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Chubb Construction Risk Engineering

OSHA Inspections

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Introduction

OSHA fined a Texas-based lath and plaster company a total of $230,100, saying the company violated workplace safety rules at two sites in Kansas. OSHA issued one repeat, three willful, six serious and one other-than-serious citation for alleged violations at the one worksite and seven repeat, seven serious, and one other-than-serious citation for alleged violations at the second worksite.

OSHA fined an Ohio excavating firm for exposing workers to trench hazards, proposing penalties of over $500,000. Inspections along a 150-mile petroleum pipeline in Ohio found inadequate cave-in protection inside trenches. The company was cited for 14 alleged safety and health violations, including eight willful violations for failure to protect employees from cave-ins at six separate trenches, allowing water accumulation in trenches, and placing excavated soil close to unprotected trench walls. The company had already been warned on-site about the hazards, yet did nothing about it. In addition, OSHA cited the company with six alleged serious violations for hazards associated with arc welding, means of egress from trenches, training for work in trenches, defective hoisting equipment, and no reflective gear for workers near highways.

OSHA fined a Georgia-based construction company $242,500 for workplace safety violations following an inspection at an Ohio jobsite. It was the 16th time company worksites had drawn OSHA scrutiny. Outstanding proposed penalties totaled over $600,000. OSHA alleged five serious, five willful and one repeat violation of workplace safety standards. Willful violations were issued for unsafe scaffolding and lack of fall protection from falls of up to 25 feet. Alleged serious violations involved electrical hazards, and the repeat citation was issued for failing to provide personal protective equipment and lack of toe boards or overhead protection on the scaffolds.

The purposes of OSHA workplace inspections are to enforce standards. OSHA is authorized under the Act to conduct workplace inspections.

Insurance doesn't cover OSHA fines. How much additional revenue would need to be generated to cover a $100,000 OSHA fine?

Nature of Inspections

OSHA May Inspect at any Reasonable Time.

OSHA inspections are authorized by law to occur at any reasonable time. A reasonable time has been defined as normal working hours or whenever a substantial amount of special work is being carried out in a unit.

No Prior Notification.

Notification of an inspection will not be given except in unusual circumstances. Inspections may be the result of an associate's complaint, a reported work fatality, or a routine inspection scheduled by the area officer.

Optional Request for a Warrant.

It is legal to request that the compliance officer obtain a warrant prior to entering the premises. Do not request this without checking with Risk Management.

OSHA's Inspection priorities from highest to lowest are as follows:

- **Imminent Danger:** Any condition where there is reasonable certainty that a danger exists that can be expected to cause death or serious physical immediately
- **Fatality or Serious Injury:**
  - All employers are required to notify OSHA when an employee is killed on the job or suffers a workrelated hospitalization, amputation, or loss of an eye.
  - A fatality must be reported within 8 hours.
  - An in-patient hospitalization, amputation, or eye loss must be reported within 24 hours.
- **Employee Complaints:** The Act gives each employee the right to request an OSHA inspection when the employee feels that he/she is in imminent danger from a hazard or when he/she feels that there is a violation of an OSHA standard that threatens physical harm.
- **Programmed High-Hazard**: Establishments with lost workday rates at or above the most recently published Bureau of Labor Statistics national rate.
- **Follow-Up Inspections:** To ensure cited items have been abated.

Compliance Officer

- Duties and Authority. The OSHA Compliance Safety and Health Officer (CSHO) has the authority to inspect all conditions, structures, equipment, or materials.
- Cannot disrupt operations. The inspection must be conducted in a manner that avoids unnecessary disruption of normal operations.
- Must reveal findings. On completion of the inspection the compliance officer must confer with management and informally advise them of apparent safety or health violations.

Note: The compliance officer may request additional records or interviews at a later time.

OSHA Inspection Process

The CSHO will present his/her credentials to the person in charge. The inspection begins with a joint opening conference at which the CSHO will:

- Inform the person in charge of the purpose and scope of the inspection
- List the records needed for review
- Explain the CSHO's right to interview employees
- Discuss the process of the physical inspection
- Schedule time and place of closing conference
- Answer any questions

Arrival of the Inspector

The OSHA inspection begins when the compliance officer arrives at the establishment. If an OSHA inspector arrives unexpectedly at your job site, immediately inform your manager. Insist upon seeing the officer's U.S. Department of Labor credentials that will have a photograph and serial number that can be verified by calling the local OSHA office. Anyone attempting to collect a penalty or promote the sale of an item or service is not an OSHA compliance officer.

