

**OSHA INSPECTIONS AND PERSONAL INJURY CLAIMS**

Marc A. Young  
Cokinos, Bosien & Young  
1500 Liberty Tower  
2919 Allen Parkway  
Houston, Texas 77019  
(713) 535-5500



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## I. OCCUPATIONAL SAFETY AND HEALTH ACT

### A. Purpose And Application

1. The Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C. 651 *et seq* (1994), was established 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. See Section 5(a)(1) of the Act, also known as the General Duty Clause.

2. OSHA applies to all employers and their employees in all fifty states, the District of Columbia, Puerto Rico and all other territories under federal government jurisdiction. The application of OSHA regulations is applied either directly through the Federal OSHA program or through a federally approved OSHA state program. For a list of OSHA approved state programs, see Addendum 1.

a. An employer is defined as any person/entity engaged in a business effecting commerce who has employees. 29 U.S.C. 652(5). This definition does not include the United States or any state or political subdivision of a state.

(1) There are two views with regard to who an employer is on a multi-employer work site.

a. The majority view is referred to as the Barnako-Cleary doctrine. This doctrine stands for the proposition that a general contractor may be responsible for OSHA violations committed by employees of subcontractors. See Clarkson Construction Company v. OSHRC, 531 F.2d 451 (10th Cir. 1976).

b. However, there is a minority view that holds that a general contractor will only

have responsibility for employees of a subcontractor if the contractor exercises direction over the operative detail of the work as opposed to determining whether the work is satisfactorily completed. See Southeast Contractors, Inc. v. Dunlop, 512 F.2d 675 (5th Cir. 1975); Anning-Johnson Co. v. OSHRC & Brennan, 516 F.2d 1081 (7th Cir. 1975); Smith v. ACandS, Inc., 31 Cal.App.4th 77, 37 Cal. Rptr. 2d 457 (Cal. App. 1 St. Dist. 1994).

- c. Each employee is also required to comply with OSHA standards, rules, regulations and orders. See 29 U.S.C. 654(b).

## B. OSHA Inspectors

1. Inspections are conducted by OSHA Compliance Safety and Health Officers (Compliance Officers). Compliance Officers are divided into two categories, (1) industrial hygienists who generally conduct only occupational health inspections and (2) safety officers who usually conduct inspections for safety hazards. Your typical industrial hygienist is a college graduate. Your typical safety officer is more likely to have only a high school education plus on the job training.

## C. Types Of OSHA Inspections

1. There are two types of OSHA inspections (1) programmed inspections and (2) unprogrammed inspections.

- a. Programmed inspections constitute roughly three-fourths of all inspections. They are aimed at specific high hazard industries, occupations or health substances. This type of inspection typically results from an administrative

selection plan which takes into consideration things such as injury incident rates, previous citation history and employee exposure to toxic substances.

- (1) Cal/OSHA is not currently making programmed inspections.
- b. Unprogrammed inspections are conducted in response to particular incidents brought to OSHA's attention by way of (1) a report of a condition which creates an imminent danger; (2) a report of a catastrophe/fatal accident; and (3) a report from the media/employers/employees of accidents involving serious injuries or hazards of a serious nature.

2. OSHA has established the following system of inspection priorities.

- a. Imminent danger.
  - (1) Imminent danger is any condition where there is reasonable certainty that a danger exists that can be expected to cause death or serious physical harm immediately or before the danger can be eliminated through normal enforcement procedures. 1903.13.
- b. Catastrophes and fatal accidents.
  - (1) Incidents involving the death to any employee or which results in the hospitalization of three or more employees must be reported to OSHA by the employer within 8 hours. 1904.8.
- c. Formal employee complaints.

(1) An employee has the right to request an OSHA inspection when the employee believes he or she is in imminent danger from a hazard or when he or she thinks there is a violation of an OSHA standard that threatens physical harm.

1903.11.

(2) OSHA will maintain the confidentiality of the complaining employee if requested and will inform the employee of any action it takes regarding the complaint and if requested will hold an informal review of any decision not to inspect. 1903.11.

d. Programmed inspections.

e. Follow-up inspections.

(1) Follow-up inspections are used to determine if previously cited violations have been corrected.

#### D. OSHA's Authority To Inspect

1. OSHA's authority to inspect is contained in 1903.3 of the Act, which allows a compliance officer to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, work place or environment where work is performed by an employee of an employer; and to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee. 29 U.S.C. 1903.3.

#### E. De-mystifying The OSHA Inspection

1. Notice - Inspections are usually conducted without advanced notice. In fact, alerting an employer without proper authorization in advance of

an OSHA inspection can bring a fine of up to \$1,000.00 and/or a six month jail term to the offender.

