Scholarly Paper

Legitimacy of the General Duty Clause Citations: Court Cases Review

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Abstract: The General Duty Clause, hereinafter referred to as the Clause, was created under the Occupational Safety and Health Act, hereinafter referred to as the Act, in 1970 to protect workers in the absence of the Occupational Safety and Health Administration (OSHA) standard. It has been utilized by the Occupational Safety and Health Administration to cite employers who are not necessarily violating a particular OSHA standard but still do not provide safe and healthful conditions to their employees. Employers over the years have contested the Clause citations. This study carefully reviews the Clause elements within the construction industry context utilizing court cases. A content analysis was initiated by first creating an annotated list of the cases and highlighting their key attributes, such as the construction task(s) involved in the incidents along with the contributing behaviors and actions. An in-depth investigation of the reasons behind affirming or denying the cases was then performed. There are few, if any, studies that have been conducted to better understand the disputation related to the Clause. The findings suggest that construction firms are not fully utilizing the dispute right that is built-in the Act. In addition, this study provides a clear explanation of the Clause's elements that should be considered by OSHA to issue a valid citation. Accordingly, this study aids compliance safety and health officers (CSHO) in issuing valid Clause citations to minimize disputes. Furthermore, the study findings are expected to help construction firms in developing safety plans that effectively reduce or eliminate workplace hazards to improve overall site safety and avoid Clause citations. **DOI: 10.1061/(ASCE)LA.1943-4170.0000469.** *© 2021 American Society of Civil Engineers.*

Introduction

The General Duty Clause's primary goal is to assure healthy and safe working conditions for workers in the United States. The General Duty Clause poses a financial penalty (i.e., civil penalty) on those who violate it. However, these civil penalties are regulatory actions and not punitive measures, which means employers are not entitled to a trial by jury, proof beyond a reasonable doubt, and confrontation of witnesses (*Beall Const. Co. v. The Occupational Safety and Health Review Commission*). According to Section 5 of the Occupational Safety and Health Act (hereinafter referred to as the Act), the Act could be violated under the following two scenarios:

- When an employer fails to provide a safe and healthy working condition to their employees [29 US Code § 654(a)(1), hereinafter referred to as the Clause]. The duty imposed by the Clause is considered "general" because employers must protect employees from all serious hazards, which represents the core of the Act. The Clause is a stand-alone obligation in which employers must mitigate unforeseen serious hazards.
- When an employer does not comply with a particular Occupational Safety and Health Administration (OSHA) promulgated detailed safety regulations [29 US Code § 654(a)(2)]. The duty imposed by § 654(a)(2) is considered "specific" because employers must comply with the Act regulations promulgated to specific workplace hazards.

Besides the general and specific duties that enforced by OSHA, industry standards could be incorporated by reference (IBR) into the OSHA standards. IBR industry standards are recognized as law, which makes them enforceable (Coble 2018). A violation of the IBR industry standards could not be cited under the Clause. The Clause was created to give OSHA a means to address safety and health hazards that had not yet been regulated. As a result, OSHA can utilize the Clause to issue citations when unsafe or unhealthy conditions are observed or emerged. The Clause is critically beneficial when the industry has a generally accepted safe practice that is not addressed by OSHA standards. In addition, the Clause is crucial when situations change rapidly, and OSHA standards have not been updated. COVID-19 is a good example of unforeseen health hazard that much be addressed by OSHA while there is no standard in place. For example, the Clause helped the Michigan Occupational Safety and Health Administration (MIOSHA) to issue Clause citations to 19 different businesses due to their failure to effectively protect their employees from COVID-19 hazards. Thus, the Clause is vital because it is infeasible for OSHA to anticipate all the potentially serious hazards that may influence the safety and health of workers. According to Morgan and Duvall (1983), the Congress adopted the Act to establish a broad employer obligation to protect the safety and health of employees. However, the Clause enforcement has been criticized as bureaucratized and dysfunctional (Spieler 2016). According to the Occupational Safety and

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Health Review Commission (OSHRC 2019), hereinafter referred to as the Commission, employers could be cited under the Clause when all the following are met:

- The existence of a serious hazard that is likely to cause death or physical harm workers,
- The absence of an OSHA promulgated standard that addresses the serious hazard,
- Workers are/were exposed to the identified hazard,
- The employer and the industry with the exercise of reasonable diligence recognize or should have recognized the hazard, and
- Feasible and effective measures existed to eliminate or mitigate the hazard.

