thereof is designed.

OPEN AIR SEATING GRANDSTANDS AND BLEACHERS. Seating facilities that are located so that the side toward which the audience faces is unroofed and without an enclosing wall.

PANIC HARDWARE. A door-latching assembly incorporating a device that releases the latch upon the application of a force in the direction of egress travel.

PUBLIC WAY. A street, alley or other parcel of land open to the outside air leading to a street, that has been deeded, dedicated or otherwise permanently appropriated to the public for public use and which has a clear width and height of not less than 10 feet (3048 mm).

RAMP. A walking surface that has a running slope steeper than one unit vertical in 20 units horizontal (5-percent slope).

REVIEWING STANDS. Elevated platforms that accommodate not more than 50 persons.

SMOKE-PROTECTED ASSEMBLY SEATING. Seating served by means of egress that is not subject to smoke accumulation within or under a structure.

STAIR. A change in elevation, consisting of one or more risers.

STAIRWAY. One or more flights of stairs, either exterior or interior, with the necessary landings and platforms connecting them, to form a continuous and uninterrupted passage from one level to another.

STAIRWAY, EXTERIOR. A stairway that is open on at least one side, except for required structural columns, beams, handrails, and guards. The adjoining open areas shall be either yards, courts or public ways. The other sides of the exterior stairway need not be open.

STAIRWAY, INTERIOR. A stairway not meeting the definition of an exterior stairway.

STAIRWAY, SPIRAL. A stairway having a closed circular form in its plan view with uniform section-shaped treads attached to and radiating about a minimum-diameter supporting column.

HISTORY: Eff. 1-1-02

SECTION 1003 GENERAL MEANS OF EGRESS

1003.1 General requirements. The general requirements specified in this section shall apply to all three elements of the means of egress system, in addition to those specific requirements for the exit access, the exit and the exit discharge detailed elsewhere in this chapter.

1003.2 System design requirements. The means of egress system shall comply with the design requirements of Sections 1003.2.1 through 1003.2.13.7.1.

1003.2.1 Multiple occupancies. Where a building contains two or more occupancies, the means of egress requirements shall apply to each portion of the building based on the occupancy of that space. Where two or more occupancies utilize portions of the same means of egress system, those egress components shall meet the more stringent requirements of all occupancies that are served.

1003.2.2 Design occupant load. In determining means of egress requirements, the number of occupants for whom means of egress facilities shall be provided shall be established by the largest number computed in accordance with Sections 1003.2.2.1 through 1003.2.2.3.

1003.2.2.1 Actual number. The actual number of occupants for whom each occupied space, floor or building is designed.

1003.2.2.2 Number by Table 1003.2.2.2. The number of occupants computed at the rate of one occupant per unit of area as prescribed in Table 1003.2.2.2.

TABLE 1003.2.2.2
MAXIMUM FLOOR AREA ALLOWANCES PER OCCUPANT

OCCUPANCY	FLOOR AREA IN SQ. FT. PER OCCUPANT
Agricultural building	300 gross
Aircraft hangars	500 gross
Airport terminal	
Baggage claim	100 gross
Baggage handling	15 gross
Concourse	20 gross
Waiting areas	300 gross
Assembly	
Gaming floors (keop, slots, etc.)	11 gross
Assembly with fixed seats	See Section 1003.2.2.9
Assembly without fixed seats	
Concentrated (chairs only—not fixed)	7 net
Standing space	5 net
Unconcentrated (tables and chairs)	15 net
Bowling centers, allow 5 persons for each lane including 15 feet of runway, and for additional areas	7 net
Business areas	100 gross
Courtrooms—other than fixed seating areas	40 net
Dormitories	50 gross
Educational	
Classroom area	20 net
Shops and other vocational room areas	50 net
Exercise rooms	50 gross
H-5 Fabrication and manufacturing areas	200 gross
Industrial areas	100 gross
Institutional areas	
Inpatient treatment areas	240 gross
Outpatient areas	100 gross
Sleeping areas	120 gross
Kitchens, commercial	200 gross
Library	
Reading rooms	50 net
Stack area	100 gross
Locker rooms	50 gross
Mercantile	
Areas on other floors	60 gross
Basement and grade floor areas	30 gross
Storage, stock, shipping areas	300 gross
Parking garages	200 gross
Residential	200 gross
Skating rinks, swimming pools	
Rink and pool	50 gross
Decks	15 gross
Stages and platforms	15 net
Accessory storage areas, mechanical equipment room	300 gross
Warehouses	500 gross

For SI: 1 square foot = 0.0929 m².

1003.2.2.3 Number by combination. Where occupants from accessory spaces egress through a primary area, the calculated occupant load for the primary space shall include the total occupant load of the primary space plus

inches (267 mm). The rise to the next alternating tread surface should not be more than 8 inches (203 mm).

1003.3.3.11 Handrails. Stairways shall have handrails on each side. Handrails shall be adequate in strength and attachment in accordance with Section 1607.7.

Exceptions:

1. Aisle stairs complying with Section 1008 provided with a center handrail need not have additional handrails.
2. Stairways within dwelling units, spiral stairways and aisle stairs serving seating only on one side are permitted to have a handrail on one side only.
3. Decks, patios, and walkways that have a single change in elevation where the landing depth on each side of the change of elevation is greater than what is required for a landing do not require handrails.
4. In Group R-3 occupancies, a change in elevation consisting of a single riser at an entrance or egress door does not require handrails.
5. Changes in room elevations of only one riser within dwelling units in Group R-2 and R-3 occupancies do not require handrails.

1003.3.3.11.1 Height. Handrail height, measured above stair tread nosings, or finish surface of ramp slope, shall be uniform, not less than 34 inches (864 mm) and not more than 38 inches (965 mm).

1003.3.3.11.2 Intermediate handrails. Intermediate handrails are required so that all portions of the stairway width required for egress capacity are within 30 inches (762 mm) of a handrail. On monumental stairs, handrails shall be located along the most direct path of egress travel.

1003.3.3.11.3 Handrail graspability. Handrails with a circular cross section shall have an outside diameter of at least 1.25 inches (32 mm) and not greater than 2 inches (51 mm) or shall provide equivalent graspability. If the handrail is not circular, it shall have a perimeter dimension of at least 4 inches (102 mm) and not greater than 6.25 inches (160 mm) with a maximum cross-section dimension of 2.25 inches (57 mm). Edges shall have a minimum radius of 0.01 inch (0.25 mm).

1003.3.3.11.4 Continuity. Handrail-gripping surfaces shall be continuous, without interruption by newel posts or other obstructions.

Exceptions:

1. Handrails within dwelling units are permitted to be interrupted by a newel post at a stair landing.
2. Within a dwelling unit, the use of a volute, turnout or starting easing is allowed on the lowest tread.
3. Handrail brackets or balusters attached to the bottom surface of the handrail that do not project horizontally beyond the sides of the handrail within 1.5 inches (38 mm) of the bottom of the handrail shall not be considered to be obstructions.

1003.3.3.11.5 Handrail extensions. Handrails shall return to a wall, guard or the walking surface or shall be continuous to the handrail of an adjacent stair flight. Where handrails are not continuous between flights, the handrails shall extend horizontally at least 12

inches (305 mm) beyond the top riser and continue to slope for the depth of one tread beyond the bottom riser.

Exceptions:

1. Handrails within a dwelling unit that is not required to be accessible need extend only from the top riser to the bottom riser.
2. Aisle handrails in Group A occupancies in accordance with Section 1008.12.

1003.3.3.11.6 Clearance. Clear space between a handrail and a wall or other surface shall be a minimum of 1.5 inches (38 mm). A handrail and a wall or other surface adjacent to the handrail shall be free of any sharp or abrasive elements.

1003.3.3.11.7 Stairway projections. Projections into the required width at each handrail shall not exceed 4.5 inches (114 mm) at or below the handrail height. Projections into the required width shall not be limited above the minimum headroom height required in Section 1003.3.3.2.

1003.3.3.12 Stairway to roof. In buildings four or more stories in height above grade, one stairway shall extend to the roof surface, unless the roof has a slope steeper than four units vertical in 12 units horizontal (33-percent slope). In buildings without an occupied roof, access to the roof from the top story shall be permitted to be by an alternating tread device.

1003.3.3.12.1 Roof access. Where a stairway is provided to a roof, access to the roof shall be provided through a penthouse complying with Section 1509.2.

Exception: In buildings without an occupied roof, access to the roof shall be permitted to be a roof hatch or trap door not less than 16 square feet (1.5 m²) in area and having a minimum dimension of 2 feet (610 mm).

1003.3.4 Ramps. Ramps used as a component of a means of egress shall conform to the provisions of Sections 1003.3.4.1 through 1003.3.4.9.

Exceptions:

1. Ramped aisles within assembly rooms or spaces shall conform with the provisions in Section 1008.10.
2. Curb ramps shall comply with ADAAG.

1003.3.4.1 Slope. Ramps within an accessible route or used as part of a means of egress shall have a running slope not steeper than one unit vertical in 12 units horizontal (8-percent slope). The slope of other ramps shall not be steeper than one unit vertical in eight units horizontal (12.5-percent slope).

Exception: Aisle ramp slope in occupancies of Group A shall comply with Section 1008.10.