Opening Conference

In the opening conference, the CSHO explains why the job, site, or organization was selected. The officer will further explain the scope of the inspection, the purpose and standards, and if applicable provide a copy of the employee complaint (minus their name). Confidentiality will be maintained upon request.

You will be asked to select an employer representative to accompany the compliance officer during the inspection. An authorized representative of the employees, if any, also has the right to go along. The compliance officer will consult with a reasonable number of employees, privately if desired.

Inspection Tour

- The CSHO will proceed through the facility, inspecting work areas for compliance.
- While the destination and duration are determined by the CSHO, the route is not.
- Trade secrets observed will be kept confidential
- Employees will be consulted during the inspection tour
- Photographs and video may be taken
- Posting and record-keeping are checked
- During the course of the inspection the CSHO will point out any unsafe or unhealthful working conditions observed
- The CSHO will also discuss possible corrective action if the employer so desires

Be brief and to the point with your answers, providing information that is responsive to the question, and take the inspector to his destination along the most direct route. The inspector may point out unsafe or unhealthy work conditions during the walk through and may offer technical advice on how to eliminate hazards. This is not the time to argue! Discrepancies that are corrected on the spot will be recorded, to be used in "good faith" determinations when assessing penalties.

Management Responsibilities

- Be Friendly and Cooperative. Recognize that the CSHO are enforcing the federal law, and answer the inspector's questions to the best of your ability. Accompany the CSHO to a quiet office where the opening conference can be held. Extend the same courtesy to State Safety Inspectors carrying out inspections under OSHA.
- Notify Senior Management as soon as possible.
- Accompany the CSHO at All Times.
- Any deficiency that can be corrected while the CSHO is present should be corrected.
- Take notes, pictures, and measurements in the same manner as the CSHO. If possible, have an industrial hygienist present to conduct tests similar to those conducted by the CSHO.
- Accurately answer the CSHO's questions. If you do not know or are uncertain of the answer, tell the CSHO that you do not know the answer. Do not guess answers to the CSHO's questions. Ask questions if you do not understand a comment made by the CSHO so that your notes accurately reflect the CSHO's concerns.

Closing Conference

At the end of the inspection, the CSHO will hold a closing conference, at which the CSHO will discuss his/her findings, explain any alleged violations, and discuss a timetable for correction. As it is the Area Director of OSHA who officially designates the amount of fines (based on the recommendations of the CSHO), the inspector will not indicate any proposed penalties.

For each apparent violation found during the inspection, the compliance officer will discuss the following with you:

- Nature of the violation;
- Possible abatement measures you may take to correct the violative condition;
- Possible abatement dates you may be required to meet; and
- Any penalties that the Area Director may issue. The CSHO is a highly trained professional who can help you recognize and evaluate hazards as well as suggest appropriate methods of correcting violations. To minimize employee exposure to possible hazardous conditions, abatement efforts should always begin as soon as possible.

The CSHO will provide nothing in writing at the closing conference, so it is essential to take good notes. Listen and obtain clarification, but do not argue with the CSHO. Objections can be expressed in a response letter.

Citations and Penalties

After the CHSO reports findings, the Area Director determines what citations, if any will be issued, and what penalties, if any will be issued. Citations inform the employer and employees of regulations and standards alleged to have been violated and of the proposed length of time set for their abatement. You will receive citations and notices of proposed penalties by certified mail.

Citations will include: 1) a description of the violation; 2) the proposed penalty, if any; and 3) the date by which the hazard must be corrected. You have 15 working days after receipt to file an intention to contest OSHA citations before the independent Occupational Safety and Health Review Commission. Types of citations/violations and associated penalties are:

- **De Minimis:** De Minimis violations are violations that have no direct or immediate relationship to safety or health and do not result in citations or penalties.
- **Willful:** A willful violation is defined as a violation in which the employer knew that a hazardous condition existed but made no reasonable effort to eliminate it and in which the hazardous condition violated a standard, regulation, or the OSH Act.

If an employer is convicted of a willful violation of a standard that has resulted in the death of an employee, the offense is punishable by; a fine for an individual or for a corporation, by imprisonment, or by both.