A serious hazardous condition could be recognized when a significant risk of harm exists. However, evaluating risk to determine its significance is a subjective judgment of the likelihood and severity of the harm that may result from the risk (Fung et al. 2010). The subjective nature of the risk evaluation represents one of the main challenges of utilizing the Clause. However, only severity (i.e., causing or likely to cause death or serious physical harm) not likelihood is considered when using the Clause (OSHRC 2019). This means nonserious violations must not be cited using the Clause. Conversely, the feasibility of a hazard control must also be established to use the Clause. Specifically, the following must be established:

- Hazard control is available to apply, and
- The proposed hazard control would effectively reduce the probability of the incident.

The Clause was not meant to be a substitute for reliance on standards nor an added restriction to the existing standards.

It is easier to cite an employer when there is a violation of a particular OSHA standard [29 US Code § 654(a)(2)]. To establish a violation of an OSHA standard, compliance safety and health officers (CSHO) must show (1) the cited standard applies; (2) the employer's noncompliance with the standard; (3) employees access to the violative condition (i.e., being exposed to the noncompliance condition); and (4) employer's actual or constructive knowledge of the violation (*Modern Continental/Obayashi v. the Commission*, 1999). For example, an opening on a third floor that is covered by 4×8 ft plywood sheets that are not installed to prevent accidental displacement. This situation represents a violation of a particular OSHA standard that requires covers to be secured against unintentional displacement (*Anning-Johnson Co. v. the Commission*, 1975).

A recent Commission's rule of a Clause citation suggested that OSHA citations under the Clause leave employers confused as to what is required of them instead of setting standards (OSHRC 2019). This statement challenges the Clause citations and pressures OSHA to develop more standards and reduce reliance on the Clause. Conversely, the statement suggests that employers are confused with the Clause requirements. Thus, the focus of this study will be the Clause citations that are not associated with OSHA promulgated standards. There are few, if any, studies that assess the legitimacy of the Clause citations to provide a guide to better managing them. The focus of this article is timely in that OSHA does not have regulations governing much of the specific safety protocols that can protect construction workers against COVID-19. In order for OSHA to cite an employer for exposing employees to this very real health hazard, they either need to find a violation in an existing standard such as personnel protective equipment (PPE) standard or cite the Clause. Without the general duty clause, OSHA would have difficulty finding a mechanism to cite employers who put employees at serious risk. Accordingly, this study aims to provide an in depth review of the Clause citations based on court cases.

Contesting the Clause Citation

The basic concept behind the Clause is that employers should provide working conditions that are free from recognized occupational hazards that may cause or likely to cause death or serious physical harm. According to Section 10(C) of the Act, employers have the right to challenge the OSHA citations, including the Clause citations, before the Commission, which is an independent federal agency that serves as the court system to adjudicate disputes between employers and OSHA. The Commission was created by Congress to decide contests of citations or penalties that OSHA issues to employers. According to 29 US Code § 661(j), an administrative law judge (ALJ) shall be appointed by the Commission to hear the dispute cases. Employers have the right to participate in a dispute hearing before an ALJ. The hearing mirrors all the elements of a trial, including examination and cross-examination of witnesses. The ALJ may affirm, modify, or eliminate any contested items of the citation or penalty. The determination of the ALJ represents the Commission's order unless one of the commission members requests that the Commission review the order. Thus, the Commission functions as a two-tiered administrative court: (1) conducting hearings, receiving evidence and rendering decisions by its ALJs; and (2) providing an optional appeals panel of commissioners for reviewing ALJ's decision (OSHRC 2020). The review of ALJ decisions by the Commission could be initiated by employers who contest ALJ's decision or by OSHA when it disagrees with ALJ's decision [see *R.L. Sanders Roofing Co. v. the Commission* (1980)].

Furthermore, employers may seek judicial review under 29 US Code § 660 of the Commission order. Similarly, the court of appeals (i.e., judicial review) may affirm or deny decisions of the Commission based on the evidence presented. The judicial review will decide whether the Commission order is constitutional or not. According to 5 US Code § 706 (2)(A), the court of appeals must affirm the Commission's decisions unless they are "arbitrary, capricious, an abuse of discretion." OSHA also has the right for judicial review when it believes the Commission order is not constitutional. For example, the Secretary of Labor petitioned for reviewing an ALJ's order that found a roofer firm had not willfully violated an OSHA standard. In this case, the court of appeals held that OSHA failed to prove that roofer's violations were willful [see *Brock v. Morello Bros. Const., Inc.* (1987)]. Clearly, this contest resolution mechanism reduces the dispute cases that reach the courts. However, it is anticipated that the court cases that are based on the clause citations will further highlight the components of a valid clause citation.

