

“HELLO, I’M FROM THE GOVERNMENT AND I AM HERE TO HELP”

A Brief Overview of OSHA in the Construction Industry

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The federal Occupational Safety and Health Act was enacted in the early 1970’s to assure safe and healthful working conditions for employees across the nation. To further this purpose, the Act created and empowered the Occupational Safety and Health Administration (“OSHA”) with jurisdiction to promulgate and enforce safety standards and regulations. Obviously, given the nature of the construction industry, contractors are impacted on a daily basis by these regulations. A contractor who is cited for violations will be subject to harsh monetary penalties, as well as the costs and expenses associated with defending the citation, not to mention the company’s internal administrative costs and loss of productivity caused by the matter. As such, an employer in the construction industry is well advised to adopt and implement an effective safety program and to adequately train its employees and supervisors on the relevant safety standards. An employer is likewise well advised to become generally familiar with the procedures governing inspections and if cited, to properly analyze the potential for an effective defense.

Enforcement standards.

Kentucky is one of 26 states that have adopted a federally approved OSHA program. Accordingly, Kentucky employers are governed by the procedures and standards adopted by the Kentucky Occupational Safety and Health Agency (“KOSHA”) rather than OSHA. Practically speaking however, this is a distinction without much meaning as Kentucky for the most part, has adopted and incorporated the federal safety standards.

It is beyond the scope of this article to address in detail, the intricacies of the OSHA enforcement standards. As a general principle, however, an employer whose employees have “reasonably predictable exposure” to a violative condition, regardless if your company “created” the hazard is subject to a citation. Whether the employee had “reasonably predictable exposure” is typically determined by whether the employee was in the “zone of danger.” This analysis must be done on a case by case basis depending on the nature of the hazard and the circumstances of the exposure. There is no black and white rule as to what constitutes the “zone of danger.’ As such, the employer is oftentimes cited for conditions that the inspector subjectively believes are in the “zone of danger” but can be effectively defended against in the hearing process. On the other hand, the circumstances may very well dictate that the employee was obviously in the zone of danger and hence, little room exists to credibly defend the substance of the violation.

Multi-employer doctrine

For years, OSHA has relied upon the multi-employer doctrine outlined in its Field Inspection Reference Manual to fine “controlling” contractors, (i.e., the general contractor) for safety violations of other contractors regardless if such contractor’s employees were exposed to the cited hazard. In effect, this meant that a general contractor (the “controlling” contractor) was typically cited in addition to the subcontractor who allegedly violated the safety standard. In a decision issued April 27, 2007 by the Occupational Safety & Health Review Commission, this policy was struck down as being inconsistent with the underlying regulation contained at 29 CFR § 1910.12 which in pertinent part provides that “Each employer shall protect the employment and places of employment of each of *his employees* engaged in construction work...” (Emphasis added) See, *Secretary of Labor v Summit Constructors, Inc.*, OSHRC Docket No. 03-1622 (2007). Accordingly, the Commission’s ruling relieves the general contractor of liability for the safety violations of its subcontractors solely because of its capacity as the controlling contractor. The *Summit* ruling is currently on appeal to the Eighth Circuit Court of Appeals. While it remains to be seen how this decision will impact the Kentucky Review Commission’s position (as well as the Kentucky courts) the *Summit* ruling is certainly a significant and major chink in the armor of the multi-employer doctrine.

Keep in mind, however, that the ruling does not relieve any contractor from responsibility it has over its *own* employees who have reasonably predictable exposure to a violative condition. Every employer on a multi-employer construction site remains responsible for compliance of the safety standards to the extent its own employees are exposed.

Inspections and Citations

KOSHA authorizes workplace inspections and investigations to determine whether employers are complying with safety standards. Most inspections are unannounced and can be triggered by a complaint, a referral, a program inspection or because of a death or hospitalization of three or more employees. A KOSHA compliance officer can not conduct a warrantless search without the employer’s consent unless the premises are in open view to the public, or where there is “imminent danger.” If denied access because of lack of a warrant, the compliance officer may obtain a warrant by application to the Franklin Circuit Court. The employer will need to seriously consider whether it is in the company’s interest to consent to the inspection or require the warrant. It is the common view of many that that issuance of a citation is more likely at the conclusion of an inspection if the employer refuses consent and forces the compliance officer to obtain a warrant.

Following the inspection, if a safety violation is found, the employer is subject to a citation and penalty which depending on the classification, can range from up to \$70,000 (willful or repeated violation) or \$7,000 (serious violation) for each violation. If an employer is cited, it is common that multiple violations (sometimes for the same condition) are found and thus, the cumulative penalties can be substantial.

Contest procedures

The employer is granted the right to contest the issuance of any citation. If this is done, the employer must do so within 15 days of being served with the citation. If timely contested, the matter is referred to the Kentucky Occupational Review Commission who then assigns the case to an administrative hearing officer who then schedules a hearing on the merits. A hearing is similar to a trial in that witnesses and evidence is presented, the parties are granted the right to cross-examine witnesses, and exhibits are introduced. The hearing officer will issue findings and conclusions either affirming the citations, or modifying or eliminating the citations based upon the evidence presented at the hearing.

Any employer who is issued citations should strongly consider contesting the violations. Many (not all) citations are defensible if not on the merits, at least in the amount of the proposed penalty. The employer who simply pays the citation must always be mindful that any repeat violation for the same safety violation is substantial (up to \$70,000 per violation). Accordingly, the employer has every incentive to defend against any citation regardless if the proposed penalty appears at first blush to be minimal.