- **Serious:** A serious violation exists when the workplace hazard could cause injury or illness that would most likely result in death or serious physical harm, unless the employer did not know or could not have known of the violation. A penalty may be imposed for each violation.
- **Other-Than-Serious:** An other-than-serious violation is defined as a situation in which the most serious injury or illness that would be likely to result from a hazardous condition cannot reasonably be predicted to cause death or serious physical harm to exposed employees but does have a direct and immediate relationship to their safety and health.
- **Failure to Abate:** A failure to abate violation exists when the employer has not corrected a violation for which OSHA has issued a citation and the abatement date has passed or is covered under a settlement agreement. A failure to abate also exists when the employer has not complied with interim measures involved in a longterm abatement within the time given.

OSHA may impose a penalty for each day during which such failure or violation continues.

- **Repeated:** A violation of any standard, regulation rule, or order, where upon re-inspection, a substantially similar violation can bring a fine for each such violation.
- A citation is currently viewed as a repeated violation if it occurs within 5 years, anywhere in the nation, either from the date that the earlier citation becomes a final order or from the final abatement date, whichever is later.
- **Other:** A violation that has a direct relationship to job safety and health, but is not serious in nature, is classified as "other." Other violations for which citations and proposed penalties may be issued upon conviction. Falsifying records, reports or applications can bring a fine or jail time.
- **OSHA announced on April 22, 2010,** that new changes would be implemented to its administrative penalty (GBP) calculation system. Several factors impact the final penalty issued to employers, including: Gravity Based, Size Reduction, History Reduction and History Increase, Good Faith, Repeat Violations, Increased Minimum Penalties, Severe Violator Enforcement Program (SVEP), and Additional Administrative Modifications to the Penalty Calculation Policy.
- **Gravity Based Penalties (GBP):** The gravity of a violation is the primary consideration in calculating penalties and is established by assessing the severity of the injury/illness which could result from a hazard and the probability that an injury or illness could occur.

OSHA adopted a Gravity Based Penalty structure for serious citations. Minimum penalties are based and assessed on the severity of each of the violations. Severity levels are established as follows: Low/Lesser, Medium/Lesser, High/Lesser, Low/Greater, Medium/Greater and High/ Greater.

- **Size Reduction:** Based on the number of employees, new reduction percentages can be applied to lower the amount of the proposed penalty. The new penalty calculation is as follows: 1 – 25 employees allows for a reductions of 40%, 26 – 100 employees allows for a reductions of 30%, 101 – 250 employees allows for a reductions of 10% and 251 or greater does NOT allow for a reduction in the penalty.
- **History Reduction:** The period for considering an employer's history of violations will expand from three years to five. An employer who has been inspected by OSHA within the previous five years and has not been issued any serious, willful, repeat, or failure-toabate citations will receive a 10 percent reduction for history.
- **History Increase:** An employer that has been cited by OSHA for any high gravity serious, willful, repeat or failure-to-abate violation within the previous five years will receive a 10 percent increase in their penalty, up to the statutory maximum. Employers who have not been inspected and those who have received citations for serious violations that were not high gravity will receive neither a reduction nor an increase for history.
- **Good Faith:** The current good faith procedures in the Field Operations Manual will be retained. A penalty reduction is permitted in recognition of an employer's effort to implement an effective workplace safety and health program. Employers must have a safety and health program in place to get any good faith reduction. Good faith reductions are not allowed in the cases of high gravity serious, willful, repeat, or failure-to-abate violations.

  The 15% Quick-Fix reduction, which is currently allowed as an abatement incentive program to encourage employers to immediately abate hazards identified during inspections, remains unchanged. However, the 10% reduction for employers with a strategic partnership agreement will be eliminated.
- **Severe Violator Enforcement Program (SVEP):** Where circumstances warrant, at the discretion of the Area Director, high gravity serious violations related to standards and hazards identified in the SVEP will not normally be grouped or combined, and may be cited as separate violations, with individual proposed penalties.
- **Administrative Modifications to the Penalty Calculation Policy:** The new penalty adjustment factors will be applied serially to the Gravity Based Penalty (e.g., 10%, then 40%, etc. instead of 50%). Adjustment factors will be applied serially as follows: History, Good Faith, Quick Fix and Size.