Research Methodology

This work aims to assess the validity of the clause citations based on judicial reviews within the construction context. In addition, the research aims to assess the Clause's utilization within the construction industry. The main objective is to aid CSHO to better understand the clause citation requirements and their acceptable justifications. In addition, the study aims to reduce the industry confusion regarding the Clause and its mechanism. To achieve the study objectives, the following have been carried by the research team:

- The research team extracted OSHA inspection citations that are associated with clause citations utilizing the General Duty Construction Standard webpage (GDC 2020).
- The research team utilized the Thomson Reuters Westlaw's online legal database to extract construction federal court cases concerning the Clause (Fig. 1). Thomson Reuters Westlaw is an

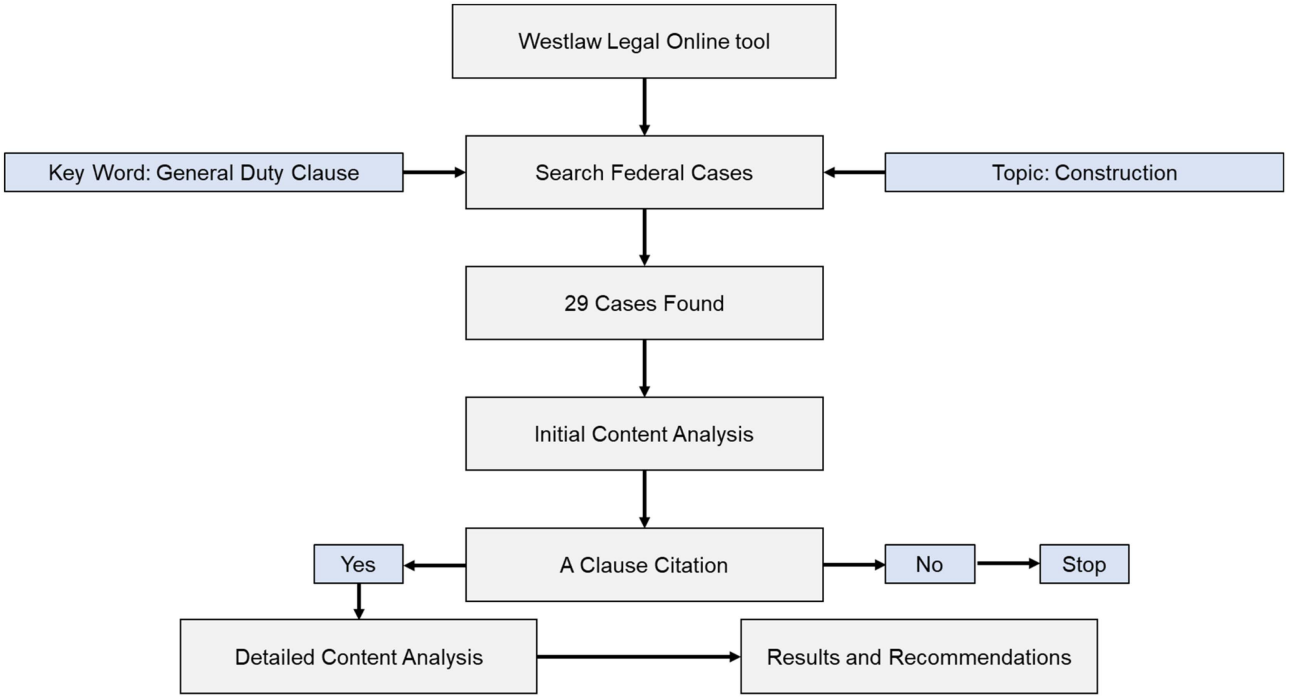

Fig. 1. Research methodology for federal court cases and content analysis.

online legal research service and proprietary database for lawyers and legal professionals. The search of the Thomson Reuters database yielded 29 court cases. However, because the analysis was mainly focused on clause citations, an initial context analysis of the 29 cases revealed only two cases that were directly relevant. Table 1 shows the results of the initial content analysis. As can be seen, several cases were not applicable because they do not present a case between a construction firm and OSHA concerning the Clause. For example, a construction firm contends that various aspects of the Act violate the constitution of the United States (*Savina Home Industries, Inc. v. Secretary of Labor*, 1979). Based on the initial content analysis, a detailed content analysis of the Clause court cases was conducted to extract the lessons learned from each case. This step is necessary to extract qualitative data from the cases related to the study objective (Nguyen et al. 2018).

