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OSHA's Knocking – Got Counsel?

By Jason S. Mills & Emily A. Bieber

Introduction

After another full-day's hearing before the California Occupational Safety and Health Appeals Board the other day, we couldn't help but think, again, about how we got there in the first place. The hearing went fine. Our managers testified well, the injured employee was honest about the circumstances of his accident, the safety manager vigorously defended the company's very effective safety program, and the inspector just as vigorously defended every aspect of his citations (as usual). There's no need to revisit the case's details here but to note that the employee's injury was the result of an honest accident, which happens. With the benefit of "20/20 retrospect," yes, the accident could have been prevented. But realistically, no amount of paperwork, no restructured injury and illness prevention plan, and no additional training would have changed what happened. It just happened. And sometimes that is the only – and honest – explanation. That didn't stop Cal/OSHA from issuing multiple "serious" citations to the company, all premised on Cal/OSHA's finding of "actual" and "constructive" employer knowledge, which, in turn, was premised on multiple management statements, called "admissions" for evidentiary purposes.

Throughout the course of this matter, we had many conversations with a very frustrated client. How could this be classified as "serious"? How can Cal/OSHA think we knew about this? How do we explain this to potential clients? What more could we have done since we've already invested so much in our safety program? All good questions, and the same ones we have had with many clients in similar situations. Often the best answer we could provide was, "OSHA is different." This isn't a lawsuit based on negligence; these are Cal/OSHA citations based on written codified standards, and

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while it's not technically "strict liability," sometimes it seems pretty close. Was there a machine guard missing? Yes? Serious citation. $18,000. Did the employee fall? Yes? Serious citation. $18,000. Was an employee injured? Yes? Serious citation. $18,000. And the burden of proof is only lessening for Cal/OSHA. With the advent of an amended Labor Code section 6432, employer knowledge is presumed so long as the investigator sends out a perfunctory form "1BY," notifying the employer of the investigator's intent to issue a serious citation, and kindly inviting the employer to submit any more information it may have – even though the employer had already responded to copious document demands.

Now, don't get us wrong. We have a great respect for Cal/OSHA and, for that matter, for Federal OSHA, as well as all the other state plans that we've worked with. They do good work. They protect employees. Their heart is in the right place. And we find them to be genuinely good people. But it's a web, and once you're caught, it is very hard to get out. Think you can negotiate down that $18,000 penalty? Try again. It's statutory. If the "serious" citation was accident related, the district manager will tell you there's nothing he or she can do about it. You should just feel lucky the penalty wasn't $25,000 (the cap for a single, nonwillful, or repeat, serious citation). Management didn't know about the violation? Nice try. Somehow or other (at least as Cal/OSHA would have it), management had "constructive knowledge," meaning that with the exercise of "reasonable diligence," management *would have* known about the violation.

So what's the answer? Well, the first answer is to ensure 100 percent compliance with all Cal/OSHA standards, and then never have an accident. But if that plan doesn't work out and Cal/OSHA comes knocking, be ready. Every single thing you do - over the course of what could be well over a year - will factor into the final outcome. It starts at that knock on your door from Cal/OSHA, and it ends when the administrative law judge issues an order.

The Knock

There are different reasons why Cal/OSHA might show up at your site or facility to conduct an inspection. Inspections fall into two categories: unprogrammed and programmed. Unprogrammed inspections are initiated in response to a report of a workplace accident or a complaint about an occupational safety and health hazard. Programmed inspections are initiated as part of any one of Cal/OSHA's emphasis programs that target industries with higher rates of occupational hazards, fatalities, injuries, or illnesses.

Either way, don't expect a friendly "heads up" call beforehand. Cal/OSHA's Policies and Procedures Manual states that inspectors "shall not" give advance notice without "express permission" from their higher-ups. Now, this doesn't mean you won't have seen it coming. Obviously, if the company just reported a serious injury to Cal/OSHA (as it is required to do within eight hours of learning of a serious injury – whether or not another entity reports it), a Cal/OSHA visit is probably forthcoming. If the accident resulted in a fatality, that visit will likely be immediate.

If the employer has reason to believe an inspection is imminent, it is an excellent time to make preparations, walk the facility, speak to people who have knowledge of the accident, and contact counsel. We have routinely found that the earlier counsel is involved with the case, the better. If a member of my OSHA team can be at the location when the inspector arrives, one of us can actually participate as the case develops – an important opportunity. We can see exactly what the inspector sees, take the same photos, and listen to and, where appropriate, answer his or her questions. The inspection will lay the foundation for the entire road ahead. If there is any way counsel can be there for it, we want to be.

