Legal Update Article

Challenging OSHA Violations at Occupational Safety and Health Review Commission Is Worth the Effort

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Workplace Safety and Health

It is more important than ever that employers understand the serious long-term, non-monetary consequences of settling or accepting Occupational Safety and Health Administration (OSHA) citations. One danger of settling OSHA citations is later being cited for repeat, willful, or failure to abate violations and put on the road to significant additional costs and enforcement activity.

Therefore, companies should utilize their resources to ensure any violations that are upheld are correct (*e.g.*, a serious, instead of willful, violation). While litigation can be an expensive endeavor, there are hidden costs associated with accepting violations, such as setting employers up for repeat, willful, or failure to abate violations. A potential repeat or willful violation carries a maximum penalty of $156,259 per violation and can trigger greater enforcement activity, such as inclusion in OSHA's Severe Violator Enforcement Program.

Several OSHA administrative law judge (ALJ) post-trial orders that vacated citations in whole or in part and became final orders of the Occupational Safety and Health Review Commission (OSHRC) (the quasi-judicial body overseeing enforcement actions by OSHA) illustrate what employers can do to challenge citations. The decisions address the requisite evidence for whether violative conditions existed on the worksites in the first place and the evidence necessary to show employer knowledge of the violative conditions and the reasonable course of conduct in demolition projects.

Knowledge Required on Construction Projects, Appropriate Compliance

In *Secretary of Labor v. Raymond – San Diego, Inc.*, OSHRC No. 21-0505 (Mar. 6, 2023), the company was contracted to paint a rolling gate in front of a loading dock of a casino. The gate was installed by a different subcontractor. It was not fully functional, but no one at the company was aware of this. When the company's employees went to move the gate, an employee was fatally crushed by its weight. OSHA cited the company. The issue was whether the company was sufficiently and reasonably diligent in evaluating safety hazards associated with work on the gate.

The relevant OSHA standard, 29 C.F.R. § 1926.20(b)(2), requires "frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons." The ALJ rejected OSHA's argument that there was non-compliance under the standard, because the company had a policy requiring daily inspections and completion of forms that identified any hazards and how to address them. Additionally, the ALJ rejected the argument that the company knew or should have known of the violation, because the competent employees reasonably reviewed the area diligently and, based on their experiences, there was no apparent safety issues. Doing a similar analysis of non-compliance and employer knowledge, the ALJ also rejected OSHA's claim that the

company did not instruct employees about the hazard associated with the gate, under § 1926.21(b)(2), because the specific hazard was not known or reasonably known to it.

The ALJ vacated the citations for alleged violations of 29 C.F.R. § 1926.20(b)(2) and § 1926.21(b)(2). This is significant because these are often OSHA's go-to regulations for construction standards when there are no other applicable standards to cite, but they are often harder to prove than OSHA believes.

Reasonable Course of Conduct in Demolition Projects

In *Secretary of Labor v. Wildcat Renovation, LLC*, OSHRC No. 21-0387 (Mar. 16, 2023), the company was awarded the bid for a demolition project at a Florida waterpark. The founder of Wildcat went to the site, visually inspected it, and returned with the project manager to visually inspect the site again. Together, they developed a plan for the demolition that three other employees would carry out. The project manager visited the site daily, twice each day sometimes, and made daily reports on his visits. On the day of the incident, the project manager saw that the debris was cleared out and left, with another part of the demolition to still be completed. As the employees worked on moving another wall for the demolition, an employee was fatally injured in the process of cutting down the wall.

The company was cited under the required standard for the procedure in starting a demolition project, 29 C.F.R. § 1926.890(a). OSHA argued the company failed to conduct an engineering survey compliant with the regulation, and an expert testified in support of this argument. The ALJ rejected that argument, stating that the expert testimony of the steps taken (inspections of existing conditions, comparing those inspections to the drawings, conducting visual inspections, developing a plan that would reasonably be believed to maintain stability, and numerous meetings with project managers, job foreman, and crew) was sufficient support that Wildcat was compliant with the regulation.

Additionally, the ALJ rejected OSHA's argument that the company violated the standard for continuing inspections during a demolition, 29 C.F.R. § 1926.589(g). The ALJ stated there was "little guidance … on how the term 'continuing inspections' is to be interpreted" and, without that specificity, it should be interpreted as what is expected as reasonable conduct under the regulation. Under the standard, an employer need not have constant supervision to show it exercised reasonable diligence to discover safety violations. Thus, that the foreman was not at the site when the wall cutting occurred, despite knowing the activity might create a hazard, was not sufficient in and of itself to constitute a lack of reasonable diligence.

The ALJ vacated the citations for alleged violations of 29 C.F.R. § 1926.890(a) and § 1926.589(g).

Importance of Contesting Violations Based on Their Classification

In *Secretary of Labor v. First Marine, LLC*, OSHRC Nos. 18-1287 & 18-1288 (Apr. 6, 2023), surrounded by heaters, employees of First Marine were fixing a boat. Some employees, including the head electrician, noticed a gas odor. While no testing was done on the odor, employees moved the materials to ventilate the area, and the head electrician took some steps to ventilate the area and try to determine the source of the odor. Work continued, but an explosion occurred that fatally injured three workers, including one

First Marine employee.

OSHA alleged a willful violation of 29 C.F.R. § 1915.12(d)(1) for failure to train employees to enter dangerous atmospheres and perform required duties safely. First Marine employees testified that they were trained. OSHRC rejected the testimony based on a lack of documentation that such training occurred and the testimony lacked sufficient detail about safety information included in the training.

Although OSHRC upheld the training violation, it found the violation was not willful and downgraded the violation to a serious one, reducing the penalty tenfold, from $129,336 to $12,934. OSHRC concluded First Marine did not act with intentional disregard for the cited standard or with plain indifference to employee safety. While the employees may not have had specific training, they were competently trained to perform their duties through weekly safety meetings, daily meetings with welders, and instructions for on-the-job performance. Additionally, although the employees could have done more, there was no indication in the record that the employees did nothing. The head electrician and other employees all took some action in response to the odor.

This case shows how difficult it can actually be for OSHA to prove a training violation, particularly when there is training, and OSHA has to identify specific deficiencies in the training. It also demonstrates the challenges of proving a heightened level of knowledge by an employer to justify a willful violation and correspondingly high penalty. In this case, it was worth it for the employer to litigate the case to avoid a willful violation in its OSHA history and lower the penalty significantly.

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If you have questions or need assistance with OSHA compliance or defense of inspections and citations, please reach out to the Jackson Lewis attorney with whom you regularly work or any member of our Workplace Safety and Health Practice Group.

(Law clerk Enaita Chopra contributed to this article.)