Findings

The OSHA database was queried using the word "construction" to better understand the distribution of the Clause within the construction industry. Then, the resulting inspection reports and citations were screened for the following standard industrial classification (SIC):

- Building construction: Code 1500–1599
- Heavy construction: Code 1600–1699
- Special trade contractors: Code 1700–1799

Furthermore, reports that have no SIC number were screened to ensure they fall within the construction industry context. A total of 1,583 citations were found between 1985 and 2019. Fig. 2 illustrates the percentage of the clause citation within each SIC. More clause citations have been issued for special trades contractors (Fig. 2). Within the extracted reports, fall hazard was the main reason for clause citations, followed by struck-by and crushing (Fig. 3). Among the known hazards, lifting as an ergonomic hazard is the only one that has no recognized OSHA construction standard. Furthermore, an assessment of the hazards associated with each construction SIC suggests a different trend of challenges for the heavy construction section, which faces a higher rate of struck by violations (Fig. 4). Conversely, falling violations seem to be lower among heavy construction contractors, which is expected because heavy construction includes construction activities where falling hazards are minimal, such as highway and street construction. Furthermore, Fig. 5 shows the trends of clause citations per the SIC and the main four causes of clause citations. It seems that the proportion of clause citations concerning the struck-by hazard during heavy construction activities after 2010 has increased. This could be a result of the fact that the current OSHA standards have less focus on highway operations, as has been suggested by Al-Shabbani et al. (2018). As a result, the CSHO have to utilize the Clause to address the struck-by hazards in heavy construction activities.

Court Cases Review

Court cases represent an important learning opportunity. The three cases presented in Table 2 will be reviewed in-depth to better understand the elements of clause citations. The courts decide whether a construction firm committed a clause violation based on the citation circumstances. The court decides if the citation violates the spirit of the Clause or not. The reasoning of a court decision is often used by other courts to solve similar disputes.

Summary of Georgia Elec. Co. v. Secretary of Labor (1979)

Georgia Elec. Co., hereinafter referred to Georgia, was cited by OSHA as a result of permitting its employees to operate a hydraulic crane that had a reversed loadline control lever. When the lever was moved to the "raise" position, the crane was lowered, and when it was moved to the "lower" position, it was raised. A hearing was held before an ALJ, who affirmed the clause citation and proposed

Table 1. Initial content analysis results

No.	Case	Year	Cited standard
1	*R.L. Sanders Roofing Co. v. The Commission*	1980	The Clause
2	*Fabi Const. Co., Inc. v. Secretary of Labor*	2007	• 29 CFR 1926.703(a)(1) • The Clause
3	*Georgia Elec. Co. v. Secretary of Labor and the Commission*	1979	• 29 CFR 1926.550(a) • The Clause
4	*Ramsey Winch Inc. v. Henry (Governor of the State of Oklahoma)*	2009	N/A
5	*Anning-Johnson Co. v. The Commission*	1975	• 29 CFR 1926.550(d) • 29 CFR 1926.550(b) • 29 CFR 1926.550(e)
6	*S & H Riggers & Erectors, Inc. v. The Commission*	1981	29 CFR 1926.28(a)
7	*Horne Plumbing & Heating Co. v. The Commission*	1976	• 29 CFR 1926.652(b) • 29 CFR 1926.651(i)
8	*Secretary of Labor v. ASHWORTH*	1976	29 CFR 1926.700(a)
9	*Savina Home Industries, Inc. v. Secretary of Labor*	1979	N/A
10	*Reynolds v. United States*	2015	N/A
11	*Dilts v. United Group Services, LLC*	2010	N/A
12	*Ellis v. Chase Communications, Inc.*	1995	N/A
13	*Brennan v. The Commission*	1975	• 29 CFR 1926.250(b) • 29 CFR 1926.500(d)
14	*Tri-State Roofing & Sheet Metal, Inc. v. The Commission*	1982	29 CFR 1926.28(a)
15	*Transportation Ins. Co. v. Citizens Ins.*	2013	N/A
16	*Kane v. J.R. Simplot Co.*	1995	N/A
17	*Carlisle Equipment Co. v. Secretary of Labor*	1994	29 CFR 1926.550(a)(1)
18	*George Hyman Const. Co. v. The Commission*	1978	29 CFR 1926.250(b)(1)
19	*Anthony Crane Rental, Inc. v. Secretary of Labor*	1995	29 CFR 1926.550
20	*Bragg v. The United States*	1999	N/A
21	*Melerine v. Avondale Shipyards, Inc.*	1981	N/A
22	*Dun-Par Engineered Form Co. v. Secretary of Labor*	1982	29 CFR 1926.550(d)
23	*Secretary of Labor v. Morello Bros. Const., Inc.*	1987	29 CFR 1926.500(g)
24	*Beall Const. Co. v. The Commission*	1974	• 29 CFR 1926.56(a) • 29 CFR 1926.401(j) • 29 CFR 1926.350(a) • 29 CFR 1926.150(a)
25	*Secretary of Labor v. Adams Steel Erection, Inc.*	1985	• 29 CFR 1926.100(a) • 29 CFR 1926.750(b)
26	*National Roofing Contractors Ass'n v. Secretary of Labor*	1974	N/A
27	*Modern Continental/Obayashi v. The Commission*	1999	29 CFR 1926.501(b)
28	*Edison Elec. Institute v. OSHA*	1988	29 CFR 1926. 400
29	*Stiefel v. Bechtel Corp*	2007	N/A

penalty of $650. The ALJ's decision was subsequently affirmed by the Commission based on the fact that the reversed lever constituted a hazard. On the court appeal, Georgia built its argument about whether the reversed lever was due to "mislabeling" or "malfunctioning" and about whether there was proof in the record that the lever should "normally" be pushed up or down to raise the crane. However, the court confirmed the Commission decision that hazard was likely to cause death or serious harm. Also, the hazard was preventable through a feasible action of relabeling the control panel or reversing the operation of the lever itself. Moreover,