But if you didn't see it coming, stay calm. The inspector can't kick down your door. He or she can only enter with permission from someone in management. Have a plan in place for this, including knowing whom to call and having someone designated to look around the facility to see if there are any obvious issues that can be quickly addressed. Greet the inspector, and let him or her know you're speaking with the appropriate folks

about consent for the inspection, and that you will promptly have an answer.

The employer is not, by any means, required to give consent for the search. If the employer declines, Cal/OSHA in all likelihood will seek a warrant and return. It's a common belief that declining entry or otherwise pushing back on the scope of the inspection will enrage Cal/OSHA, and the company will pay for it down the line. True, declining entry is not a great way to make friends, but that's no reason to permit entry without first putting in some thought. There are many, many factors to consider in determining whether to permit entry and, generally, very little time to make the decision. And this is a game-time decision that can have long-term financial and legal ramifications for the company. Again, have a plan and all the right people in place, likely including your OSHA counsel. In our experience, employers generally permit entry – but this doesn't need to be the default. The employer should always take the time, if only ten minutes, to consider whether it makes sense to permit entry without a warrant.

The Inspection

The inspection is a dynamic and uncertain event. It starts with the opening conference, which "shall" occur pursuant to Cal/OSHA policy. The inspector will sit down with management, show his or her identification, explain the purpose of the inspection (without revealing any employee names if a complaint triggered the visit), discuss the employer's OSHA Form 300 log (records of employee injuries and illnesses) and injury and illness prevention plan ("IIPP"), and roughly describe the inspection process. Pay attention, because the employer needs to understand the scope. A wall-to-wall inspection (or "comprehensive" inspection, as Cal/OSHA calls it) is unlikely unless it is programmed or the inspector has otherwise determined that a comprehensive inspection is appropriate. Otherwise, the inspector is probably focused on a piece of equipment or a particular site, either where an accident occurred or where certain conditions gave rise to an employee complaint. If the anticipated inspection, as described, seems broader than it should be, then clear this up and come to an agreement before anyone leaves the opening conference. If you can't reach an agreement, then don't permit the inspection to expand beyond what you have determined to be the permissible scope. The inspector may push back but, ultimately, he or she will need to obtain a warrant.

Still, even a properly narrowed scope won't stop the inspector from citing the employer for violations in "plain sight." My OSHA team sees this all the time – a host of violations that the inspector eyed just walking to the accident location. To avoid this, make sure the pathway to the location is clear, in compliance, and the most direct route possible.

If you take nothing else from this article, remember this: Cal/OSHA does not represent the employer's interests. We find the inspectors to be generally friendly and easygoing. They're not accusatory. They just look around, take some photos, ask a lot of questions, conduct some interviews, and leave a document request on their way out the door. But they record everything – everything they see, everything you say, and everything employees say. We routinely represent employers who are shocked to find that they were issued serious citations after an inspection. They thought the inspector was friendly and would "let them off the hook." It won't happen. If the inspector thinks he or she spotted a violation, the employer will be cited for it. The inspectors know that they can be far more effective in their investigations by being friendly. By all means, be friendly back. But never forget that your interests are adverse, as the forthcoming citations will confirm.

Still, to be fair, in one way Cal/OSHA's and the employer's interests are not adverse, but are really aligned: Employee safety. Employers want their employees to be safe and, in many cases, employ personnel who are designated solely to handle the health and safety side of operations. These safety personnel generally consider the safety and well-being of their employees a personal responsibility, a cornerstone of the company's identity, and a source of pride. This creates a dynamic that we see nowhere else. Two adverse sides entirely focused on the same thing, and one side (Cal/OSHA) telling the other side (the employer's safety and health manager) that he or she did it wrong. Ouch.

Where possible, legal counsel should be involved at this stage. The inspection forces the safety and health people to be on the defensive. And counsel can be the buffer between management and the inspector, from the opening conference through the close of the inspection (which can be months later). It is much easier for us to push back on certain demands and otherwise manage the inspection. By being involved early on, we can eliminate from the process the understandable compulsion that safety and health personnel feel to, perhaps, be overly compliant with Cal/OSHA's demands. The fact is that "being helpful" does not necessarily support the employer's interests, and being overly helpful may very well hurt them. The inspection process is an important time to be objective, careful, and thoughtful.