1003.3.4.2 Cross slope. The slope measured perpendicular to the direction of travel of a ramp shall not be steeper than one unit vertical in 50 units horizontal (2-percent slope).

1003.3.4.3 Vertical rise. The rise for any ramp run shall be 30 inches (762 mm) maximum.

1003.3.4.4 Minimum dimensions. The minimum dimensions of means of egress ramps shall comply with Sections 1003.3.4.4.1 through 1003.3.4.4.3.

1003.3.4.4.1 Width. The minimum width of a means of egress ramp shall not be less than that required for corridors by Section 1004.3.2.2. The clear width of a ramp and the clear width between handrails, if provided, shall be 36 inches (914 mm) minimum.

119.02

Note 7

Administrative regulations issued pursuant to statutory authority have force and effect of law; consequently, administrative agencies are bound by their own rule until those rules are duly changed. *Lyden Co. v. Tracy* (Ohio, 07-17-1996) 76 Ohio St.3d 66, 666 N.E.2d 556, 1996-Ohio-112. Administrative Law And Procedure ¶ 416.1; Administrative Law And Procedure ¶ 417

Guidelines promulgated by State Department of Administrative Services (DAS) pursuant to statute governing granting of public contracts to lowest responsible bidder are not subject to requirements governing adoption of administrative rules; statute expressly provides that director of DAS is to establish policy and procedure guidelines in connection with public works contracts, rather than "rules" which would be subject to administrative requirements. *Cleveland Const., Inc. v. Ohio Dept. of Adm. Serv., Gen. Serv. Adm.* (Ohio App. 10 Dist., 06-10-1997) 121 Ohio App.3d 372, 700 N.E.2d 54,

119.03 Procedure for adoption, amendment, or rescission of rules; fiscal analyses

In the adoption, amendment, or rescission of any rule, an agency shall comply with the following procedure:

(A) Reasonable public notice shall be given in the register of Ohio at least thirty days prior to the date set for a hearing, in the form the agency determines. The agency shall file copies of the public notice under division (B) of this section. (The agency gives public notice in the register of Ohio when the public notice is published in the register under that division.)

The public notice shall include:

- (1) A statement of the agency's intention to consider adopting, amending, or rescinding a rule;
- (2) A synopsis of the proposed rule, amendment, or rule to be rescinded or a general statement of the subject matter to which the proposed rule, amendment, or rescission relates;
- (3) A statement of the reason or purpose for adopting, amending, or rescinding the rule;
- (4) The date, time, and place of a hearing on the proposed action, which shall be not earlier than the thirty-first nor later than the fortieth day after the proposed rule, amendment, or rescission is filed under division (B) of this section.

In addition to public notice given in the register of Ohio, the agency may give whatever other notice it reasonably considers necessary to ensure notice constructively is given to all persons who are subject to or affected by the proposed rule, amendment, or rescission.

The agency shall provide a copy of the public notice required under division (A) of this section to any person who requests it and pays a reasonable fee, not to exceed the cost of copying and mailing.

(B) The full text of the proposed rule, amendment, or rule to be rescinded, accompanied by the public notice required under division (A) of this section, shall be filed in electronic form with the secretary of state and with the director of the legislative service commission. (If in compliance with this division an agency files more than one proposed rule, amendment, or rescission at the same time, and has prepared a public notice under division (A) of this section that applies to more than one of the proposed rules, amendments, or rescissions, the agency shall file only one notice with the secretary of state and with the director for all of the proposed rules, amendments, or rescissions to which the notice applies.) The proposed rule, amendment, or rescission and public notice shall be filed as required by this division at least sixty-five days prior to the date on which the agency, in accordance with division (D) of this section, issues an order adopting the proposed rule, amendment, or rescission.

If the proposed rule, amendment, or rescission incorporates a text or other material by reference, the agency shall comply with sections 121.71 to 121.76 of the Revised Code

STATE GOVERNMENT

appeal not allowed 80 Ohio St.3d 1426, 685 N.E.2d 239. States ¶ 98

Administrative body may only promulgate regulation consistent with and predicated upon express or implicit statutory grant of authority. *Midwestern College of Massotherapy v. Ohio Med. Bd.* (Ohio App. 10 Dist., 03-21-1995) 102 Ohio App.3d 17, 656 N.E.2d 963, appeal not allowed 73 Ohio St.3d 1428, 652 N.E.2d 800. Administrative Law And Procedure ¶ 386

Lottery Commission rules for a multi-state lottery were valid despite filing one month before effective date of the statute authorizing the Lottery Commission to promulgate the rules for a multi-state lottery; the Commission had the statutory authority to comply with the procedural requirements for rule-making, initiated the process after enactment of the statute, but adopted the rules after the statute took effect. *Ohio Roundtable v. Taft* (Ohio Com.Pl., 07-15-2002) 119 Ohio Misc.2d 49, 773 N.E.2d 1113, 2002-Ohio-3669. Lotteries ¶ 2

ADMINISTRATIVE PROCEDURE

The proposed rule, amendment to the date of the hearing at the charge to any person affected requesting it shall not invalidate

If the agency files a substantial rescission under division (H) of proposed rule, amendment, or secretary of state and with the d

The agency shall file the rule 127.18 of the Revised Code, amendment, or rescission or pr filed with the secretary of state c

The director of the legislative text of the original and each rev full text of a public notice; and with the director under this divis

(C) On the date and at the tir a public hearing at which any pe and be heard in person, by the arguments, or contentions, oral evidence tending to show that effectuated, will be unreasonable proposed rule, amendment, or r in writing, not only at the hearing and after the hearing. A pers writing before or after the hearin

At the hearing, the testimony of the agency. The agency is req person requests transcription of a the costs of the transcription. A of the cost of the transcription.

In any hearing under this sectic

(D) After complying with divis for legislative review and invalida may issue an order adopting the p rule, consistent with the synopsis time the agency shall designate tl shall not be earlier than the tenth its final form as provided in sectic

(E) Prior to the effective date reasonable effort to inform those available for distribution to thos amended.

(F) If the governor, upon the 1 the immediate adoption, amendm the text of which shall be filed in director of the legislative service that the procedure prescribed by rescission of a specified rule is emergency rule, amendment, or amendment, or rescission, in fin: 119.04 of the Revised Code, are fi of the legislative service commiss filings are not completed on the s be effective on the day on which 1 full text of the emergency rule, am

lowed 80 Ohio St.3d 1426; 685 N.E.2d
= 98

ative body may only promulgate regula-
it with and predicated upon express or
itory grant of authority. *Midwestern
fassootherapy v. Ohio Med. Bd.* (Ohio
, 03-21-1995) 102 Ohio App.3d 17, 656
ppeal not allowed 73 Ohio St.3d 1428,
300. Administrative Law And Proce-

mission rules for a multi-state lottery
spite filing one month before effective
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mission had the statutory authority to
the procedural requirements for rule-
ted the process after enactment of the
dopted the rules after the statute took
) *Roundtable v. Taft* (Ohio Com.Pl.,
, 19 Ohio Misc.2d 49, 773 N.E.2d 1113,
169. Lotteries = 2

Adoption of rules; fiscal analyses

An agency shall comply with the

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ent, or rescission,

ates a text or other material by
o 121.76 of the Revised Code.

The proposed rule, amendment, or rescission shall be available for at least thirty days prior to the date of the hearing at the office of the agency in printed or other legible form without charge to any person affected by the proposal. Failure to furnish such text to any person requesting it shall not invalidate any action of the agency in connection therewith.

If the agency files a substantive revision in the text of the proposed rule, amendment, or rescission under division (H) of this section, it shall also promptly file the full text of the proposed rule, amendment, or rescission in its revised form in electronic form with the secretary of state and with the director of the legislative service commission.

The agency shall file the rule summary and fiscal analysis prepared under section 121.24 or 127.18 of the Revised Code, or both, in electronic form along with a proposed rule, amendment, or rescission or proposed rule, amendment, or rescission in revised form that is filed with the secretary of state or the director of the legislative service commission.

The director of the legislative service commission shall publish in the register of Ohio the full text of the original and each revised version of a proposed rule, amendment, or rescission; the full text of a public notice; and the full text of a rule summary and fiscal analysis that is filed with the director under this division.

(C) On the date and at the time and place designated in the notice, the agency shall conduct a public hearing at which any person affected by the proposed action of the agency may appear and be heard in person, by the person's attorney, or both, may present the person's position, arguments, or contentions, orally or in writing, offer and examine witnesses, and present evidence tending to show that the proposed rule, amendment, or rescission, if adopted or effectuated, will be unreasonable or unlawful. An agency may permit persons affected by the proposed rule, amendment, or rescission to present their positions, arguments, or contentions in writing, not only at the hearing, but also for a reasonable period before, after, or both before and after the hearing. A person who presents a position or arguments or contentions in writing before or after the hearing is not required to appear at the hearing.

At the hearing, the testimony shall be recorded. Such record shall be made at the expense of the agency. The agency is required to transcribe a record that is not sight readable only if a person requests transcription of all or part of the record and agrees to reimburse the agency for the costs of the transcription. An agency may require the person to pay in advance all or part of the cost of the transcription.

In any hearing under this section the agency may administer oaths or affirmations.

