I. An OSHA Primer


1. General purpose of the Act is to “assure so far as possible every working man and woman in the Nation safe and healthful working conditions. . . .” 29 U.S.C. § 651(b).


   a) Employers are required to comply with applicable standards promulgated under the Act by the Occupational Safety and Health Administration (“OSHA”). 29 U.S.C. § 654(a)(2). These standards, found primarily at 29 C.F.R. § 1910 (1989), regulate a broad range of workplace activities and conditions.

   b) Where OSHA has not promulgated specific standards governing particular workplace conditions, employers are subject to a general duty to furnish to employees a place of employment which is “free from recognized hazards that are causing or are likely to cause death or serious physical harm . . .” 29 U.S.C. § 654(a)(1) (the “general duty clause”).

3. The Act creates two enforcement-related agencies:

   a) OSHA, an arm of the United States Department of Labor, which promulgates safety and health standards and enforces compliance with the Act by inspecting workplaces and issuing citations to employers.

   b) The Occupational Safety and Health Review Commission (“OSHRC”), which adjudicates contested OSHA citations, thus functioning as an administrative court.

4. Like many environmental statutes, the Act calls for states to assume full responsibility for administration and enforcement of the Act upon submission of an approved plan. 29 U.S.C. § 667. However, less than half of the states have applied for and received OSHA approval to implement the Act; Colorado is not one of those states. Thus, all inspections of employers within Colorado will be conducted on the federal level by OSHA.

B. Scope of OSHA’s investigative authority.

1. While the Act generally authorizes OSHA to inspect business premises, see 29 U.S.C. § 657(a), the Supreme Court has held that the Fourth Amendment prevents OSHA from entering any private facility for inspection purposes unless it first obtains
either the employer's consent or a valid warrant authorizing the inspection. Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), cert. denied 470 U.S. 1003 (1985). Thus, an employer always has the option to bar OSHA from entering its establishment, absent a valid warrant. To support issuance of a warrant, OSHA must either:

a) Possess specific evidence (such as an employee complaint) that the worksite it wants to inspect contains an existing violation of law (an "unprogrammed inspection"); or

b) Choose the particular establishment as a result of unbiased implementation of a systematic plan for selecting OSHA inspection targets (a "programmed inspection"). See Marshall v. Barlow's, Inc., supra, 436 U.S. at 323-324; see also OSHA Field Inspection Reference Manual (the "OSHA Manual"). Chapter I, reprinted at 4 Employment Safety & Health Guide (CCH) (also available on OSHA’s website, an important resource). At present, most OSHA inspections are unprogrammed and triggered by a written, signed employee complaint.

2. Many courts, including the Tenth Circuit Court of Appeals (which encompasses Colorado), have limited the scope of a warrant, and thereby OSHA’s underlying inspection authority, to those conditions identified in an employee complaint. See Marshall v. W & W Steel Co., 604 F.2d 1322 (10th Cir. 1979); Donovan v. Sarasota Concrete Co., 693 F.2d 1061, 1068 (11th Cir. 1982); Marshall v. North American Car Co., 626 F.2d 320 (3d Cir. 1980), cert. denied 459 U.S. 830 (1982); but see Burkart Randall Div. of Textron, Inc. v. Marshall, 625 F.2d 1313 (7th Cir. 1980) (allowing inspection of an entire workplace based on several complaints). On the other hand, a warrant issued on the basis of a programmed inspection will normally allow inspection of the entire workplace. See Stoddard Lumber Co. v. Marshall, 627 F.2d 984 (9th Cir. 1980); Marshall v. Chromalloy American, 589 F.2d 1335 (7th Cir. 1979), cert. denied, 444 U.S. 884 (1979).

3. OSHA’s onsite inspection procedures are detailed in Chapter II of OSHA’s Manual, supra, 4 Employment Safety and Health Guide. Additional inspection protocols and employer and employee rights are discussed in OSHA’s regulations at 29 C.F.R. §§ 1903.1-1903.13 (2002). These and other guidance documents should be consulted in regard to specific onsite inspection issues, but several general points are highlighted here:

a) Both a management and an employee representative may accompany the OSHA compliance officer at all times during the inspection. 29 C.F.R. § 1903.8. Most employer representatives keep careful notes of and take photographs and/or videos of every condition noted, photographed or videotaped by the OSHA officer.