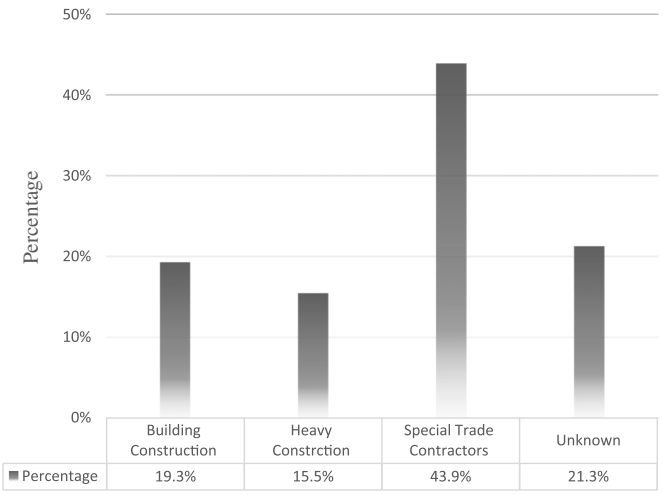

Fig. 2. Frequency of clause citations per SIC.

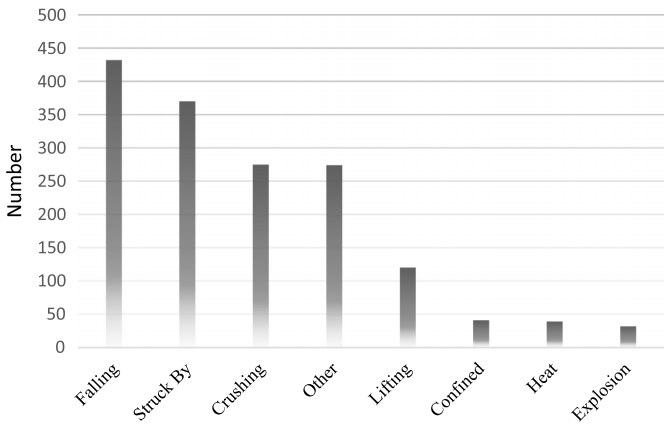

Fig. 3. Frequency of clause citations per hazard.

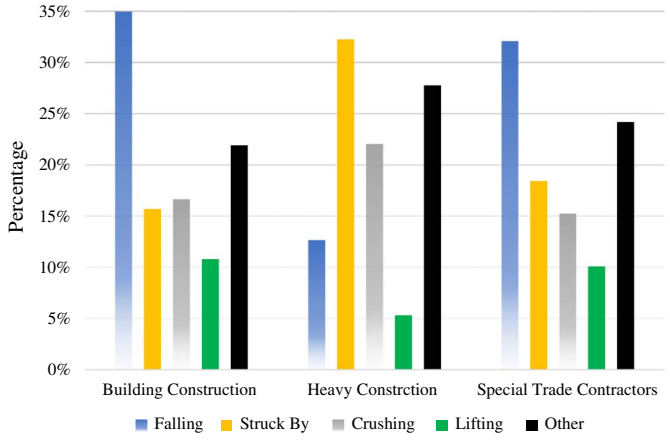

Fig. 4. Frequency of clause citations per SIC and hazard.

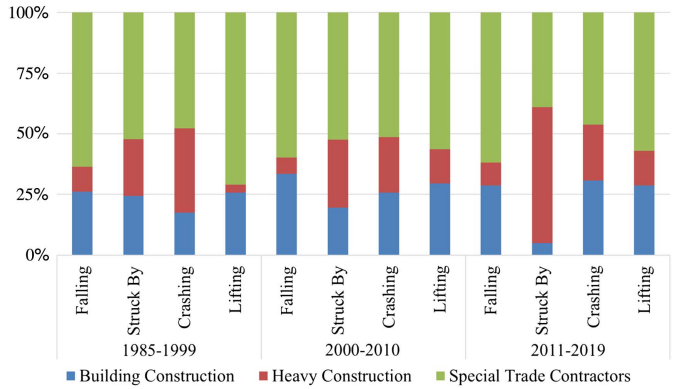

Fig. 5. Trends of the frequency of clause citations per SIC and main hazards.