The employer should always work in good faith with Cal/OSHA during an inspection, but it should never forget that, while both sides share employee safety as a goal, one side pursues that goal by issuing citations and monetary penalties to the other side.

The Interviews

We cannot say enough about the impact of interviews on the entire process. Depending on the circumstances of the inspection, the inspector will ask to speak with any number of employees and managers. You can expect that the inspector will interview any injured employees and witnesses, as well as any direct supervisors. And the inspector may also randomly pull aside employees that he or she sees while conducting the walk-around. The employer has no right to be present when employees are interviewed (although it doesn't hurt to ask), but the employer absolutely has the right to be present, through counsel, when management-level personnel are interviewed. This is an important right that should always be asserted. Everything a manager says can and will be used against the company at a hearing on whether the citations will stand. Management statements are called ''admissions,'' and the inspector will be free to testify to all those admissions at the hearing.

Ideally, legal counsel would have already been involved before this happens, and would have talked with any witnesses or injured employees. Obviously, counsel can't change the facts, but it is very helpful to hear the witnesses' perspective and to explain to them the inspection process. We find that employees can feel put on the defensive during their interviews with the inspector and, feeling like they're being blamed, may attempt to shift the blame to the employer. They may tell the inspector they were not properly trained or that they had no idea how to operate a particular piece of equipment, when that simply is not the case. When legal counsel speaks with them beforehand, we can explain that they are not being blamed and that their only obligation is to tell the truth. It is also helpful to discuss their prior training and have them explain why they think the accident occurred.

Whatever the result of the interviews, they will permanently impact the case. You can't change the facts, but you want to be the first to know what the facts are.

The Internal Investigation

The company representative and, ideally, the company's attorney will both be present during the site inspection. But the company needs to conduct an internal investigation as well and, if possible, even before the inspector arrives. Keep in mind that the company's internal investigation report will be discoverable – meaning Cal/OSHA can demand to see it as part of the appeal process – unless the company can successfully argue that the investigation is protected as attorney work product. Who knows what the investigation will show – maybe the company did everything perfectly, or perhaps it reveals problematic information. Either way, this is information that the company should develop internally, without risk of disclosure, to ensure a thorough and honest review. Cal/OSHA will ultimately have access to the same facts (which, again, can't be changed), but there's no reason to highlight the company's thought processes and theories when reviewing those facts. Indeed, in all likelihood the statements contained in a nonprivileged investigation report will be "admissions," which can be used against the company at a future hearing. By involving an attorney early on, this unintended result can be avoided.

The Bureau of Investigation

Also be aware that Cal/OSHA's interest in the accident may not be limited to issuing citations and penalties. Per Labor Code section 6315, Cal/OSHA's Bureau of Investigation ("BOI") *must* investigate any accident that involves serious injuries to five or more employees or a fatality, and it *may* investigate other accidents as well, depending on the circumstances. Once the BOI is involved, there are potential criminal implications, as the BOI works directly with the local prosecuting authority. Clearly, the BOI's involvement raises the stakes and only heightens the importance of staying affirmatively engaged with the *entire* inspection process.

The "1BY" Letter

If Cal/OSHA is determined to issue one or more ''serious'' citations (meaning it believes that "there is a substantial probability that death or serious bodily harm could result from a violation''), then the company will be receiving a "1BY" letter, also called a "Notice of Intent to Issue Serious Violation." The form letter describes the anticipated citation and solicits from the employer any additional information that the employer would like Cal/OSHA to consider.

The 1BY letter is the product of Labor Code section 6432, and came into play in January 2011, after much lobbying from Cal/OSHA. The only purpose for this letter is to secure against the employer a rebuttable presumption of employer knowledge, which is an essential element of a "serious" violation. Once the

letter goes out, the presumption is in place – and Cal/OSHA can make its case at the hearing without putting on any evidence of employer knowledge.

But don't be too concerned. Lack of employer knowledge is still a defense that the employer can raise. Section 6432 states that an employer "shall not be barred" from raising an employer knowledge defense and "no negative inference shall be drawn" if the employer chooses not to provide additional information. So should you provide additional information? Probably not. The company has already given information to Cal/OSHA, and it's doubtful that any "new" information or explanation will change Cal/OSHA's mind. The new information could also have the negative effect of highlighting any colorable defenses and giving Cal/OSHA a road map before even issuing the final citations. Definitely check in with your OSHA attorney before deciding, but, as a general matter, it makes sense to respectfully decline to provide additional information and then wait to see the inspector's case file.