In November of 2015, the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 was enacted. The act further amended the Federal Civil Penalties Inflation Adjustment Act to improve the effectiveness of civil monetary penalties and maintain their deterrent effect. The Inflation Adjustment Act required agencies to: (1) adjust the level of civil monetary penalties with an initial "catch-up" adjustment through an interim final rule and (2) make subsequent annual adjustments for inflation, no later than January 15 of each year. This is completed thorough the cost-of-living adjustment multiplier which is based on the Consumer Price Index for All Urban Consumers. As a result, the civil monetary penalties should be verified each year to ensure you have the most current data.

For Example:

Sample Data	Summed	Serially
Higher/Lesser	$5,000	$5,000
History (10%)		$4,500 – 10%
Good Faith (15%)		$3,825 – 15%
Quick Fix (15%)		$3,251 – 15%
Size 30%	10% + 15% + 15% + 30% = 70%	$2,275 – 30%
$2,275 – 30%	$1,500	$1,500

Employer Options

Promptly after the closing conference, discuss the results with Senior Management, who will assist in the development of an action plan regarding potential citations and plans to correct associated conditions. Promptly correcting violations and documenting those actions can demonstrate a good faith effort and help reduce the severity of penalties if contested.

No later than 6 months following the closing conference, OSHA will issue a written citation. As an employer who has been cited, you may take either of the following courses of action:

- If you agree to the Citation and Notification of Penalty, you must correct the condition by the date set in the citation and pay the penalty, if one is proposed;
- If you do not agree, you have 15 working days from the date you receive the citation to contest in writing the citation, the proposed penalty, and/or the abatement date.

After the fifteenth day, the apparent violation must be abated and the prescribed fine must be paid, whether or not you agree with it. Copies of all citations must be promptly sent to Senior Management. Fines are often cut by 50% just by contesting them. Many times, they are reduced even further or eliminated. Contesting violations requires a prompt meeting with the OSHA Area Director to discuss and resolve. Senior Management should review and approve written responses to OSHA.

Citations will be accompanied by:

- An Invoice/Debt Collection Notice, and
- Certification of Corrective Action Worksheet

Informal Conference and Settlement

Before deciding whether to file a Notice of Intent to Contest, you may request an informal conference with the OSHA Area Director to discuss any issues related to the citation and notification of penalty. OSHA will inform the affected employee representatives of the informal conference or contest.

Whenever the employer, an affected employee, or employee representative requests an informal conference, the parties shall be afforded the opportunity to participate fully. If either party chooses not to participate in the informal conference, that party forfeits the right to be consulted before decisions are made that affect the citations. If the requesting party objects to the attendance of the other party, OSHA may hold separate informal conferences. During a joint informal conference, separate or private discussions will be permitted if either party requests them. Informal conferences may be held using any means practical.

You may use this opportunity to do any of the following:

- Obtain a better explanation of the violations cited;
- Obtain a more complete understanding of the specific standards that apply;
- Negotiate and enter into an informal settlement agreement;
- Discuss ways to correct violations;
- Discuss problems concerning the abatement dates;
- Discuss problems concerning employee safety practices;
- Resolve disputed citations and penalties, (thereby eliminating the need for the more formal procedures associated with litigation before the Review Commission); and
- Obtain answers to any other questions you may have.

Subjects Not To Be Addressed During the Conference

No opinions regarding the legal merits of an employer's case shall be expressed during the informal conference and there should be no discussion with employers or employee representatives concerning the potential for referral of fatality inspections to the Department of Justice for criminal prosecution under the Act.

Area Director and Informal Conference Considerations

Area Directors have the authority to raise or lower penalties. Area Directors offer up to a 30% reduction in penalties at an informal conference. The Regional Administrator must approve reductions greater than 30%.

If not satisfied with the outcome of the Informal Conference

You have the right to file the written Notice of Intent to Contest. You must, however, be prepared with the written Notice of Intent to Contest. If you are unsatisfied with outcome of the Informal Conference, file the Notice of Intent to Contest immediately. Be aware that the Informal Conference or any request for such a conference shall not act as a stay of the 15 working day contest period.

How to Contest Citations

To contest any portion of your citation, you must submit a Notice of Intent to Contest in writing within 15 working days after receipt of the citation and notification of penalty. This applies even if you have stated your disagreement with a citation, penalty, or abatement date during a telephone conversation or an informal conference.