(D) After complying with divisions (A), (B), (C), and (H) of this section, and when the time for legislative review and invalidation under division (I) of this section has expired, the agency may issue an order adopting the proposed rule or the proposed amendment or rescission of the rule, consistent with the synopsis or general statement included in the public notice. At that time the agency shall designate the effective date of the rule, amendment, or rescission, which shall not be earlier than the tenth day after the rule, amendment, or rescission has been filed in its final form as provided in section 119.04 of the Revised Code.

(E) Prior to the effective date of a rule, amendment, or rescission, the agency shall make a reasonable effort to inform those affected by the rule, amendment, or rescission and to have available for distribution to those requesting it the full text of the rule as adopted or as amended.

(F) If the governor, upon the request of an agency, determines that an emergency requires the immediate adoption, amendment, or rescission of a rule, the governor shall issue an order, the text of which shall be filed in electronic form with the agency, the secretary of state, the director of the legislative service commission, and the joint committee on agency rule review, that the procedure prescribed by this section with respect to the adoption, amendment, or rescission of a specified rule is suspended. The agency may then adopt immediately the emergency rule, amendment, or rescission and it becomes effective on the date the rule, amendment, or rescission, in final form and in compliance with division (A)(2) of section 119.04 of the Revised Code, are filed in electronic form with the secretary of state, the director of the legislative service commission, and the joint committee on agency rule review. If all filings are not completed on the same day, the emergency rule, amendment, or rescission shall be effective on the day on which the latest filing is completed. The director shall publish the full text of the emergency rule, amendment, or rescission in the register of Ohio.

invalid at the end of the adopt the emergency rule, rescission by complying with amendment, and rescission of this division to readopt the emergency rule, amendment, or rescission, amendment, or rescission period, except when division emergency rule, amendment, or rescission within the ninety-day period. emergency rule, amendment, or rescission on 5117.02 of the Revised

and family services for the department of or of the department of on if the statutes pertaining tax appeals or to a higher authority a right to a hearing on any rule, amendment, or rescission of section 5117.02 of the Revised Code by judgment as provided in section 5117.02 of the Revised Code of tax appeals, or of the

under division (B) of this section on agency rule review shall be filed in the same form and the same compliance with this division shall be filed at the same time, and shall be filed to more than one of the joint committees by one notice with the joint committees to which the notice is directed. The notice shall be filed with the joint committees on the proposed rule, amendment, or rescission, and promptly file the full text of the proposed rule, amendment, or rescission in electronic form with the joint committees on the same proposed rule, amendment, or rescission as filed with the joint committees. The notice shall be filed with the joint committees along with a copy of the proposed rule, amendment, or rescission.

adopted verbatim by an authority within sixty days of adoption, in accordance with this state, so long as the

with a federal law or rule; in accordance with compliance.

under division (H)(2) of this section an amendment was adopted, or an amendment, or its rescission, on (H) of this section.

and the adoption of a rule, amendment, or part thereof if it

(a) That the rule-making agency has exceeded the scope of its statutory authority in proposing the rule, amendment, or rescission;

(b) That the proposed rule, amendment, or rescission conflicts with another rule, amendment, or rescission adopted by the same or a different rule-making agency;

(c) That the proposed rule, amendment, or rescission conflicts with the legislative intent in enacting the statute under which the rule-making agency proposed the rule, amendment, or rescission;

(d) That the rule-making agency has failed to prepare a complete and accurate rule summary and fiscal analysis of the proposed rule, amendment, or rescission as required by section 121.24 or 127.18 of the Revised Code, or both, or that the proposed rule, amendment, or rescission incorporates a text or other material by reference and either the rule-making agency has failed to file the text or other material incorporated by reference as required by section 121.73 of the Revised Code or, in the case of a proposed rule or amendment, the incorporation by reference fails to meet the standards stated in section 121.72, 121.75, or 121.76 of the Revised Code.

The joint committee shall not hold its public hearing on a proposed rule, amendment, or rescission earlier than the forty-first day after the original version of the proposed rule, amendment, or rescission was filed with the joint committee.

The house of representatives and senate may adopt a concurrent resolution invalidating a proposed rule, amendment, rescission, or part thereof. The concurrent resolution shall state which of the specific rules, amendments, rescissions, or parts thereof are invalidated. A concurrent resolution invalidating a proposed rule, amendment, or rescission shall be adopted not later than the sixty-fifth day after the original version of the text of the proposed rule, amendment, or rescission is filed with the joint committee, except that if more than thirty-five days after the original version is filed the rule-making agency either files a revised version of the text of the proposed rule, amendment, or rescission, or revises the rule summary and fiscal analysis in accordance with division (1)(4) of this section, a concurrent resolution invalidating the proposed rule, amendment, or rescission shall be adopted not later than the thirtieth day after the revised version of the proposed rule or rule summary and fiscal analysis is filed. If, after the joint committee on agency rule review recommends the adoption of a concurrent resolution invalidating a proposed rule, amendment, rescission, or part thereof, the house of representatives or senate does not, within the time remaining for adoption of the concurrent resolution, hold five floor sessions at which its journal records a roll call vote disclosing a sufficient number of members in attendance to pass a bill, the time within which that house may adopt the concurrent resolution is extended until it has held five such floor sessions.

Within five days after the adoption of a concurrent resolution invalidating a proposed rule, amendment, rescission, or part thereof, the clerk of the senate shall send the rule-making agency, the secretary of state, and the director of the legislative service commission in electronic form a certified text of the resolution together with a certification stating the date on which the resolution takes effect. The secretary of state and the director of the legislative service commission shall each note the invalidity of the proposed rule, amendment, rescission, or part thereof, and shall each remove the invalid proposed rule, amendment, rescission, or part thereof from the file of proposed rules. The rule-making agency shall not proceed to adopt in accordance with division (D) of this section, or to file in accordance with division (B)(1) of section 111.15 of the Revised Code, any version of a proposed rule, amendment, rescission, or part thereof that has been invalidated by concurrent resolution.

Unless the house of representatives and senate adopt a concurrent resolution invalidating a proposed rule, amendment, rescission, or part thereof within the time specified by this division, the rule-making agency may proceed to adopt in accordance with division (D) of this section, or to file in accordance with division (B)(1) of section 111.15 of the Revised Code, the latest version of the proposed rule, amendment, or rescission as filed with the joint committee. If by concurrent resolution certain of the rules, amendments, rescissions, or parts thereof are specifically invalidated, the rule-making agency may proceed to adopt, in accordance with division (D) of this section, or to file in accordance with division (B)(1) of section 111.15 of the Revised Code, the latest version of the proposed rules, amendments, rescissions, or parts thereof as filed with the joint committee that are not specifically invalidated. The rule-making

agency may not revise or amend any proposed rule, amendment, rescission, or part thereof that has not been invalidated except as provided in this chapter or in section 111.15 of the Revised Code.

(2)(a) A proposed rule, amendment, or rescission that is filed with the joint committee under division (H) of this section or division (D) of section 111.15 of the Revised Code shall be carried over for legislative review to the next succeeding regular session of the general assembly if the original or any revised version of the proposed rule, amendment, or rescission is filed with the joint committee on or after the first day of December of any year.

(b) The latest version of any proposed rule, amendment, or rescission that is subject to division (I)(2)(a) of this section, as filed with the joint committee, is subject to legislative review and invalidation in the next succeeding regular session of the general assembly in the same manner as if it were the original version of a proposed rule, amendment, or rescission that had been filed with the joint committee for the first time on the first day of the session. A rule-making agency shall not adopt in accordance with division (D) of this section, or file in accordance with division (B)(1) of section 111.15 of the Revised Code, any version of a proposed rule, amendment, or rescission that is subject to division (I)(2)(a) of this section until the time for legislative review and invalidation, as contemplated by division (I)(2)(b) of this section, has expired.

(3) Invalidation of any version of a proposed rule, amendment, rescission, or part thereof by concurrent resolution shall prevent the rule-making agency from instituting or continuing proceedings to adopt any version of the same proposed rule, amendment, rescission, or part thereof for the duration of the general assembly that invalidated the proposed rule, amendment, rescission, or part thereof unless the same general assembly adopts a concurrent resolution permitting the rule-making agency to institute or continue such proceedings.

The failure of the general assembly to invalidate a proposed rule, amendment, rescission, or part thereof under this section shall not be construed as a ratification of the lawfulness or reasonableness of the proposed rule, amendment, rescission, or any part thereof or of the validity of the procedure by which the proposed rule, amendment, rescission, or any part thereof was proposed or adopted.

(4) In lieu of recommending a concurrent resolution to invalidate a proposed rule, amendment, rescission, or part thereof because the rule-making agency has failed to prepare a complete and accurate fiscal analysis, the joint committee on agency rule review may issue, on a one-time basis, for rules, amendments, rescissions, or parts thereof that have a fiscal effect on school districts, counties, townships, or municipal corporations, a finding that the rule summary and fiscal analysis is incomplete or inaccurate and order the rule-making agency to revise the rule summary and fiscal analysis and refile it with the proposed rule, amendment, rescission, or part thereof. If an emergency rule is filed as a nonemergency rule before the end of the ninetieth day of the emergency rule's effectiveness, and the joint committee issues a finding and orders the rule-making agency to refile under division (I)(4) of this section, the governor may also issue an order stating that the emergency rule shall remain in effect for an additional sixty days after the ninetieth day of the emergency rule's effectiveness. The governor's orders shall be filed in accordance with division (F) of this section. The joint committee shall send in electronic form to the rule-making agency, the secretary of state, and the director of the legislative service commission a certified text of the finding and order to revise the rule summary and fiscal analysis, which shall take immediate effect.