1903.6.

2. Presentment - The OSHA Compliance officer, upon arrival at a construction site, must present his official credentials and ask to meet an appropriate employer representative. Although the presentation of credentials is required by statute, failure to present credentials will not necessarily invalidate the inspection. 1903.7(a).

- a. OSHA's Field Operations Manual (FOM) directs the compliance officer who arrives at a construction work site to "attempt to locate the owner, operator or agent in charge." On a multi-employer work site, the representative of the general contractor is typically requested to provide the name of the various subcontractors and their representative so that all may be gathered at one location to participate in the opening conference and the walk around.

3. Request for access - Although compliance officers have a right to inspect work sites, any employer may refuse entrance or access. OSHA may not conduct warrantless inspections without an employer's consent. See Marshall v. Barlow, 436 U.S. 307, 98 S.Ct. 1816 (1978). In Barlow, the Court held that a judicially authorized search warrant was required in order to search a premises where an employer had denied OSHA the right to enter. 436 U.S. at 312, 98 S.Ct. at 1827. The Fourth Amendment to the Constitution provides the basis for the legal protection from arbitrary searches by the government. See 29 U.S.C. 1903.4(a).

- a. In California, non-consensual inspections follow the holding in Salwasser Mfg. Co., Inc. v. Municipal Court for Fresno Judicial Dist., 94 Cal.App.3d 223, 156 Cal. Rptr. 292 (Cal. App. 5 Dist. 1979). In Salwasser, the Court held the possible far

reaching penal consequences of the Cal/OSHA inspection forced the Court to conclude that the search and seizure requirements of the Fourth Amendment and Article I, Section 13 of the California Constitution mandated the requirement of probable cause for inspection warrants. The Salwasser Court set a standard higher than that of the U.S. Supreme Court in Marshall vs. Barlow because the penal consequences of the Cal/OSHA inspection far exceed those under the federal OSH Act. The probable cause requirement in the Salwasser standard must support a belief that safety violations currently exist on the premises whereas the Barlow decision simply required probable cause based upon administrative probable cause or evidence of a violation.

- b. The processing time for a typical search warrant or inspection warrant is two to five days. The decision to refuse entrance to an OSHA compliance officer should be weighed very carefully. It has been reported that three times as many violations are cited to an employer who refuses entrance as opposed to one who does not.
  
- c. In California, a return must be provided to the judge who issues the inspection warrant within 14 days of its issuance, explaining what was found as a result of the warrant. In order to initially obtain the warrant, OSHA must have represented to the Court by way of affidavit information sufficient for a showing of probable cause. The Court is likely to look with disfavor upon the issuance of future inspection warrants if very many returns are filed indicating no violations were observed.

- d. Some companies prohibit warrantless searches of their premises as a stated company policy. See Addendum 2 for an example of such a policy.
- e. An employer may revoke his voluntary consent to an inspection at any time during the inspection.

4. Opening conference - Once a compliance officer is lawfully on the premise and in contact with both the appropriate representative of the employer and any employee groups which may be entitled to representation, an opening conference is conducted. Typically, the compliance officer will explain the purpose of the visit, the scope of the inspection and the standards that apply. The compliance officer will also explain how this particular sight was selected and whether the investigation will be "wall to wall" or on some limited subject or topic. In the case of a search warrant, the warrant will dictate the scope of the search or inspection allowed. 1903.7(a).

- a. During this opening conference an employer is entitled to identify any areas within the premises which contain or might contain trade secrets. OSHA is required to preserve the confidentiality of all information which might reveal trade secrets. 1903.9.

5. The Walk Around - The walk around is the actual inspection process. The compliance officer and any accompanying representatives will proceed through the establishment to inspect work areas for safety and health hazards. The inspection process should take place during normal work hours absent unusual circumstances. 1903.7(b) & (c).

- a. During the inspection, an employer representative and employee representative, if applicable, are entitled to accompany the compliance officer on his inspection. 657(a).
- b. The compliance officer is allowed

to speak with employees privately.  
1903.10.

- c. The company compliance officer may take photos and instrument readings, examine records, collect air samples, measure noise levels, survey existing engineering controls and monitor employee exposure to toxic fumes, gases and dusts. 1903.7(b) & (c).

6. The Closing Conference - Following the inspection, the compliance officer shall:

"confer with the employer or his representative and informally advise him of any apparent safety or health violations disclosed by the inspection."

1903.7(e).