The Notice of Intent to Contest must clearly state what is being contested — the citation, the penalty, the abatement date, or any combination of these factors. In addition, the notice must state whetherall the violations on the citation, or just specific violations, are being contested. Your contest must be made in good faith. OSHA will not consider a contest filed solely to avoid your responsibilities for abatement or payment of penalties to be a good faith contest.

A proper contest of any item suspends your legal obligation to abate and pay until the item contested has been resolved. If you contest only the penalty, you must still correct all violations by the dates indicated on the citation. If you contest only some items on the citation, you must correct the other items by the abatement date and pay the corresponding penalties within 15 days of notification.

Posting Requirements

The written citation will also include an order to post the notice of violation at the workplace. When you receive a Citation and Notification of Penalty, you must post the citation (or a copy of it) at or near the place where each violation occurred to make employees aware of the hazards to which they may be exposed. The citation must remain posted for 3 working days or until the violation is corrected, whichever is longer (Saturdays, Sundays, and Federal holidays are not counted as working days.) You must comply with these posting requirements even if you contest the citation.

The abatement certification documents such as abatement certifications, abatement plans and progress reports — also must be posted at or near the place where the violation occurred. For moveable equipment found to be in violation and where the posting of violations would be difficult or impractical, you may identify the equipment with a "Warning" tag specified in the abatement verification regulation.

Litigation Before the Occupational Safety and Health Review Commission

After you file a Notice of Intent to Contest, your case is officially in litigation. All settlements of contested cases are negotiated between you and OSHA's attorney according to the rules of procedure of the Occupational Safety and Health Review Commission.

The CSHO shall explain that when a Notice of Intent to Contest is properly filed, the Area Director is required to forward the case to an independent adjudicatory agency, (Review Commission) at which time the case is considered to be in litigation.

OSHA will normally cease all investigatory activities once an employer has filed a notice of contest. Any action relating to a contested case must first have the concurrence of the Regional Solicitor (RSOL).

Upon receipt of the Notice of Intent to Contest, the Review Commission assigns the case to an administrative law judge, who will schedule a hearing in a public place close to the workplace.

Abatement dates and certification requirements are determined based on the Review Commissions final order.

- **Parties May Represent Themselves**
  The Review Commission's Rules do not require that a party — an employer, a union, or affected employee(s) — be represented by a lawyer. However, proceedings before the Review Commission are legal in nature. Certain legal formalities must be followed.

  OSHA will be represented by lawyers from the Solicitor of Labor's Office, the employer may be represented by a lawyer, and the decision in the case may have consequences beyond the amount of the penalty. For example, a decision may require corrective actions at a worksite. Parties to cases should consider carefully whether to hire a lawyer to represent them in their case.

- **Notice of Docketing**
  The OSHA Area Director sends the notice of contest to the Commission. The Executive Secretary's Office then notifies the employer that the case has been received and assigns a docket number. This docket number must be printed on all documents sent to the Commission.

- **Party Requests for Simplified Proceedings**
  Cases heard by Administrative Law Judges may proceed in one of two ways: conventional proceedings or simplified proceedings. The Chief Administrative Law Judge may designate a case for simplified proceedings soon after the notice of contest is received at the Review Commission. Parties may also request simplified proceedings within 20 days of the date on the notice of docketing. If a case is not designated for simplified proceedings, conventional proceedings are in effect.

  Simplified proceedings are appropriate for cases that involve less complex issues and for which more formal procedures used in conventional proceedings are deemed unnecessary to assure the parties a fair and complete contest. Even though the legal process is streamlined, the proceedings are still a trial before an Administrative Law Judge with sworn testimony and witness cross-examination.

- **The Complaint**
  Within 20 calendar days of receipt of the employer's notice of contest, the Secretary of Labor must file a written complaint with the Commission. A copy must be sent to the employer and any other parties. The complaint sets forth the alleged violation(s), the abatement period and the amount of the proposed penalty.

- **The Answer**
  The employer must file a written answer to the complaint with the Commission within 20 calendar days after receiving the complaint from the Secretary of Labor. The answer must contain a short, plain statement denying allegations of the complaint that the employer wishes to contest.

  Any allegation not denied by the employer is considered to be admitted. In addition, if the employer has a specific defense it wishes to raise, such as (1) the violation was due to employee error or failure to follow instructions, or (2) compliance with a standard was infeasible, or (3) compliance with a standard posed an even greater hazard, the answer must describe that defense. If the employer fails to file an answer to the Complaint on time, its Notice of Contest may be dismissed, and the Citation and Penalties may become final.