Georgia knew, or should have known, about the hazard with the exercise of reasonable diligence. As a result, all the elements necessary to prove a serious violation of the General Duty Clause have been established. As for the Georgia's argument, the court indicated that this argument misses the point. It does not matter whether it was mislabeled or malfunctioned. It is the fact that the lever was working in the opposite direction from the markings on the control panel. Accordingly, the petition was denied and enforcement was affirmed.

Summary of R. L. Sanders Roofing Co. v. The Commission (1980)

On June 3, 1976, OSHA issued a citation charging R. L. Sanders Roofing Company, hereinafter referred to as RL, with a serious violation of the Clause. The citation arose out of an accident in which one of RL's employees fell from the flat roof of a building on which they were working without fall protection equipment. RL contested the alleged violation before the Commission where an ALJ found that RL was not in violation of the Clause because OSHA had failed to prove that falling from a flat roof was a recognized hazard. At that time, the ALJ relied on a prior statement by OSHA that 4/12 slope or less roofs did not present a substantial danger of falls. The readers of this article should be aware that the law has been changed. The current law requires fall protection on flat commercial roofs. Additionally, the ALJ found that utilizing the Clause when there was no duty to install fall protection under the promulgated regulations did not comply with either reason or fundamental fairness. OSHA petitioned the Commission for review. After a briefing by the parties, the Commission overturned the decision of the ALJ based on the fact that OSHA has provided evidence that working on a flat roof is a recognized serious hazard by safety experts. In addition, the Commission stated that the severity of an accident is high if an accident occurs. As a result, RL petitioned the court of appeals for review of the Commission's order. The court of appeals agreed that the existence of promulgated regulations that address roofing works precludes OSHA from charging RL with a violation of the Clause. In the absence of a specific regulation under the roofing works regulation at that time, the court declined to impose liability on RL. Therefore, RL's petition was accepted and enforcement of the citation was denied.

Summary of Fabi Const. Co., Inc. v. Secretary of Labor (2007)

Fabi Construction, Inc. and its management company, Pro Management Group, hereinafter referred to as Fabi and Pro, were hired by a general contractor to place concrete for a 10-story parking garage. On October 30, 2003, while Fabi and Pro were pouring concrete on the eighth level, Levels 4–8 collapsed, killing four employees and injuring 20. OSHA cited Fabi and Pro for willful violation of the Clause by failing to place top steel in accordance with shop drawings and rebar in accordance with industry practice. Fabi and Pro contested the citations before the Commission. The Commission appointed an ALJ to hear the case. Just before the hearing, OSHA changed the willful classification of the citation into a serious classification. ALJ affirmed the citation. As a result, Fabi and Pro petitioned the court of appeals for reviewing the order and challenged the Commission's affirming the citation by stating that the citation was not based on substantial evidence. OSHA indicated that the petitioners violated the Clause by failing to place top steel in accordance with shop drawings and industry practice. The ALJ hearing established enough evidence by having experts testify that drawing and industry practice required petitioners to attach the top steel to the crash wall and to embed the top steel into the columns at about 8 in. As for the feasible abatement, the ALJ stated that the petitioners could have been stopped to consult with the structural

Table 2. Clause court cases

Case	Hazard description	Court order	SH	AP	WE	RH	FM
Georgia Elec. Co. v. Secretary of Labor (1979)	Operate a hydraulic crane that had a reversed loadline control lever	Petition denied and enforcement affirmed	Yes	Yes	Yes	Yes	Yes
R.L. Sanders Roofing Co. v. The Commission (1980)	Not installing guardrails around a flat roof	Petition accepted and enforcement denied	Yes	No	Yes	Yes	Yes
Fabi Const. Co., Inc. v. Secretary of Labor (2007)	Parking garage collapse during construction	Petition denied and enforcement affirmed	Yes	Yes	Yes	Yes	Yes

Note: SH = serious hazard; AP = the absence of an OSHA promulgated standard; WE = workers exposed; RH = recognized hazard; and FM = feasible measures.

engineer to ensure that the shop drawings were sufficient. Accordingly, the petition was denied, and enforcement was affirmed.