An order issued under division (I)(4) of this section shall prevent the rule-making agency from instituting or continuing proceedings to adopt any version of the proposed rule, amendment, rescission, or part thereof until the rule-making agency revises the rule summary and fiscal analysis and refiles it in electronic form with the joint committee along with the proposed rule, amendment, rescission, or part thereof. If the joint committee finds the rule summary and fiscal analysis to be complete and accurate, the joint committee shall issue a new order noting that the rule-making agency has revised and refiled a complete and accurate rule summary and fiscal analysis. The joint committee shall send in electronic form to the rule-making agency, the secretary of state, and the director of the legislative service commission a certified text of this new order. The secretary of state and the director of the legislative service commission shall each link this order to the proposed rule, amendment, rescission, or part thereof. The rule-making agency may then proceed to adopt in accordance with division (D)

of this section, or to Code, the proposed rule and order under division revised rule summary shall recommend the this section.

(2002 S 265, eff. 9-17-00; eff. 7-1-00; 1999 S 11, § 33, eff. 8-16-94; 1984 S 8; 1978 S 321; 197

2002 S 265, § 3, eff. 9-

(A)(1) Except as otherwise (A)(2) of this section, see 119.032, as amended to 121.71, 121.72, 121.73, 12 the Revised Code first effective date of this act. shall use the emergency division (F) of section 1 to designate depository 1

Amendment Note: 200 paragraph of division (I with sections 121.71 to 1 inserted "except when section prevents the an emergency rule, amendm emergency rule, amendm ninety-day period" in the sion (F); inserted "or

Agro Ohio fund, director to conduct public hearing Mitigation proposals, eva

Administrative hearings, Adoption of rules, OAC Method of notice for 3304-1-08, 3304:1-21- Notice of change of address Notice procedure, OAC 5 Notification of public hearing Procedure for adoption, of rules, OAC 125-3-0 Procedure for adoption of Public notice, OAC 4766- Public notice: adoption, a rules, OAC 4115-3-05 Public notice of prom 127-1-02 Public notice of proposal, or rescission 4501:5-1-01

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of this section, or to file in accordance with division (B)(1) of section 111.15 of the Revised Code, the proposed rule, amendment, rescission, or part thereof that was subject to the finding and order under division (I)(4) of this section. If the joint committee determines that the revised rule summary and fiscal analysis is still inaccurate or incomplete, the joint committee shall recommend the adoption of a concurrent resolution in accordance with division (I)(1) of this section.

(2002 S 265, eff. 9-17-02; 1999 H 470, § 6, eff. 4-1-02; 1999 H 470, § 3, eff. 4-1-01; 1999 H 470, § 1, eff. 7-1-00; 1999 S 11, § 6, eff. 4-1-02; 1999 S 11, § 3, eff. 4-1-01; 1999 S 11, § 1, eff. 9-15-99; 1994 S 33, eff. 8-16-94; 1984 S 239, eff. 1-1-85; 1984 H 244; 1983 H 291; 1981 H 694, H 1; 1979 H 657, H 204, S 8; 1978 S 321; 1977 H 25, H 257, S 43; 1976 H 317; 1969 H 1; 1953 H 1; GC 154-64)

Uncodified Law

2002 S 265, § 3, eff. 9-17-02, reads:

(A)(1) Except as otherwise provided in division (A)(2) of this section, sections 111.15, 119.03, and 119.032, as amended by this act, and sections 121.71, 121.72, 121.73, 121.74, 121.75, and 121.76 of the Revised Code first apply one month after the effective date of this act. The State Library Board shall use the emergency rule-making procedure of division (F) of section 119.03 of the Revised Code to designate depository libraries under division (J)

of section 3375.01 of the Revised Code in anticipation of section 121.74 of the Revised Code becoming first applicable.

(2) The amendment by this act to division (F) of section 119.03 of the Revised Code first applies on the effective date of this act.

(B) As used in Sections 4, 5, 6, and 7 of this act, "date of first applicability" means the date of first applicability specified in division (A)(1) of this section.

Historical and Statutory Notes

Amendment Note: 2002 S 265 added the second paragraph of division (B), relating to compliance with sections 121.71 to 121.76 of the Revised Code; inserted "except when division (I)(2)(a) of this section prevents the agency from adopting the emergency rule, amendment, or rescission as a non-emergency rule, amendment or rescission within the ninety-day period" in the second paragraph of division (F); inserted "or that the proposed rule,

amendment, or rescission incorporates a text or other material by reference and either the rule-making agency has failed to file the text or other material incorporated by reference as required by section 121.73 of the Revised Code or, in the case of a proposed rule or amendment, the incorporation by reference fails to meet the standards stated in section 121.72, 121.75, or 121.76 of the Revised Code" in division (I)(1)(d).

Cross References

Agro Ohio fund, director of agriculture department to conduct public hearing, 924.12
Mitigation proposals, evaluation, 6111.31

Standards for licensure of teachers, 3319.23
Water pollution control, rules, credible data criteria, 6111.51

Ohio Administrative Code References

Administrative hearings, OAC 173-2-05
Adoption of rules, OAC 4703-4-03
Method of notice for public hearings, OAC 3304-1-08, 3304:1-21-17
Notice of change of address, OAC 4755-3-08
Notice procedure, OAC 5120:2-1-01
Notification of public hearings, OAC 4775-4-01
Procedure for adoption, amendment or rescission of rules, OAC 125-3-01
Procedure for adoption of rules, OAC 4753-1-01
Public notice, OAC 4766-1-01
Public notice: adoption, amendment or rescission of rules, OAC 4115-3-05
Public notice of promulgation of rules, OAC 127-1-02
Public notice of proposed rule adoption, amendment, or rescission, OAC 3333-1-06, 4501:5-1-01

Public notice of proposed rules, OAC 3750-15-05
Public notice of rule adoption, amendment, or rescission, OAC 4765-2-04
Public hearings on adoption, amendment, or rescission of rules: methods of public notice, OAC 4761:1-1-01
Public notice of rules, OAC 122-1-01
Public hearings on adoption, amendment, or rescission of rules: methods of public notice, OAC 4761:1-1-01
Public notice of proposed rule adoption, amendment or rescission, OAC 4501:5-1-01
Public notice of the adoption, amendment, or rescission of rules, OAC 111-7-01
Rule for giving public notice, OAC 4101:14-1-08
Unclaimed funds, public notice, adjudication hearing, OAC Ch 1301:10-2

cedents' Estates XI a ReE, Division-
Practice Aids
ey, Ohio Real Estate Law and Prac-
Statutory Fiduciary Sales-Grounds
Sale-Consent of Beneficiaries.

issue of a common-law marriage. In
state (Cuyahoga 1966) 7 Ohio App.2d
2d 547, 36 O.O.2d 404.

CHAPTER 2125

ACTION FOR WRONGFUL DEATH

- Section
- 2125.01 Civil action for wrongful death
- 2125.02 Proceedings; damages allowable; limitation of actions; statute of repose for product liability claims; abandonment of deceased child; definitions
- 2125.03 Distribution of award
- 2125.04 New action

Westlaw Electronic Research

See Westlaw Electronic Research Guide following the Preface.

Uncodified Law

1987 H 1, § 3, eff. 1-5-88, reads, in part: (D) It is the intent of the General Assembly in enacting section 2315.21 of the Revised Code in this act to recognize that punitive or exemplary damages are not recoverable in wrongful death actions under Chapter 2125. of the Revised Code, as found by the Supreme Court in *Rubeck v. Huffman*, 54 Ohio St. 2d 20 (1978).

Comparative Laws

Ill.—ILCS 740 180/1 et seq.
Ky.—Baldwin's KRS 411.130 et seq.
Mich.—M.C.L.A. § 600.2922.

Cross References

- Actions against political subdivisions, 2744.05
- Civil action for injury caused by criminal act barred by certain criminal convictions arising out of same act, tort action defined, 2307.60
- Foreign wards and guardians, 2111.43
- Law, not to limit damages for wrongful death; O Const Art I §19a
- Limitation on damages recoverable against state university or college, exception for wrongful death action, 3345.40
- Motor vehicle insurance, policies allowed to treat all claims for bodily injury to one person as single claim, 3937.44
- Order in which debts to be paid, 2117.25
- Payment of debts after three months, 2117.15
- Powers of guardian of person and estate, 2111.07
- Powers of trustee for person who has disappeared, 2119.03
- Presentation and allowance of creditor's claims; procedure, 2117.06
- Product liability actions, claimant defined, 2307.71
- Uninsured and underinsured motorist coverage, 3937.18

Law Review and Journal Commentaries

- The Criminal Corporation: Is Ohio Prepared for Corporate Criminal Prosecutions for Workplace Fatalities? Comment. 45 Clev St L Rev 135 (1997).
- Damages Recoverable in Survivorship Actions as Compared to Wrongful-Death Actions, William K. McCarter and Sean A. McCarter. 21 Lake Legal News 10 (April 1998).
- Punitive Damages in Wrongful Death, Gary N. Gilman. 20 Clev St L Rev 301 (May 1971).
- Tort Law: Protection Of Prenatal Life Through Wrongful Death Statutes—Critique Of *Giardina v. Bennett*, 111 N.J. 412, 545 A.2d 139 (1988), Note. 15 U Dayton L Rev 157 (Fall 1989).
- Wrongful Death Suits for Fetuses: Gain, David E. Rovella. 18 Nat'l LJ A6 (July 15, 1996).