- **Discovery**
  Discovery is a method used whereby one party obtains information from another party or person before a hearing. Discovery techniques in Commission cases include (1) written questions, called interrogatories; (2) oral statements taken under oath, which are depositions; (3) asking a party to admit the truth of certain facts, called requests for admissions; and (4) requests that another party produce certain documents or objects for inspection or copying.

  In conventional proceedings, any party can use these discovery techniques without the judge's permission, except for depositions, which require that that parties agree to take depositions or that the judge orders the taking of depositions after a party files a motion requesting permission to do so.

Conventional Proceedings

- **Scheduling Order or Conference**
  In conventional cases, discovery takes place after the answer is filed and before the hearing date. After the answer to the complaint is filed, the judge will issue an order setting a schedule for the case and may also hold a conference with the parties to clarify the issues, consider settlement, or discuss other ways to expedite the hearing.

- **Withdrawal of Notice of Contest**
  A party wishing to withdraw its notice of contest to all or parts of a case may do so at any time. The Notice of Withdrawal must be served on all affected employees and all other parties. A copy must also be sent to the judge. The withdrawal terminates the proceedings before the Commission with respect to the citation or citation items covered by the notice of withdrawal.

- **Settlement**
  The Commission encourages the Settlement of cases. Cases can be settled at any stage. The Secretary of Labor and the employer must agree to the settlement terms, and the affected employees or their union must be shown the settlement before it will be approved. Any party can also request that a Settlement Judge be appointed to help facilitate a settlement.

- **Hearings**
  The parties will be notified of the time and place of the hearing at least 30 days in advance. The employer must post the hearing notice if there are any employees who do not have a representative and served on all unions representing affected employees. The hearing is usually conducted as near the work place as possible.

  At the hearing, a Commission Judge presides. The hearing enables the parties to present evidence on the issues raised in the complaint and answer. Each party to the proceedings may call witnesses, introduce documentary or physical evidence, and cross-examine opposing witnesses.

  In conventional proceedings, the Commission follows the Federal Rules of Evidence. Under these rules, evidence is only admitted into the record if it meets certain criteria that are designed to assure that the evidence is reliable and relevant.

- **Post-hearing Briefs**
  After the hearing is completed and before the judge reaches a decision, each party is given an opportunity to submit to the judge proposed findings of fact and conclusions of law with reasons why the judge should decide in its favor.

Proposed findings of fact are what a party believes actually happened in the circumstances of a case based upon the evidence introduced at the hearing. Proposed conclusions of law are how a party believes the judge should apply the law to the facts of a case. The statement of reasons is known as a brief.

- Judge's Decision and Petition for Discretionary Review
  After hearing the evidence and considering all arguments, the judge will prepare a decision based upon all of the evidence placed in the hearing record and mail copies of that decision to all parties.

  The parties then can object to the judge's decision by filing a Petition for Discretionary Review. Instructions for submitting such a petition will be stated in the judge's letter transmitting the decision and in a Notice of Docketing of Administrative Law Judge's Decision issued by the Executive Secretary's Office.

- Decisions Final in 30 Days
  If a Commissioner does not order review of a judge's decision, it becomes a final order of the Commission 30 days after the decision has been filed. If a Commissioner does direct review, it will ultimately issue its own written decision and that decision becomes the final order of the Commission.

  Any party who is adversely affected by a final order of the Commission can appeal to a United States Court of Appeals. However, the courts usually will not hear appeals from parties that have not taken advantage of all possible appeal rights earlier in the case. Thus, a party who failed to file a petition for review of the judge's decision with the Commission likely will not be able to later appeal that decision to a Court of Appeals.