The Citations

After receiving the citations, think long and hard about whether it makes sense to appeal. You have plenty of time – 15 *business* days after *receipt* of the citations to transmit the appeal. Then, if the company appeals, you will have literally months (and likely a year or more) to consider the company's defenses and negotiate with Cal/OSHA. We often find that employers feel rushed to schedule an informal conference before filing the appeal (sometimes incorrectly thinking the conference must happen within 10 days of receiving the citations or they "waive" the right). We've seen an early informal conference work a few times, but we much prefer to let the citations rest for a while before getting into negotiations. If you schedule an informal conference just days after the citations issue, you can expect the district manager and inspector (the likely participants in any informal conference) to be dug into their positions. With time, and reasonable discussions, they may be willing to adjust their positions and work out a settlement that is palatable to the company.

District managers also typically involve Cal/OSHA's legal department to handle an appeal. This is generally a favorable turn in the matter's dynamic. We find Cal/OSHA's attorneys to be reasonable and pragmatic. They will look at the citations from a purely "proof" perspective, and they'll work with the company's attorney to reach a fair settlement, when appropriate. Without the appeal, the employer likely misses out on the opportunity to engage in truly meaningful settlement negotiations. There's no rush. If in doubt, appeal the citations and let the system work. Have someone on your side who can negotiate with Cal/OSHA, and see how things go.

Think Before Settling

Often, the real impact of Cal/OSHA citations is not the short-term penalty amount, but the long-term implications. Owners and contractors that are soliciting bids frequently seek information on prior OSHA violations, the disclosure of which can be the difference between winning the bid and losing out. There also is the threat of "willful" and "repeat" citations, which carry substantial monetary penalties, heighten Cal/OSHA's monitoring of the cited employer, and further discourage prospective business. A single willful or repeat citation can result in a $70,000 penalty. Prior related citations can be evidence of willfulness, and more than one serious citation within a three-year period can quickly lead to *repeat* citations.

In fact, potential liability for repeat citations may expand in the near future. Cal/OSHA held an advisory meeting on March 13, 2014, to discuss amending the definition of a "Repeat Violation," as set forth in section 334(d) of title 8 of the California Code of Regulations. The proposed revisions relate to the criteria for classifying a citation as "Repeat," including the timing and geographic requirements for the underlying citation upon which a "Repeat" citation could be based. The revision as currently proposed would extend the statute of limitations from three to five years, and change the geographic limitation to statewide. This means that an employer with a violation at its operations in San Diego could be cited for a repeat violation for the same condition in its San Francisco facility. Accordingly, the decision to accept the violation(s) and pay the citation penalties is not one that should be taken lightly or made without the input of counsel. If there's nothing that can be done, so be it. But don't rush the decision.

The Hearing

If both sides are dug in and the case won't settle, then all that's left is the hearing. Hearing preparation requires scrutinizing the applicable regulations and case law, reviewing all information and records in the file, and crafting a solid strategy for the hearing. The hearing is before an administrative law judge, with both sides generally represented by counsel. It is a legal proceeding that roughly follows the rules of evidence. This means that all timely evidentiary objections must be asserted in real time when the objectionable

evidence is offered. The judge will rule on the objections from the bench. If objections are not timely made, they are waived. This is critical because if you disagree with the judge's ultimate decision, you will need the official record of all evidence, including your evidentiary objections, to petition for reconsideration. At the close of the hearing, either party may move for leave to submit a post-hearing brief for the judge's consideration. The judge's decision is rendered in the form of a proposed order, a public record of the Board. Within 30 days of its issuance, the Appeals Board may confirm, adopt, modify or set aside the proposed order, with or without further proceedings.

Conclusion

Whether or not the matter reaches the Appeals Board or beyond, every single thing you do over the course of a Cal/OSHA inspection will factor into the final outcome. While no one knows safety like your company's safety folks, there are many moving parts here, and a great many of them have nothing to do with safety. The company's first chance to mount a defense is when Cal/OSHA knocks. If your company is concerned about the implications of receiving citations and is determined to fight, then get the right people on board and give the company its best chance of success.

Got counsel?

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