Discussion and Recommendations

The information presented in this study is vital to effectively manage disputes regarding the Clause. Thus, upper management and safety personnel should be aware of the elements of the proper clause citation. Upper management and safety personnel are responsible for the overall safety culture (Al-Bayati et al. 2019). Construction firms have the right to contest OSHA citations when issued, allowing them to dispute their liability for the alleged violation. The Commission, which is an independent federal body from OSHA, will serve as the adjudicatory body for this dispute during the first phase of the challenge. However, construction firms should contact the OSHA area director to discuss the citation in more detail. This discussion, which is commonly known as the informal conference, will not preclude contesting the citation. Contesting OSHA citations could be a necessary step when employers believe the citation is unfair or can significantly damage their business. Warning employers of potential hazard in order to eliminate or mitigate them is the keystone of the Act (*Brennan v. The Commission*, 1975). Thus, it is always recommended to have an informal conference with OSHA to discuss the citations if they significantly influence the business operation and contest them before the Commission if necessary. There are several situations where contesting a clause citation is necessary, including, but not limited to, costly abatement, significant penalty amount, avoiding protentional civil liability (state laws vary significantly, but some jurisdictions allow OSHA citations to be considered in personal injury litigation), and industry reputation, which is an asset that should be carefully managed to prevent the loss of future business opportunities.

OSHA must prove that a violation occurred by providing substantial evidence. The burden to prove a violation is heavier when it comes to clause citations because there are no particular actions required to be carried out by the employer. Specifically, the research team believes that clause citation is challenging when it comes to providing substantial evidence that a serious hazard exists and feasible means to eliminate or mitigate it is available as well. Based on the reviewed cases, the courts seem to consider the following as substantial evidence for both the hazard severity and the feasibility of the means:

- Industry practice and recognition,
- Shop drawings,
- Manufacturer's safety warnings (OSHRC 2013), and
- Common knowledge of safety experts who are familiar with the situation.

Furthermore, the RL case suggests that it is not acceptable to use the Clause to restrict the requirements of promulgate standards: "If the Secretary of Labor (i.e., OSHA) is concerned about employees' falling from the edge of a flat roof, he should promulgate a regulation that specifically addresses that hazard rather than seek to impose liability on employers under the general duty clause for failure to protect against it."

As a result of this case, OSHA currently has a promulgated regulation to address the hazard of falling from the edge of a flat roof. Precisely, the current *Duty to Have Fall Protection* standard [i.e., 1926.501(b)(1)] requires the following: "Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 ft (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems."

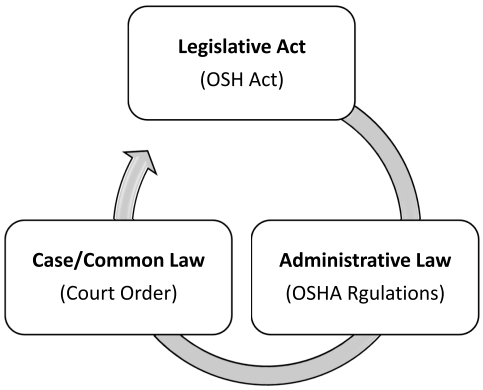

Fig. 6. Importance of the case law in improving OSHA standard.

It seems that this standard did not exist in 1976. Accordingly, it could be concluded that contesting OSHA citations can contribute to better regulations and understating of overall need to mitigate the industry recognized hazards.

Fig. 6 illustrates a theoretical model of the beneficial contribution of contesting OSHA citations. Citations and sometimes the appeals of these citations can be a useful impetus to enacting new safety and health standard. In addition, the process of learning through citation contests could help improve the current shortcomings of OSHA standards. Thus, contesting clause citations that are not satisfying the components discussed in this article is a necessary step for a healthier safety and health management system.

It is not recommended that CSHO issue a clause citation for activities that already have promulgated standards such as excavation and scaffolding. As a result, construction firms should dispute clause citations that are part of promulgated standards unless the situation is not covered by the standard [29 C.F.R. § 1910.5(f)]. It seems that falling hazard has been the main cause of clause citations (Fig. 2). A review of the frequency of utilizing the Clause to cite fall hazard violations between 2000 and 2019 is presented in Fig. 7. Despite the spike in 2009 and 2010, the number of citations over the years seem to be inconsistent. The high number of clause citations that are related to fall hazards and the apparent spike in 2009 and 2010 will require further investigation to reveal the nature of these citations and why the promulgated fall standard was not enough to address them. Unfortunately, there is not enough information available about the nature of the fall clause citations. Thus, further investigation is crucial to provide insightful information about the shortcomings of the current fall standard that forced CSHO to use the Clause. The investigation could highlight the need to propose new standards or revise the existing ones because the Clause is only intended to fill the unintentional gaps in the fall promulgated standard.