- Major Features of Simplified Proceedings
  - Early discussions among the parties and the Administrative Law Judge are required to narrow and define the disputes between the parties.
  - Motions, which are requests asking the judge to order some act to be done, such as having a party produce a document, are discouraged unless the parties try first to resolve the matter among themselves.
  - Disclosure. The Secretary is required to provide the employer with inspection details early in the process. In some cases, the employer will also be required to provide certain documents, such as evidence of their safety program, to the Secretary.
  - Discovery, which is the written exchange of information, documents and questionnaires between the parties before a hearing, is discouraged and permitted only when ordered by the judge.
  - Appeals of actions taken by the judge before the trial and decision, such as asking the Commission to rule on the judge's refusal to allow the introduction of a piece of evidence, called interlocutory appeals, are not permitted.
  - Hearings are less formal. The Federal Rules of Evidence, which govern other trials, do not apply. Each party may present oral argument at the close of the hearing. Post-hearing briefs (written arguments explaining your position in the case), will not be allowed except by order of the judge. In some instances, the judge will render his or her decision "from the bench," which means the judge will state at the end of the hearing whether the evidence and testimony proved the alleged violations and will state the amount of the penalty the employer must pay, if a violation is found.

- Should You Ask for Simplified Proceedings?
  If you are an employer, have received an OSHA citation, have filed a notice of contest, and the total proposed penalties in the citation are between $20,000 and $30,000, the Chief Judge may designate your case for Simplified Proceedings.

  If the penalties are $20,000 or less, you may file a request for Simplified Proceedings provided that there is no allegation of willfulness or a repeat violation, and the case does not involve a fatality. You must file your request within 20 days of docketing of your case by the Executive Secretary's Office. The request must be in writing and it is sufficient if you state: "I request Simplified Proceedings." The Chief Judge or the assigned judge will then rule on your request.

- Complaint and Answer
  Once your case is selected for Simplified Proceedings, the complaint and answer are not required. However, until an employer is notified that a case has been designated for Simplified Proceedings, conventional procedures should be followed and an answer must be filed.

- Notifying Other Parties
  It is required that a copy of your request for Simplified Proceedings must be sent to the Regional Solicitor of the Department of Labor office for your region. The address is on your Notice of Docketing.

All employee representatives, including an employee union, that have elected party status must also be sent a copy of your request for Simplified Proceedings. A brief statement indicating to whom, when, and how your request was served on the parties in the case must be received with the request for Simplified Proceedings.

- Pre-hearing Conference
  Soon after the parties exchange the required information, the judge will hold a pre-hearing conference either to reach settlement in the case or to find out which factual and legal issues the parties agree on. This discussion may be conducted in person but is usually conducted by a telephone conference call.

  The purpose of the pre-hearing conference is to settle the case or, if settlement is not possible, to determine what areas of dispute must be resolved at a hearing. Even if a settlement of the entire case cannot be reached, the parties are required to attempt agreement on as many facts and issues as possible. The discussion will include the following topics:

  - Narrowing of Issues. The parties will be expected to discuss all areas in dispute and to resolve as many as possible. Where matters remain unresolved, the judge will list the issues to be resolved at the hearing.
  - A Statement of Facts. The parties are expected to agree on as many of the facts as possible. Examples of these facts may include: the size and nature of the business, its safety history, details of the inspection, and the physical nature of the worksite.
  - A Statement of Defenses. You will be required to list any specific defenses you might have to the citation. The burden is on the Secretary to establish that each violation occurred. However, you should be prepared to tell the judge all reasons why you believe that the Secretary's allegations are wrong.

You might also have what is called an **"affirmative defense."** An affirmative defense is a recognized set of circumstances in which an employer will be found not in violation even though the employer did not comply with the cited standard. For example, you may believe that the alleged violation was the result of an employee acting contrary to a work rule that has been effectively communicated and enforced. Or, you may think that compliance with the standard was impossible or infeasible, or would have resulted in a danger to employees that was greater than the danger that the standard was designed to prevent. You should be aware that **the burden of proving an affirmative defense is on you, the employer.** Therefore, if you argue that the violation was the result of employee misconduct, at the hearing you will have to prove to the judge that you had an effectively communicated and enforced work rule.

It is critical that you set forth your defenses at the pre-hearing conference. You may be prohibited from later asserting any defenses not raised at the pre-hearing conference. Remember, even if your defense does not excuse the violation, the judge may find it relevant in determining the penalty amount.

- **Witnesses and Exhibits.** The parties are expected to list the witnesses they intend to call if there is a hearing, and to list any documents or physical evidence they intend to introduce to support their positions. For example, you should list any photographs that you believe show the existence of a safety device that the Secretary claims you failed to provide.

- **Review of the Judge's Decision**
  Any party dissatisfied with the judge's decision may petition the Commission for review of that decision. No particular form is required for the, however, it should clearly explain why you believe that the judge's decision is in error on either the facts or the law or both. Review of a judge's decision is at the discretion of the Commission. It is not a right.