c) The employer representative accompanying the OSHA compliance officer should take steps to insure that, as much as possible, the officer does not investigate or observe any areas outside the scope of the inspection authorized by the warrant or the employer’s consent. Management should instruct the employer representative to consult with management or legal counsel, if a dispute arises concerning the scope of the inspection, before allowing the officer to continue. In challenging an inspection warrant, the employer does risk a
contempt citation. See, e.g., Donovan v. Hackney, Inc., 769 F.2d 650 (10th Cir. 1985).

d) The OSHA inspector may also interview individual employer representatives during the inspection process. 29 U.S.C. § 657(a)(2); 29 C.F.R. § 1903.7(b). An additional employer representative may request to be present during these interviews.

e) The Act provides that "no citation may be issued . . . after the expiration of six months following the occurrence of any violation." 29 U.S.C. § 658(c). While the case law is unclear, it appears that this six-month requirement forces OSHA to issue a citation within six months from the initial day of an inspection, not from the actual date of any prior violation. See Furry Grain Co. D.K.B., Inc., 1973-74 OSHD (CCH) ¶ 16,524 (Aug. 30, 1973). OSHA inspectors often utilize a good portion of this six-month period, leaving employer representatives frustrated as to the protracted, halting nature of the investigation.

f) If an employer has trade secrets that might be revealed during an inspection, the employer should designate such areas or materials during the initial conference and insist that OSHA preserve the confidentiality of those trade secrets, as required under the Act. 29 U.S.C. § 664; see also 29 C.F.R. § 1903.9.
court to include any information “relevant to any inquiry that the Secretary is authorized by law to undertake.” Dole v. Trinity Industries, Inc., 904 F.2d 867, 874 (3d Cir. 1990), cert. denied 112 L. Ed. 562 (1990, U.S.). As a result, it is difficult for an employer to win a challenge to the scope of an administrative subpoena based on the commonly asserted ground that the information is not relevant to an employee complaint. Nevertheless, the employer does not risk a contempt citation by claiming the subpoena is overly broad and moving to quash the subpoena or forcing the agency to seek judicial enforcement. Such a move may, however, heighten the enforcement vigor of OSHA officials.

d) If OSHA incorporates a records request in a warrant for an unprogrammed inspection, then the scope of the records review is limited to the scope of the complaint. See W&W Steel, 694 F.2d at 1327, Secretary of Labor v. Trinity Indus., 1990 OSHRC Lexis 80, OSHRC No. 891158 (Feb. 22, 1990).

e) OSHA regulations also require that employees be afforded access to employer records. See 29 C.F.R. § 1910.1020 (exposure records). OSHA often issues citations to employers for failing to expressly inform employees of their right to access and copy exposure records. Id.

C. Citations and penalties – a sevenfold increase.

1. OSHA’s citation and penalty authority (both civil and criminal) is prescribed by 29 U.S.C. § 666. This section was amended on October 27, 1990 by increasing by a factor of seven the maximum penalty for most categories of citations. The Act establishes several categories of violations:

    a) Willful violations: penalty of not more than $70,000, and not less than $5,000, for each violation (29 U.S.C. § 666(a)), with criminal penalties provided for willful violations of an OSHA standard that cause an employee’s death. Id. at § 666(e). Under Tenth Circuit case law, a willful violation requires an “intentional disregard” or “plain indifference” to the requirements of the Act. Kent Nowlin Constr. Co. v. Occupational Safety & Health Review Com., 593 F.2d 368, 372 (10th Cir. 1979).

    b) Repeated violations: now carries the same maximum civil penalty as for willful violations ($70,000). While the Act does not define “repeated,” the OSHRC has held that a violation is repeated when there is a prior OSHRC order (which includes any uncontested citation) against that employer for a “substantially similar” violation. Potlatch Corp., 1979 OSHD ¶ 23,294 (Jan. 22, 1979).

    c) Serious violations: now requires that OSHA impose a fine of up to $7,000; serious violations are those which create a “substantial probability” that the condition will cause “death or serious bodily harm” in the event an accident occurs. Id. at § 666(k). This is the most common category issued by OSHA.

    d) Non-serious violations: authorizes OSHA to impose a fine of up to $7,000, but, unlike a serious violation, the fine is not mandatory. OSHA rarely issues penalties for nonserious violations.

    e) De minimis violations: those violations where there is “no direct or immediate relationship to safety or health.” 29 C.F.R. § 1903.14(a). No penalty is assessed, and no abatement steps are required.
2. All OSHA citations will identify as to each particular violation the date upon which that violation must be abated. Penalties may be levied for failure to abate uncontested citations within the time frame specified in the citation. 29 U.S.C. § 666(d); see also Brennar v. Occupational Safety and Health Com., 513 F.2d 553 (10th Cir. 1975) (employer may be cited for failure to abate even where abatement time was less than the 15-working-day period within which to contest the citation). The reasonableness of the abatement period can be contested even where an employer admits to the underlying violation.