It seems that the industry is not fully aware of the steps involved in and the necessity for contesting clause citations. This conclusion is based on the fact that there are a small number of court cases when compared to the number of Clause citations, hence highlighting the importance of this study. The importance lies in the clear explanation of the process that has been rarely discussed in the literature. Employer knowledge about the hazard must also be established to issue a clause citation. OSHA needs only to show that a hazard violation has been committed and that the area of the hazard has been accessible to the employees of the cited employer or those of other subcontractors (*Brennan v. The Commission*, 1975). However, Section 17(k) of the Act precludes employer liability for a serious violation when the employer did not, and could not with the exercise of reasonable diligence, know about the violation,

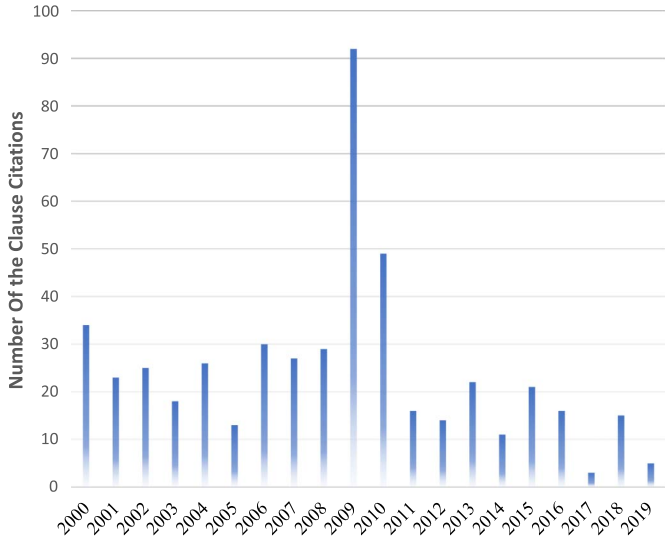

Fig. 7. Frequency of the clause fall citations per year.

suggesting that a clause citation should not be issued in these situations. This is true because a clause citation must be built on a serious violation. For example, the United States Court of Appeals, Fifth Circuit reversed the Commission order that affirmed a serious violation and concluded that it was inconsistent with the Act to penalize an employer for violations that he had no knowledge or could not have foreseen (*Horne Plumbing & Heating Co. v. The Commission*, 1976). The measures and circumstances presented before the court in this case were: (1) an excellent safety program existed that was verified by a safety expert; (2) the owner actively engaged in efforts to provide safe working conditions; (3) the employer had an excellent safety record prior to the day of the accident; and (4) prior to the construction day, the owner made a written summary of pertinent OSHA and county regulations, and informed OSHA and the county inspector of the re-excavation plans. This case delivers a great example of how safety efforts could be utilized to reduce violation classification and show OSHA that an employer is taking precautions to ensure the safety of their employees. Accordingly, the employer should not receive a serious violation. Similarly, the Commission considers the training efforts to establish evidence that an employer has mitigated the hazard (OSHRC 2019). As a result, employers who provide evidence of their efforts to improve overall site safety should not be cited with a serious violation for unpreventable instances of hazardous conduct by their employees. Thus, it is recommended that construction firms make serious efforts to participate in safety education events and utilize industry best practices and common sense to mitigate or eliminate workplace hazards. All these activities should be appropriately documented to avoid serious violations, and consequently, clause citations. The limited number of clause citations that have been discussed in this study could be a result to the effective dispute management system (i.e., the Commission). However, the learned lessons from these three cases highlighted the main critical components of a justifiable clause citation. It is recommended that construction firms assess these components to evaluate the validity of a clause citation.

Concluding Remarks

Issuing a clause citation must be based on the existence of a serious hazard that is recognized by the industry. A serious hazard refers to a condition that poses a risk of harm that can cause death or serious physical or health injuries. Furthermore, CSHO must ensure that industry practices such as training and other measures to avoid a serious hazard have not been followed before issuing a clause citation. Finally, the fact that an employer knew, or should have known, about the unsafe condition must be established as well. Accordingly, clause citations need to be clearly defined and established on solid evidence to be valid. Construction activities that are not yet addressed by a specific OSHA regulation but executed according to the common industry practices should not be subject to the Clause. As our knowledge and understanding of occupational safety and health continue to expand, construction practitioners and scholars may start recognizing and documenting new hazards that should be addressed through the Clause until proper regulation is issued. A warning of these new hazards and their mitigation should be clearly communicated to eliminate ambiguity because the intent of the Act is to help employers provide safe and healthy workplaces. Therefore, it is recommended to always discuss clause citations with OSHA through the informal conference to utilize them for improving the overall safety performance. The informal conference could help OSHA and construction firms save time and better manage occupational safety and health. Ultimately, the aim of the Clause and OSHA standards is to improve overall site safety through industry best practices and feasible measures that are based on fairness and knowledge. This study has provided a clear illustration of the Clause requirements as well as its limitations, which will help CSHO and construction practitioners better manage the Clause and satisfy its purpose. Finally, understanding the Clause is helpful for the industry in that construction firms will realize that just because there is not an OSHA standard for something does not mean that they should not or do not need to be taking precautions to keep their workers safe and healthy.

Data Availability Statement

Some or all data, models, or code that support the findings of this study are available from the corresponding author upon reasonable request.

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