  Your petition should be filed no later than 20 days after issuance of the judge's written decision. Under the law, the Commission cannot grant any petition for review more than 30 days after the judge's decision is filed. Therefore, your petition must be filed as soon as possible to obtain maximum consideration.

  The Commission will notify you whether your petition has been granted. If it is granted, your case will then proceed under the Commission's conventional rules.

Follow-up Inspections and Failure to Abate

If you receive a citation, a follow-up inspection may be conducted to verify that you have done the following:

- Posted the citation as required;
- Corrected the violations as required in the citation; and/or
- Protected employees adequately and made appropriate progress in correcting hazards during multi-step or lengthy abatement periods;
- In addition to providing for penalties for Failure-to-Post citations and Failure-to-Abate violations, you have a continuing responsibility to comply with the OSH Act. OSHA will cite any new violations discovered during a follow-up inspection.

Anti-Discrimination Provisions

The OSH Act prohibits employment retaliation against an employee who complains to an employer, files a complaint, initiates a proceeding, contests an abatement date, requests information from OSHA or testifies under the Act. In certain circumstances, an employee may refuse to work under seriously threatening health or safety conditions. OSHA will investigate complaints from employees who believe that they have been discriminated against. If the investigation discloses probable violations of employee rights, court action may follow.

Special Rules for Construction

The prime contractor and any subcontractors may make their own arrangements with respect to safety obligations that might be more appropriately treated on a jobsite basis rather than individually. In no case shall the prime contractor be relieved of overall responsibility for compliance with the requirements of this part for all work to be performed under the contract.

By contracting for full performance of a contract, the prime contractor assumes all obligations prescribed as "employer" obligations under the standards contained in this part, whether or not he subcontracts any part of the work.

To the extent that a subcontractor of any tier agrees to perform any part of the contract, he also assumes responsibility for complying with the standards in this part with regards to that part. Thus the prime contractor assumes the entire responsibility under the contract and the subcontractor assumes responsibility with respect to his portion of the work. With respect to subcontracted work, the prime contractor and any subcontractor or subcontractors shall be deemed to have joint responsibility. Where joint responsibility exists, both the prime contractor and his subcontractor or subcontractors, regardless of tier, shall be considered subject to the enforcement provisions of the Act.

Multi-Employer Policy

On multi-employer worksites, citations normally shall be issued to employers whose employees are exposed to the hazards (THE EXPOSING EMPLOYER). In addition, the employer who actually creates the hazard shall likely be cited (THE CREATING EMPLOYER).

The employer who is responsible, by contract or actual practice, for safety and health conditions on the worksite, i.e., the employer who has the authority for ensuring that the hazardous condition is corrected, shall normally be cited (THE CONTROLLING EMPLOYER).

The employer who has the responsibility for actually correcting the hazard shall likely be cited (THE CORRECTING EMPLOYER).

It must be shown that each employer to be cited has knowledge of the hazardous condition or could have had such knowledge with the exercise of reasonable diligence.

Due to updates that occur to governing documents related to the content of this guide, you as the employer should routinely monitor and make yourself aware of any such changes to ensure you are working with the most current established information.

References and Resource Links

- 29CFR Part 1903 - Inspections, Citations, and Proposed Penalties, https://www.osha.gov/laws-regs/regulations/standardnumber/1903
- Occupational Safety and Health Administration (OSHA) Inspections, www.osha.gov/sites/default/files/publications/factsheet-inspections.pdf
- OSHA Administrative Penalty Information Bulletin, http://63.234.227.130/dep/ administrative-penalty.html
- U.S. Department of Labor Memorandum for Regional Administrators, "Administrative Enhancements to OSHA' Penalty Policies" dated April 22, 2010.
- OSHA Field Operations Manual, Directive Number: CPL 02-00-148, Effective Date: 3/26/2009.
- Guide to Review Commission Procedures, Occupational Safety and Health Review Commission, August 2005
- Inspection Information. Enables access to information about an inspection when the activity number identifying the inspection is known http://www.osha.gov/pls/imis/InspectionNr.html
- 2025 Annual Adjustments to OSHA Civil Penalties.
- Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2025. https://www.federalregister.gov/documents/2025/01/10/2024-31602/ federal-civil-penalties-inflationadjustment-act-annual-adjustmentsfor-2025