- a. During such conference, the employer shall be afforded an opportunity to bring to the attention of the Compliance Safety and Health Officer any pertinent information regarding conditions of the work place." 1903.7(e).
- b. The failure to hold such a conference will not void any of the citations given absent a showing of prejudice. See, e.g., Pullman Power Prods. Inc. v. Marshall, 655 F.2d 41 (4th Cir. 1981).

F. OSHA Investigation Records

1. All non-privileged OSHA documents are discoverable by way of a Freedom of Information Act request.

- a. Time of discoverability. Section 9C of the OSH Act provides that "no citation may be issued... after the expiration of six months following the occurrence of any violation." The six month statute of limitation for civil penalties is not extended to criminal penalties. The limitation for criminal penalties is subject to the five year statute of limitations provided in 18 U.S.C. 3238 for federal, non-capital offenses.

2. Admissibility of OSHA documents vary from state to state. California Labor Code Section 6304.5 states,

"neither this division nor any part of this division shall have any application to, nor be considered in, nor be admissible into, evidence in any personal injury or wrongful death action arising after the operative date of this section, except as between an employee and his employer." See also, Griesel v. Dart Industries, Inc., 23 Cal.3d 578, 591 P.2d 503 (Cal. 1979); overruled on other grounds by Privette v. Superior Court, 5 Cal.4th 689, 854 P.2d 721, 21 Cal. Rptr. 2d 72 (Cal. 1993)

G. OSHA Regulations As Used In Personal Injury Cases

1. Section 653(b)(4) of the Act provides

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

This provision was placed in the original OSH Act to alleviate the concerns of law makers that private litigants would use OSHA regulations to create new private causes of actions. Some jurisdictions hold that OSHA standards and regulations are intended to govern solely the relationship between employer and employee whereas other jurisdictions accept a broader interpretation extending even to third parties.

- a. Although regulations within the Act do not allow for the creation of new private causes of actions, numerous states have allowed OSHA regulations to be admitted into evidence for the purpose of establishing a standard of care. See Pratico vs. Portland Terminal Co., 783 F.2d 255 (1st Cir. 1985). For a list of some of the states using OSHA as a standard of care, see Addendum 3.
- b. A minority of states allow violations of OSHA regulations to serve as proof of negligence *per se*. For a list of some of the

states applying the negligence *per se* standard, see Addendum 3.

c. Some states strictly prohibit the admissibility of OSHA regulations for proof in civil actions except as against employers.

(1) California strictly prohibits the application of any OSHA regulation for the admissibility of any OSHA document as evidence in any personal injury or wrongful death action except as between an employee and his employer. See Cal/OSHA 6304.5.

d. Some courts have suggested OSHA regulations may be used defensively.

(1) One means of an application of the defensive use of the OSHA regulations is provided in 654(b) of the Act which reads:

"Each employee shall comply with occupational safety and health standards and all rules, regulations and orders issued pursuant to this chapter which are applicable to his own actions and conduct. In jurisdictions where OSHA regulations are applicable, an argument may be made that every violation an employer is alleged to have committed would also have necessarily been violated by the employee."

(2) Defendants may also argue in those jurisdictions which allow the introduction of OSHA standards their compliance with same as manifesting a reasonable standard

of care. See Smith v. Firestone Tire and Rubber Co., 755 F.2d 129 (8th Cir. 1985).

H. Admissibility Of OSHA Compliance Officer Testimony

1. In general, OSHA compliance officers cannot be compelled to testify at civil state court proceedings which involve the matters the compliance officer investigated in connection with his OSHA employment. See 29 C.F.R. 2.20(a).

ADDENDUM 1

STATES WITH FEDERALLY APPROVED  
OSHA PLANS

Alaska  
Arizona  
California  
Connecticut  
Hawaii  
Indiana  
Iowa  
Kentucky  
Maryland  
Michigan  
Minnesota  
Nevada  
New Mexico  
New York  
North Carolina  
Oregon  
Puerto Rico  
South Carolina  
Tennessee  
Utah  
Vermont  
U. S. Virgin Islands  
Virginia  
Washington  
Wyoming

ADDENDUM 2

EXAMPLE OF COMPANY POLICY PROHIBITING  
WARRANTLESS SEARCH OF EMPLOYER'S PREMISES

STEEL NAIL CORPORATION - STATEMENT OF POLICY

It is the policy of Steel Nail Corporation to cooperate with any governmental agency seeking to lawfully enforce federal, state or local laws or regulations pursuant to the safeguards guaranteed by the Constitution of the United States.