2125.01 Civil action for wrongful death

When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the person who would have been liable if death had not ensued or the administrator or executor of the estate of such person, as such

administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances which make it aggravated murder, murder, or manslaughter. When the action is against such administrator or executor, the damages recovered shall be a valid claim against the estate of such deceased person. No action for the wrongful death of a person may be maintained against the owner or lessee of the real property upon which the death occurred if the cause of the death was the violent unprovoked act of a party other than the owner, lessee, or a person under the control of the owner or lessee, unless the acts or omissions of the owner, lessee, or person under the control of the owner or lessee constitute gross negligence.

When death is caused by a wrongful act, neglect, or default in another state or foreign country, for which a right to maintain an action and recover damages is given by a statute of such other state or foreign country, such right of action may be enforced in this state. Every such action shall be commenced within the time prescribed for the commencement of such actions by the statute of such other state or foreign country.

The same remedy shall apply to any such cause of action now existing and to any such action commenced before January 1, 1932, or attempted to be commenced in proper time and now appearing on the files of any court within this state, and no prior law of this state shall prevent the maintenance of such cause of action (2001 S 108, § 2.01, eff. 7-6-01; 2001 S 108, § 2.02, eff. 7-6-01; 1996 H 350, eff. 1-27-97¹; 1981 H 332, eff. 2-5-82; 1953 H 1; GC 10509-166)

¹ See Notes of Decisions and Opinions, *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (Ohio 1999), 86 Ohio St.3d 451, 715 N.E.2d 1062.

Uncodified Law

2001 S 108, § 1, eff. 7-6-01, reads:

It is the intent of this act (1) to repeal the Tort Reform Act, Am. Sub. H.B. 350 of the 121st General Assembly; 146 Ohio Laws 3867, in conformity with the Supreme Court of Ohio's decision in *State, ex rel. Ohio Academy of Trial Lawyers, v. Sheward* (1999), 86 Ohio St.3d 451; (2) to clarify the status of the law; and (3) to revive the law as it existed prior to the Tort Reform Act.

2001 S 108, § 3, eff. 7-6-01, reads, in part:

Historical and Statutory Notes

Ed. Note: The amendment of this section by 1996 H 350, eff. 1-27-97, was repealed by 2001 S 108, § 2.02, eff. 7-6-01. See *Baldwin's Ohio Legislative Service Annotated*, 1996, page 10/L-3379, and 2001, page 6/L-1441, or the OH-LEGIS or OH-LEGIS-OLD database on Westlaw, for original versions of these Acts.

Pre-1953 H 1 Amendments: 114 v 438

Amendment Note: 1996 H 350 rewrote this section, which prior thereto read:

When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and

(A) In Section 2.01 of this act:

(3) Sections 109.36, 2117.06, 2125.01, 2125.02, 2125.04, 2305.10, 2305.16, 2305.27, 2305.38, 2307.31, 2307.32, 2307.75, 2307.80, 2315.01, 2315.19, 2501.02, 2744.06, 3722.08, 4112.14, 4113.52, 4171.10, and 4399.18 of the Revised Code, are revived and amended, supersede the versions of the same sections that are repealed by Section 2.02 of this act, and include amendments that gender neutralize the language of the sections (as contemplated by section 1.31 of the Revised Code) and that correct apparent error.

recovered damages if death had not ensued, the person who would have been liable if death had not ensued, or the administrator or executor of the estate of such person, as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances which make it aggravated murder, murder, or manslaughter. When the action is against such administrator or executor, the damages recovered shall be a valid claim against the estate of such deceased person. No action for the wrongful death of a person may be maintained against the owner or

of the real property upon which occurred if the cause of the death was the violent unprovoked act of a party other than the owner or lessee, unless the acts or omissions of the owner or lessee constitute gross negligence.

When death is caused by a wrongful act, neglect, or default in another state or foreign country, for which a right to maintain an action and recover damages is given by a statute of such other state or foreign country, such right of action may be enforced in this state.

Amendment of pleadings to conform to evidence, Civ R 15

Amount of recovery in tort action to be limited, 2315:80

Asbestos claims, applicability, 2307.95

Counterclaim and crossclaim, Civ R 13

Damages for wrongful death not to be limited, O Const Art I, § 19a

Order of claims and remedies, Civ R 18

Death § 15, 43.

Westlaw Topic No. 117.

OH S: Death §§ 34, 36, 68, 113 to 114.

Encyclopedias

OH Jur. 3d Actions § 126, Where Death Occurs; Relationship to Action for Wrongful Death.

OH Jur. 3d Actions § 128; Survival of Action Against Tortfeasor's Estate.

OH Jur. 3d Actions XII E Ref., Divisional References.

OH Jur. 3d Aliens & Citizens § 20, Wrongful Death.

OH Jur. 3d Aliens & Citizens III B Ref., Divisional References.

OH Jur. 3d Appellate Review § 47, Extraordinary Proceedings.

OH Jur. 3d Boats, Ships, & Shipping § 1, Death or Death of Ship's Personnel.

OH Jur. 3d Boats, Ships, & Shipping Divisional References.

OH Jur. 3d Conflict of Laws § 56, Limitations.

OH Jur. 3d Conflict of Laws VI Ref., Divisional References.

OH Jur. 3d Death § 35, Ohio Wrongful Death Statute.

OH Jur. 3d Death § 36, Constitutionality.

OH Jur. 3d Death § 37, Applicability, G

ce § 258, Calculation of Dam-

ce § 259, Reduction of Dam-
ntiff's Percentage of Tortious

ce § 262, Judgment.

s Liability § 82, Contributory
er Contributory Tortious Con-

ce Aids

7 Practice § 6:16, Motions for
it Filed by a Defendant in a
—Comparative Negligence or
nduct.

to give them wide berth, and
something hit her automobile,
vidence that chicken was in
vel at any time prior to impact;
ationary or moving in same
, or that chicken did not sud-
orist's path. *Snider v. Town-*
Dist., Mercer, 10-03-2005 No.
5267, 2005 WL 2416334, Unre-
244(41.1)

two causes contribute to inju-
is defendant's negligence and
of God," liability shall attach
tiff's damage would not have
endant's negligence. *Davis v.*
isp., Dist. # 9 (Ohio Ct.Cl.,
3-12298-AD, 2004-Ohio-3583,
Unreported. Negligence 2423

" in its legal significance in
and proximate cause, means
er, result of natural causes,
violent storms, lightning and
"an act of God" must pro-
nature, or force of elements
man must have had nothing to
Ohio Dept. of Transp., Dist.
17-2004 No. *2003-12298-AD,*
WL 1515011, Unreported.

tron tripped in shopping mall
pen and obvious danger; and
did not breach any duty in
a business invitee; curb was
white paint outline, curb was
e, whereas the roadway was
is likely made of asphalt or
ite outline around the curb
tron acknowledged she would
ad looked down, and witness
sufficient. *Carlie v. Cafaro*
t., Belmont, 03-18-2004 No.
9, 2004 WL 549461, Unre-
1127

nd obvious doctrine, home
ad no duty to warn social

guest that railing around stairwell opening in floor
of great room, leading down to a basement, was
removed, even though guest was presumably dis-
tracted by unrolling wallpaper border when she
walked backwards into opening, where guest knew
that opening was there, and that railing around it
had been removed. *Lingquist v. Sutek (Ohio App. 5*
Dist., Stark, 12-08-2003) No. *2003CA00124,*
2003-Ohio-6793, 2003 WL 22950833, Unreported.
Negligence 1020; Negligence 1040(4)

Comparative negligence principles are inapplica-
ble to a traffic injury case where decedent's negli-
gence in failing to maintain an assured clear dis-
tance is the sole proximate cause of his injury when
he proceeds more than 2500 feet without making
any effort to avoid hitting a truck in its path which
is stopped because of debris and broken glass on
the highway; the driver of the truck is not negligent
because it is reasonable for him to remain where he
had stopped on the highway and the driver of the
flat bed truck which loses its load of wood and glass
on the highway is relieved from potential liability
for negligently blocking the highway with debris by
the intervening, independent conduct of the motor-
ist who fails to maintain an assured clear distance.
Sabbaghzadeh v. Shelvey (Ohio App. 9 Dist., Lo-
rain, 06-14-2000) No. *98CA007244, 2000 WL*
763322, Unreported; appeal not allowed 90 Ohio
St.3d 1443, 736 N.E.2d 904.

2315.33 Contributory fault not bar to recovery of damages

The contributory fault of a person does not bar the person as plaintiff from recovering
damages that have directly and proximately resulted from the tortious conduct of one or more
other persons, if the contributory fault of the plaintiff was not greater than the combined
tortious conduct of all other persons from whom the plaintiff seeks recovery in this action and
of all other persons from whom the plaintiff does not seek recovery in this action. The court
shall diminish any compensatory damages recoverable by the plaintiff by an amount that is
proportionately equal to the percentage of tortious conduct of the plaintiff as determined
pursuant to section 2315.34 of the Revised Code.
(2004 S'80, eff. 4-7-05; 2002 S 120, eff. 4-9-03)

Historical and Statutory Notes

Amendment Note: 2004 S 80 deleted the last
sentence, which read:

"This section does not apply to actions described
in section 4113.03 of the Revised Code."