3. A citation may be challenged by the employer by filing an official notice of contest with the OSHA Area Director within 15 days of receipt of the citation. 29 U.S.C. § 659(a). An unchallenged citation becomes a final order of the OSHRC not subject to further review. Id. The 15-working-day period often affords employers who are uncertain about OSHA’s grounds for a citation(s) an opportunity to schedule an informal conference with the OSHA Area Director to attempt to resolve the matter without a notice of contest. See 29 C.F.R. § 1903.20. A notice of contest may sometimes be useful to the employer to avoid establishing a citation record, and favorable settlement of the matter prior to administrative hearing is often possible after the notice of contest is filed.

4. The filing of a notice of contest of an OSHA citation initiates proceedings before the OSHRC, an independent tribunal whose sole function is to adjudicate the validity of OSHA citations, proposed penalties and proposed abatement dates. The OSHRC operates on two levels, the first of which consists of administrative law judges (“ALJs”) who conduct trials. The second level consists of three Commissioners who act as appellate-like reviewers of decisions by ALJs. The ALJ’s decision becomes final only if the OSHRC does not select it for review, or if it reviews and affirms the decision. Those unreviewed ALJ decisions, as well as final OSHRC decisions, are ripe for judicial appeal directly to the U.S. Circuit Court of Appeals for that region. 29 U.S.C. § 660.

II. Cumulative Trauma Disorders/Repetitive Motion Injuries

A. OSHA’s agenda for the 1990s strongly emphasized problems associated with cumulative trauma disorders (“CTDs”) in the workplace. CTDs comprise a broad category of ailments afflicting workers who perform repetitive motions or are subject to repetitive stresses during the course of their workday. Accordingly, the problem often surfaces for those workers performing line or other repetitive factory work, data input on video terminal displays (“VDTs”) and other similar repetitive activities.

B. Repeated attempts by OSHA to promulgate a “one size fits all” standard for repetitive motion injuries have met with vehement opposition from industry. At present, while there are numerous guidance documents available on ergonomic programs, no standard exists.

C. Since there is no specific OSHA standard governing the control of or allowable incidence rate for CTD ailments in the workplace, OSHA has grounded citations on the “general duty clause,” 29 U.S.C. § 654(a)(1) (see Section I.A.2.b, supra). Under OSHA’s view, this clause requires that employers go to great lengths to minimize the incidence of CTDs in the workplace. Various decisions have been issued by the OSHRC on the application of the general duty clause to ergonomics, with mixed results.

D. The subjective nature of many of the symptoms and CTD ailments classified as due to repetitive stress, in conjunction with related difficulties in diagnosing and tracing the cause(s) of CTDs, compounds the problems in identifying methods of alleviating CTDs. (However, some forms of CTD, such as carpal tunnel syndrome, have fairly uniform symptomology and means of diagnosis.) In light of these uncertainties, and of the difficulty in identifying ergonomic measures which are both feasible and demonstrated to be effective in minimizing CTD incidents, OSHA’s ability to invoke the general duty clause in this context to force abatement measures is uncertain.
See National Realty & Constr. Co. v. Occupational Safety & Health Review Com., 489 F.2d 1257 (D.C. Cir. 1973) (to sustain citation, OSHA bears burden of demonstrating the availability, feasibility and likely utility of steps which an employer could have taken to avoid general duty clause violation). These and related CTD issues are discussed in detail in our attached article entitled “Going Around and Around with CTDs: A Look at The Legal Issues,” published in BNA’s Occupational Safety and Health Reporter in June 1990.

E. Employer difficulties in unraveling OSHA’s recordkeeping requirements are brought particularly to bear in relation to CTD ailments. For instance, it is often difficult to determine whether a concern or problem identified by a worker (such as a back pain or undiagnosed ache) has risen to the level of an “illness” or an “injury” so as to trigger reporting requirements. See “Recordkeeping Guidelines for Occupational Injuries and Illnesses,” Bureau of Labor Statistics (“BLS”) (April 1986) (discussing meaning of the terms “illness” and “injury” for purposes of recordability). OSHA and the employer often have divergent views as to the recordability of certain ailments and the presumptions that should be made in determining whether to record a nebulous report of pain by an employee.