Steel Nail Corporation is familiar with the United States Supreme Court's ruling in Marshall vs. Barlow, Inc., that a warrantless search or inspection of company property, or any portion thereof, conducted pursuant to Section 8(a) of the Occupational Safety and Health Act of 1970 is unconstitutional.

Therefore, Steel Nail Corporation chooses to exercise its constitutional rights and will not permit, nor is any employee of this company authorized to permit, any search or inspection by any representative of the Occupational Safety and Health Administration unless conducted pursuant to a valid warrant.

Steel Nail Corporation does not believe that probable cause exists for an OSHA inspection of its property. In the event that the Secretary of Labor believes otherwise and decides to make application for an inspection warrant, we hereby request that notice of such application be given to us so we can have an opportunity to oppose the same.

This statement of policy has been reduced to writing and is being delivered in hand to each OSHA representative seeking to make a warrantless search of our properties so that OSHA will be officially advised of everything stated therein. Only the following persons are authorized to represent this company in any discussion or meeting with anyone requesting an OSHA inspection:

ADDENDUM 2 - CONTINUED

Donovan J. Milton, Plant Manager  
B. F. Rand, Director of Personnel  
Walter John, Safety Representative

R. Ben Hogan III et al, Occupational Safety and Health Act, Volume I, at Chapter 5, Page 29 (1995).

### ADDENDUM 3

#### STATES USING OSHA REGULATIONS AS A STANDARD OF CARE OR ALLOWING VIOLATIONS OF OSHA REGULATIONS AS PROOF OF NEGLIGENCE *PER SE*

##### **Connecticut**

Wendland v. Ridgefield Const. Services, Inc., 184 Conn. 173, 439 A.2d 954 (Conn. 1981). Violation of OSHA is merely evidence of negligence, not negligence *per se* under Connecticut law.

##### **Florida**

Radon v. Automatic Fasteners, 672 F.2d 1231, 1238 (5th Cir. 1982). The court affirmed admission of OSHA regulations in a product liability case, reasoning that violation of an OSHA regulation is evidence of negligence or, in appropriate circumstances, negligence *per se*.

##### **Maryland**

Albrecht v. Baltimore & Ohio R. Co., 808 F.2d 329 (4th Cir. 1987). Upheld use of OSHA regulations as evidence of the standard of care exacted upon employers in a negligence action.

##### **Mississippi**

Dixon v. International Harvester Co., 754 F.2d 573 (5th Cir. 1985). Affirmed earlier holdings that OSHA regulations may only be used to establish negligence *per se* when the plaintiff is an employee of the defendant, and that notwithstanding the absence of such a relationship, OSHA standards could still be offered as relevant evidence of a defendant's negligence.

##### **New York**

Cappellini v. McCabe Powers Body Co., 713 F.2d 1 (2nd Cir. 1983). Under New York law, violation of the OSHA regulation does not establish negligence *per se*, but will constitute some evidence of negligence, which the jury can take into consideration with all other evidence bearing on the subject.

Kaczmarek v. Bethlehem Steel Corp., 884 F.Supp. 768 (D.N.Y. 1995). As recognized by the Second Circuit, the violation of OSHA regulations may merely constitute some evidence in support of a general negligence claim in an appropriate case.

ADDENDUM 3 - CONTINUED

**Ohio**

Angel v. United States, 775 F.2d 132 (6th Cir. 1985), *aff'd*, 836 F.2d 1347 (6th Cir. 1988). The breach of a duty imposed by regulation is negligence *per se* if the plaintiff is a member of a class of persons which the regulation was intended to protect, and this extends to violations of OSHA regulations.

**Tennessee**

Teal v. E.I. dupont de Nemours & Co., 728 F.2d 799, (6th Cir. 1984). A breach of a duty imposed by statute or regulation is negligence *per se* if the party injured is a member of the class of persons which the statute or regulation was intended to protect. Even a *de minimis* breach of [this duty] is negligence *per se*.

**Washington**

Robertson v. Burlington Northern R. Co., 32 F.3d 408 (9th Cir. 1994). For purposes of determining railroad's liability under Federal Employer' Liability Act, violation of OSHA regulation is not negligence *per se*, but OSHA standards may be admitted as some evidence of applicable standard of care, so long as such evidence is considered only in relation to all other evidence in case.

Ward v. Ceco Corp., 40 Wash.App. 619, 699 P.2d 814 (Ct. App. Wash. 1985), review denied 104 Wash.2d 1004 (1985). Employer's violation of the Washington Industrial Safety & Health Act (with standards meeting or exceeding OSHA requirements) and the regulations promulgated thereunder amounted to negligence *per se*.

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