Research References

Encyclopedias

OH Jur. 3d Carriers § 181, Negligence or Assump-
tion of Risk; Generally.

OH Jur. 3d Contribution, Indemnity, & Subroga-
tion § 85, Persons Entitled to or Liable for Con-
tribution.

OH Jur. 3d Contribution, Indemnity, & Subroga-
tion § 87, Measure of Contribution.

OH Jur. 3d Negligence § 66, Proximate Cause.

OH Jur. 3d Negligence § 182, Where Comparative
Negligence Rule is Applicable.

OH Jur. 3d Negligence § 215, Contributory Negli-
gence Under Comparative Negligence Doctrine.

OH Jur. 3d Negligence § 217, Contributory Negli-
gence Under Comparative Negligence Doc-
trine—Inference or Presumption of Plaintiff's
Negligence.

Treatises and Practice Aids

Ohio Personal Injury Practice § 1:8, Introduction
to Case Assessment—Aspects of Case Assess-
ment Guidelines—Evaluation of Possible Defens-
es.

Ohio Personal Injury Practice § 6:16, Motions for
Summary Judgment Filed by a Defendant in a
Negligence Action—Comparative Negligence or
Other Tortious Conduct.

Hole in store parking lot in which shopping cart's
wheel fell, causing cart to tip and shopper's minor
child to be thrown from cart and injured, was an
open and obvious dangerous condition, and thus
store owner had no duty to protect shopper or child
from the hole; shopper described crack as being 21
inches in length and an inch or two in depth at the
time of the incident. *Voelker v. Mark Glassman,*
Inc. (Ohio App. 8 Dist., Cuyahoga, 07-24-1997) No.
71999, 1997 WL 33796162, Unreported. Negli-
gence 1076

2. Intentional tort

Restaurant's mats near counter were an open
and obvious hazard, and thus, restaurant owner did
not owe customer a duty to protect her from them,
despite claim that mats were difficult to see; cus-
tomer knew restaurant had mats in front of store,
having been to restaurant several times before,
customer stepped on other mats that were exactly
the same, customer waited in restaurant for 15
minutes with an unobstructed view of area prior to
her fall, customer knew floor mats occasionally
flipped up, fall occurred when restaurant's lights
were on during daylight hours, mats and flooring
were not the same color, and mats had black trim
designating the edges. *Brown v. The Twins Group-*
PH LLC (Ohio App. 2 Dist., Clark, 08-12-2005) No.
2004CA59, 2005-Ohio-4197, 2005 WL 1939888, Un-
reported. Negligence 1076

3781.061

HEALTH—SAFETY—MORALITY

BUILDING STANDARDS—GENERAL

Notes of Decisions

Historica

Insurance plan participation 1

1. Insurance plan participation

Notwithstanding the provisions of RC 303.21, 3781.06, and 3781.061, RC 307.37(A)(2) authorizes a county to include, in its building code, regulations needed for participation in national flood insurance program, including regulations that govern the pro-

hibition, location, or construction of buildings or structures for agricultural purposes in unincorporated areas of the county located within the flood plain; further, RC 307.85 provides general authority for a county to participate in the national flood insurance program by adopting procedures of building actions that are not prohibited by the Ohio Constitution or in conflict with the laws of Ohio. OAG 91-028.

1953 H 1 Amendments: 110 v 350
C
water inspection fees, 4105.17
building systems inspection, duties of board of building standards, 4104.44

BOARD OF BUILDING STANDARDS

3781.07 Board of building standards; qualifications; terms

There is hereby established in the department of commerce a board of building standards consisting of eleven members appointed by the governor with the advice and consent of the senate. The board shall appoint a secretary who shall serve in the unclassified civil service for a term of six years at a salary fixed pursuant to Chapter 124, of the Revised Code. The board may employ additional staff in the classified civil service. The secretary may be removed by the board under the rules the board adopts. Terms of office shall be for four years, commencing on the fourteenth day of October and ending on the thirteenth day of October. Each member shall hold office from the date of appointment until the end of the term for which the member was appointed. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which the member's predecessor was appointed shall hold office for the remainder of such term. Any member shall continue in office subsequent to the expiration date of the member's term until the member's successor takes office, or until a period of sixty days has elapsed, whichever occurs first. One of the members appointed to the board shall be an attorney at law, admitted to the bar of this state; two shall be registered architects; two shall be professional engineers, one in the field of mechanical and one in the field of structural engineering, each of whom shall be duly licensed to practice such profession in this state; one shall be a person of recognized ability, broad training, and fifteen years experience in problems and practice incidental to the construction and equipment of buildings specified in section 3781.06 of the Revised Code; one shall be a person with recognized ability and experience in the manufacture and construction of industrialized units as defined in section 3781.06 of the Revised Code; one shall be a member of the fire service with recognized ability and broad training in the field of fire protection and suppression; one shall be a person with at least ten years of experience and recognized expertise in building codes and standards and the manufacture of construction materials; one shall be a general contractor with experience in residential and commercial construction; and one, chosen from a list of three names the Ohio municipal league submits to the governor, shall be the mayor of a municipal corporation in which the Ohio residential and nonresidential building codes are being enforced in the municipal corporation by a certified building department. Each member of the board, not otherwise required to take an oath of office, shall take the oath prescribed by the constitution. Each member shall receive as compensation an amount fixed pursuant to division (J) of section 124.15 of the Revised Code, and shall receive actual and necessary expenses in the performance of official duties. The amount of such expenses shall be certified by the secretary of the board and paid in the same manner as the expenses of employees of the department of commerce are paid.

(2005 H 66, eff. 9-29-05; 1998 S 142, eff. 3-30-99; 1995 S 162, eff. 10-29-95; 1989 H 222, eff. 11-3-89; 1982 S 550; 1977 H 1; 1973 S 131; 1970 H 967; 1969 H 709; 132 v H 93; 129 v 1434; 126 v 912; 1953 H 1; GC 12600-285)

Uncodified Law

1995 S 162, § 5, eff. 10-25-95, reads: Within ninety days after the effective date of this act, the Governor shall appoint to the Board of Building Standards a member who has at least ten years of experience and recognized expertise in building codes and standards and the manufacture of construction materials pursuant to section 3781.07 of the Revised Code, as amended by this act, to a term ending on October 13, 1999. Thereafter, terms of office of this member shall be as provided in section 3781.07 of the Revised Code.

Ohio Admin
division of boiler inspection, definitions and regulations, OAC Ch 4101:4-1

L
Health §392.
Washaw Topic No. 198H.
Ohio Health and Environment §§ 35, 51 to 10-04.

R
Encyclopedias
Ohio Jur. 3d Buildings, Zoning, & Land Use §331, Effect of Failure to Comply With Rules.

Members 1
Rulemaking authority 2

Members
An architect member of the Ohio board of building standards is not prohibited by RC 3781.07 from receiving or agreeing to receive compensation for services rendered or to be rendered personally as an employee or independent contractor of another state agency. Ethics O

Rulemaking authority
A free-standing billboard which poses a safety hazard is not a component necessary to constitute a "billboard" under RC 3781.07.

3781.08 Organization; employe

The board of building standards shall have a term of two years. The department of commerce shall employ such stenographic and clerical personnel as may be necessary to enable the board to perform the duties of the board.

(1995 S 162, eff. 10-29-95; 1953 H 1, eff. 10-29-53)

His
Pre-1953 H 1 Amendments: 110 v 35

Public employees, method of appointment
Health §392.

(3) The rules adopted pursuant to this section are complete, lawful alternatives to any requirements specified for buildings or industrialized units in any section of the Revised Code. The board shall, on its own motion or on application made under sections 3781.12 and 3781.13 of the Revised Code, formulate, propose, adopt, modify, amend, or repeal the rules to the extent necessary or desirable to effectuate the purposes of sections 3781.06 to 3781.18 of the Revised Code.

(B) The board shall report to the general assembly proposals for amendments to existing statutes relating to the purposes declared in section 3781.06 of the Revised Code that public health and safety and the development of the arts require and shall recommend any additional legislation to assist in carrying out fully, in statutory form, the purposes declared in that section. The board shall prepare and submit to the general assembly a summary report of the number, nature, and disposition of the petitions filed under sections 3781.13 and 3781.14 of the Revised Code.

(C) On its own motion or on application made under sections 3781.12 and 3781.13 of the Revised Code, and after thorough testing and evaluation, the board shall determine by rule that any particular fixture, device, material, process of manufacture, manufactured unit or component, method of manufacture, system, or method of construction complies with performance standards adopted pursuant to section 3781.11 of the Revised Code. The board shall make its determination with regard to adaptability for safe and sanitary erection, use, or construction, to that described in any section of the Revised Code, wherever the use of a fixture, device, material, method of manufacture, system, or method of construction described in that section of the Revised Code is permitted by law. The board shall amend or annul any rule or issue an authorization for the use of a new material or manufactured unit on any like application. No department, officer, board, or commission of the state other than the board of building standards or the board of building appeals shall permit the use of any fixture, device, material, method of manufacture, newly designed product, system, or method of construction at variance with what is described in any rule the board of building standards adopts or issues or that is authorized by any section of the Revised Code. Nothing in this section shall be construed as requiring approval, by rule, of plans for an industrialized unit that conforms with the rules the board of building standards adopts pursuant to section 3781.11 of the Revised Code.

(D) The board shall recommend rules, codes, and standards to help carry out the purposes of section 3781.06 of the Revised Code and to help secure uniformity of state administrative rulings and local legislation and administrative action to the bureau of workers' compensation, the director of commerce, any other department, officer, board, or commission of the state, and to legislative authorities and building departments of counties, townships, and municipal corporations, and shall recommend that they audit those recommended rules, codes, and standards by any appropriate action that they are allowed pursuant to law or the constitution.

(E)(1) The board shall certify municipal, township, and county building departments and the personnel of those building departments, and persons and employees of individuals, firms, or corporations as described in division (E)(7) of this section to exercise enforcement authority, to accept and approve plans and specifications, and to make inspections, pursuant to sections 3781.03, 3791.04, and 4104.43 of the Revised Code.

(2) The board shall certify departments, personnel, and persons to enforce the state residential building code, to enforce the nonresidential building code, or to enforce both the residential and the nonresidential building codes. Any department, personnel, or person may enforce only the type of building code for which certified.

(3) The board shall not require a building department, its personnel, or any persons that it employs to be certified for residential building code enforcement if that building department does not enforce the state residential building code. The board shall specify, in rules adopted pursuant to Chapter 119. of the Revised Code, the requirements for certification for residential and nonresidential building code enforcement, which shall be consistent with this division. The requirements for residential and nonresidential certification may differ. Except as otherwise provided in this division, the requirements shall include, but are not limited to, the satisfactory completion of an initial examination and, to remain certified, the completion of a specified number of hours of continuing building code education within each three-year period following the date of certification which shall be not less than thirty hours. The rules shall provide that

the council of American building or entities the board recognizes are all specify requirements that are council of American building officials

on and renewal fee for building persons, firms, or corporations as division.

l complete the number of hours of es or, for failure to do so, forfeit

l to certify personnel of municipal and employees of persons, firms, or ities do not include the exercise of tions, or making inspections under

ifications and enforcement author- cifications may be approved and ion, township, or county, by any of

ownship, or county;

rations, pursuant to a contract to municipal corporation, township, or

act with, a municipal corporation, n, pursuant to a contract to furnish

ents have jurisdiction within the Revised Code, only with respect to y are certified under this section

e municipal corporation, the board and approval of that application by irth:

r nonresidential buildings, or both the building department;

firms, or corporations contracting u s section;

wnship, county, health district, or ices pursuant to division (E)(7) of

; department.

verning all of the following:

l and persons and employees of t to division (E)(7) of this section

r person who contracts for serv- department when that employee

exercise authority over any other for the construction, alteration,

drawings or specifications for w- tment shall provide other shall

ntial building codes as they pertain

(b) The minimum services to be provided by a certified building department.

(11) The board of building standards may revoke or suspend certification to enforce the residential and nonresidential building codes, on petition to the board by any person affected by that enforcement or approval of plans, or by the board on its own motion. Hearings shall be held and appeals permitted on any proceedings for certification or revocation or suspension of certification in the same manner as provided in section 3781.101 of the Revised Code for other proceedings of the board of building standards.

(12) Upon certification, and until that authority is revoked, any county or township building department shall enforce the residential and nonresidential building codes for which it is certified without regard to limitation upon the authority of boards of county commissioners under Chapter 307. of the Revised Code or boards of township trustees under Chapter 505. of the Revised Code.

(F) In addition to hearings sections 3781.06 to 3781.18 and 3791.04 of the Revised Code require, the board of building standards shall make investigations and tests, and require from other state departments, officers, boards, and commissions information the board considers necessary or desirable to assist it in the discharge of any duty or the exercise of any power mentioned in this section or in sections 3781.06 to 3781.18, 3791.04, and 4104.43 of the Revised Code.

(G) The board shall adopt rules and establish reasonable fees for the review of all applications submitted where the applicant applies for authority to use a new material, assembly, or product of a manufacturing process. The fee shall bear some reasonable relationship to the cost of the review or testing of the materials, assembly, or products and for the notification of approval or disapproval as provided in section 3781.12 of the Revised Code.

(H) The residential construction advisory committee shall provide the board with a proposal for a state residential building code that the committee recommends pursuant to division (C)(1) of section 4740.14 of the Revised Code. Upon receiving a recommendation from the committee that is acceptable to the board, the board shall adopt rules establishing that code as the state residential building code.

(I) The board shall cooperate with the director of job and family services when the director promulgates rules pursuant to section 5104.05 of the Revised Code regarding safety and sanitation in type A family day-care homes.

(J) The board shall adopt rules to implement the requirements of section 3781.108 of the Revised Code.

2005 H 66, eff. 9-29-05; 2004 H 175, eff. 5-27-05; 2004 H 183, eff. 11-5-04; 1999 H 471, eff. 7-1-00; 1998 S 142, eff. 3-30-99; 1995 S 162, eff. 10-29-95; 1995 H 231, eff. 11-24-95; 1989 H 222, eff. 11-3-89; 1989 S 139; 1987 H 171; 1985 H 435; 1984 H 300; 1979 H 46; 1978 H 751, H 419; 1977 S 155; 1976 S 289; 1970 H 938; 1969 H 709; 129 v 1441; 128 v 1112, 716; 127 v 958; 126 v 912; 1953 H 1; GC 12600-288)

Uncodified Law

2004 H 175, § 4, eff. 5-27-05, reads:

Any building department that enforces a residential building code on or before the effective date of this section and that wishes to enforce the residential building code the Board of Building Standards adopts pursuant to this act may enforce the state

residential building code the Board adopts without being certified under section 3781.10 of the Revised Code for not more than one year after that code becomes effective. Thereafter, only a building department certified to enforce the residential building code pursuant to section 3781.10 of the Revised Code may enforce that code.

Historical and Statutory Notes

Pre-1953 H 1 Amendments: 110 v 350

Prohibition: 3791.02, 3791.03

Architect's and engineers' seals, requirement for submission of plans, 3791.04

Board of building standards, rulemaking powers, enforcement, 4104.43

Cross References

Building standards; automatic sprinkler systems, plans submitted by certified designers, 3791.041

Building standards; offenses and penalties, procedures when certified board does not have personnel to do plan and specification review, 3791.042

LEXSTAT 29 U.S.C 651(B)

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*** CURRENT THROUGH P.L. 110-46, APPROVED 7/5/2007 ***

TITLE 29. LABOR
CHAPTER 15. OCCUPATIONAL SAFETY AND HEALTH

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29 USCS § 651

§ 651. Congressional statement of findings and declaration of purpose and policy

[(a)] 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.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources--

(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

(2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

(3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational and Health Review Commission for carrying out adjudicatory functions under the Act;

(4) by building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;

(5) by providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;

(6) by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;

(7) by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

(8) by providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

(9) by providing for the development and promulgation of occupational safety and health standards;

(10) by providing an effective enforcement program which shall include a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition;

29 USCS § 651

(11) by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this Act, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith;

(12) by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this Act and accurately describe the nature of the occupational safety and health problem;

(13) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.

HISTORY:

(Dec. 29, 1970, P.L. 91-596, § 2, 84 Stat. 1590.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES**References in text:**

"The Act" or "this Act", referred to in this section, is Act Dec. 29, 1970, P.L. 91-596, 84 Stat. 1590, popularly known as the Occupational Safety and Health Act of 1970, which appears generally as *29 USCS §§ 651 et seq.* For full classification of such Act, consult USCS Tables volumes.

Explanatory notes:

The bracketed designation "(a)" has been added to implement the probable intent of Congress, which enacted this section with a subsec. (b) but no subsec. (a).

Effective date of section:

This section became effective 120 days after enactment, as provided by § 34 of Act Dec. 29, 1970, P.L. 91-596, which appears as a note to this section.

Short titles:

Act Dec. 29, 1970, P.L. 91-596, § 1, 84 Stat. 1590, provided: "This Act may be cited as the 'Occupational Safety and Health Act of 1970'." For full classification of this Act, consult USCS Tables volumes.

Act July 16, 1998, P.L. 105-197, § 1, 112 Stat. 638, provides: "This Act [adding *29 USCS § 670(d)*] may be cited as the 'Occupational Safety and Health Administration Compliance Assistance Authorization Act of 1998'."

Other provisions:

Effective date of Act Dec. 29, 1970. Act Dec. 29, 1970, P.L. 91-596, § 34, 84 Stat. 1620, provided: "This Act shall take effect one hundred and twenty days after the date of its enactment." For full classification of this Act, consult USCS Tables volumes.

NOTES:

LEXSTAT 29 U.S.C. 655

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*** CURRENT THROUGH P.L. 110-46, APPROVED 7/5/2007 ***

TITLE 29. LABOR
CHAPTER 15. OCCUPATIONAL SAFETY AND HEALTH

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29 USCS § 655

§ 655. Standards

(a) Promulgation by Secretary of national consensus standards and established Federal standards; time for promulgation; conflicting standards. Without regard to chapter 5 of title 5, *United States Code* [5 USCS §§ 500 et seq.], or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this Act and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

(b) Procedure for promulgation, modification, or revocation of standards. The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard in the following manner:

(1) Whenever the Secretary, upon the basis of information submitted to him in writing by an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing organization, the Secretary of Health, Education, and Welfare, the National Institute for Occupational Safety and Health, or a State or political subdivision, or on the basis of information developed by the Secretary or otherwise available to him, determines that a rule should be promulgated in order to serve the objectives of this Act, the Secretary may request the recommendations of an advisory committee appointed under section 7 of this Act [29 USCS § 656]. The Secretary shall provide such an advisory committee with any proposals of his own or of the Secretary of Health, Education, and Welfare, together with all pertinent factual information developed by the Secretary or the Secretary of Health, Education, and Welfare, or otherwise available, including the results of research, demonstrations, and experiments. An advisory committee shall submit to the Secretary its recommendations regarding the rule to be promulgated within ninety days from the date of its appointment or within such longer or shorter period as may be prescribed by the Secretary, but in no event for a period which is longer than two hundred and seventy days.

(2) The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments. Where an advisory committee is appointed and the Secretary determines that a rule should be issued, he shall publish the proposed rule within sixty days after the submission of the advisory committee's recommendations or the expiration of the period prescribed by the Secretary for such submission.

(3) On or before the last day of the period provided for the submission of written data or comments under paragraph (2), any interested person may file with the Secretary written objections to the proposed rule, stating the grounds therefor and requesting a public hearing on such objections. Within thirty days after the last day for filing such

objections, the Secretary shall publish in the Federal Register a notice specifying the occupational safety or health standard to which objections have been filed and a hearing requested, and specifying a time and place for such hearing.

(4) Within sixty days after the expiration of the period provided for the submission of written data or comments under paragraph (2), or within sixty days after the completion of any hearing held under paragraph (3), the Secretary shall issue a rule promulgating, modifying, or revoking an occupational safety or health standard or make a determination that a rule should not be issued. Such a rule may contain a provision delaying its effective date for such period (not in excess of ninety days) as the Secretary determines may be necessary to insure that affected employers and employees will be informed of the existence of the standard and of its terms and that employers affected are given an opportunity to familiarize themselves and their employees with the existence of the requirements of the standard.

(5) The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

(6) (A) Any employer may apply to the Secretary for a temporary order granting a variance from a standard or any provision thereof promulgated under this section. Such temporary order shall be granted only if the employer files an application which meets the requirements of clause (B) and establishes 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. Any temporary order issued under this paragraph shall prescribe the practices, means, methods, operations, and processes which the employer must adopt and use while the order is in effect and state in detail his program for coming into compliance with the standard. Such a temporary order may be granted only after notice to employees and an opportunity for a hearing: *Provided*, That the Secretary may issue one interim order to be effective until a decision is made on the basis of the hearing. No temporary order may be in effect for longer than the period needed by the employer to achieve compliance with the standard or one year, whichever is shorter, except that such an order may be renewed not more than twice (I) so long as the requirements of this paragraph are met and (II) if an application for renewal is filed at least 90 days prior to the expiration date of the order. No interim renewal of an order may remain in effect for longer than 180 days.

(B) An application for a temporary order under this paragraph (6) shall contain:

- (i) a specification of the standard or portion thereof from which the employer seeks a variance,
- (ii) a representation by the employer, supported by representations from qualified persons having firsthand knowledge of the facts represented, that he is unable to comply with the standard or portion thereof and a detailed statement of the reasons therefor,
- (iii) a statement of the steps he has taken and will take (with specific dates) to protect employees against the hazard covered by the standard,
- (iv) a statement of when he expects to be able to comply with the standard and what steps he has taken and what steps he will take (with dates specified) to come into compliance with the standard, and
- (v) a certification that he has informed his employees of the application by giving a copy thereof to their authorized representative, posting a statement giving a summary of the application and specifying where a copy may be examined at the place or places where notices to employees are normally posted, and by other appropriate means.

A description of how employees have been informed shall be contained in the certification. The information to employees shall also inform them of their right to petition the Secretary for a hearing.

(C) The Secretary is authorized to grant a variance from any standard or portion thereof whenever he determines, or the Secretary of Health, Education, and Welfare certifies, that such variance is necessary to permit an employer to

participate in an experiment approved by him or the Secretary of Health, Education, and Welfare designed to demonstrate or validate new and improved techniques to safeguard the health or safety of workers.

(7) Any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure. Where appropriate, such standard shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring employee exposure at such locations and intervals, and in such manner as may be necessary for the protection of employees. In addition, where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure. In the event such medical examinations are in the nature of research, as determined by the Secretary of Health, Education, and Welfare, such examinations may be furnished at the expense of the Secretary of Health, Education, and Welfare. The results of such examinations or tests shall be furnished only to the Secretary or the Secretary of Health, Education, and Welfare, and, at the request of the employee, to his physician. The Secretary, in consultation with the Secretary of Health, Education, and Welfare, may by rule promulgated pursuant to *section 553 of title 5, United States Code*, make appropriate modifications in the foregoing requirements relating to the use of labels or other forms of warning, monitoring or measuring, and medical examinations, as may be warranted by experience, information, or medical or technological developments acquired subsequent to the promulgation of the relevant standard.

(8) Whenever a rule promulgated by the Secretary differs substantially from an existing national consensus standard, the Secretary shall, at the same time, publish in the Federal Register a statement of the reasons why the rule as adopted will better effectuate the purposes of this Act than the national consensus standard.

(c) Emergency temporary standards.

(1) The Secretary shall provide, without regard to the requirements of chapter 5, *title 5, United States Code* [5 USCS §§ 500 et seq.], for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.

(2) Such standard shall be effective until superseded by a standard promulgated in accordance with the procedures prescribed in paragraph (3) of this subsection.

(3) Upon publication of such standard in the Federal Register the Secretary shall commence a proceeding in accordance with section 6(b) of this Act [subsec. (b) of this section], and the standard as published shall also serve as a proposed rule for the proceeding. The Secretary shall promulgate a standard under this paragraph no later than six months after publication of the emergency standard as provided in paragraph (2) of this subsection.

(d) Variances from standards; procedure. Any affected employer may apply to the Secretary for a rule or order for a variance from a standard promulgated under this section. Affected employees shall be given notice of each such application and an opportunity to participate in a hearing. The Secretary shall issue such rule or order if he determines on the record, after opportunity for an inspection where appropriate and a hearing, that the proponent of the variance has demonstrated by a preponderance of the evidence that the conditions, practices, means, methods, operations, or processes used or proposed to be used by an employer will provide employment and places of employment to his employees which are as safe and healthful as those which would prevail if he complied with the standard. The rule or order so issued shall prescribe the conditions the employer must maintain, and the practices, means, methods, operations, and processes which he must adopt and utilize to the extent they differ from the standard in question. Such a rule or order may be modified or revoked upon application by an employer, employees, or by the Secretary on his own motion, in the manner prescribed for its issuance under this subsection at any time after six months from its issuance.

(e) Statement of reasons for Secretary's determinations; publication in Federal Register. Whenever the Secretary promulgates any standard, makes any rule, order, or decision, grants any exemption or extension of time, or

29 USCS § 655

compromises, mitigates, or settles any penalty assessed under this Act he shall include a statement of the reasons for such action, which shall be published in the Federal Register.

(f) **Judicial review.** Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The filing of such petition shall not, unless otherwise ordered by the court, operate as a stay of the standard. The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.

(g) **Priority for establishment of standards.** In determining the priority for establishing standards under this section, the Secretary shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments. The Secretary shall also give due regard to the recommendations of the Secretary of Health, Education, and Welfare regarding the need for mandatory standards in determining the priority for establishing such standards.

HISTORY:

(Dec. 29, 1970, P.L. 91-596, § 6, 84 Stat. 1593.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES**References in text:**

"The effective date of this Act", referred to in this section is 120 days after Dec. 29, 1970; see the Other provisions note to 29 USCS § 651.

"This Act", referred to in this section, is Act Dec. 29, 1970, P.L. 91-596, 84 Stat. 1590, popularly known as the Occupational Safety and Health Act of 1970, which appears generally as 29 USCS §§ 651 et seq. For full classification of this Act, consult USCS Tables volumes.

Effective date of section:

This section became effective 120 days after enactment, as provided by § 34 of Act Dec. 29, 1970, P.L. 91-596, which appears as a note to 29 USCS § 651.

Transfer of functions:

Act Oct. 17, 1979, P.L. 96-88, Title V, § 509, 93 Stat. 695, which appears as 20 USCS § 3508, redesignated the Secretary of Health, Education, and Welfare as the Secretary of Health and Human Services and provided that any reference to the Secretary of Health, Education, and Welfare, in any law in force on the effective date of such Act, shall be deemed to refer and apply to the Secretary of Health and Human Services, except to the extent such reference is to a function or office transferred to the Secretary of Education or the Department of Education under such Act.

Other provisions:

Termination of advisory committees. Act Oct. 6, 1972, P.L. 92-463, §§ 3(2), 14, 86 Stat. 770, 776, located at 5 USCS Appendix, provided that advisory committees in existence on Jan. 5, 1973, would terminate not later than the expiration of the two-year period following Jan. 5, 1973, unless, in the case of a committee established by the President