

Affirmative Defenses for OSHA Citations

by Philip L. Colleran

Occupational Safety and Health Compliance Officers (CSHOs) are responsible for documenting all apparent violations they detect when conducting inspections in the workplace. Although the scope of their visits may at first be limited to investigation of a specific complaint or accident event, CSHOs are not allowed to overlook or ignore hazards that come to their attention during inspections. Under current OSHA procedures, construction employers should expect that *any* jobsite visit will be broadened to a comprehensive inspection because their industry is viewed as a "high hazard activity". For this reason alone, construction employers, large and small, face a significantly greater likelihood of being inspected and receiving "repeat" citations than those in general industry.

Consider three common defenses to citations and penalties that may result from such inspections:

- **Isolated Employee Misconduct**
- **OSHA's Multi-employer citation policy, and**
- **Feasibility of abatement/impossibility of compliance**

Isolated Employee Misconduct:

Most injuries on construction worksites stem from unsafe acts or unsafe

conditions. Unsafe acts are largely the result of inadequate training or enforcement; unsafe conditions very often the result of an employer's failure to inspect and initiate prompt corrective action. Such phrases as "carelessness" or "failure to use common sense" are shortsighted. They fail to identify the root causes of hazards. You cannot assume that employees are knowledgeable about even the most common safety hazards associated with your kind of work unless you:

- **assure their competency through careful supervision and inspection early on;**
- **issue specific instructions that address the hazards of their work, and;**
- **reinforce your instructions through discipline and keep a record of it.**

OSHA places the burden of safety training and enforcement on employers. Isolated employee misconduct cannot be raised when a supervisor has knowledge of or participates in an unsafe act or condition. When supervisor knowledge and plain indifference is apparent, OSHA frequently classifies such violations as willful and assesses far greater penalties.

If you have an established safety and health program, regularly conduct training in hazard recognition for employees and uniformly enforce safe work rules, you may be in a position to argue that unsafe acts or conditions are the result of isolated employee misconduct.

Thoroughness, consistency and corroboration are critical in raising this defense. OSHA Compliance Officers will interview employees to determine if work rules are in place and safety training is performed. They will expect you to substantiate *uniform* enforcement through written records. A smaller contractor's documentation of enforcement may be simple notations on a daily log. They can be corroborated by both the supervisor's and worker's signatures. On its face, the "formalization" of warnings is viewed as adversarial, but contractors who take these steps send a clear signal to employees that their safety is important. The majority of workers need not be warned a second and third time about safety infractions. Suspensions or firings are rare.

Follow these steps when implementing a progressive disciplinary action program:

- **Look at your injury experience and those of others contractors in your trade discipline. Make a list of the kinds of hazards that caused them, e.g. bad lifting practices; unsecured planks or ladders; poor housekeeping;**
- **Make a list of work rules that address those hazards. Make the work rules specific, e.g. ladders will be held fast until the first person up secures it;**
- **Give your employees those rules and have them acknowledge receipt in writing;**
- **Take time to train your employees about the rules and tell them you intend to enforce them, first with a**

verbal warning (and written record), and suspension or dismissal for second infractions.

- **Don't make exceptions in the uniformity of your enforcement. Employees won't take your safety efforts seriously if you're inconsistent, (the same treatment goes for your brother-in-law as it does for any other employee).**
- **Keep a record of your warnings and require employees to sign-off on their receipt. Do not throw them away.**
- **Update your rules when new hazards are discovered.**

Multi-employer Citation Policy:

Many OSHA citations are issued to employers because their workers are exposed to hazards, regardless of cause and control.

Often referred to as the "Anning Johnson defense", citations and penalties have been successfully averted because of four factors:

- **The employer did not cause the hazard to exist;**
- **The employer did not directly control conditions causing the hazard;**
- **The employer has taken reasonable steps to notify the party(s) charged with cause and control of the problem; and**
- **The employer has taken reasonable steps to keep his/her employees away from the hazard, (short of walking off the job).**

To invoke the multi-employer citation defense, an employer's on-site representative must be prepared to demonstrate that all of the above elements have been met.

General contractors, by virtue of their purse strings authority on projects, often have difficulty arguing that they have no control of hazards. However, their diligence in monitoring subcontractors' activities and records ordering abatement of hazards go far in OSHA's evaluation of the overall safety effort.

A common concern of subcontractors is formally notifying generals, construction managers or owners of conditions which, although technical violations of the OSH Act, may not present an immediate threat. Contractors, after all, want to maintain good business relationships with others from whom they might get future work. On the other hand, "Avoid Verbal Orders" notices and similar communications speak to a subcontractor's professionalism and thoroughness. Although written notification is always desirable, verbal communications, which can be corroborated, are effective in meeting the test as well.

OSHA considers simple access to a hazard as the basis for establishing employee exposure. The more your site representative inspects the work environment, (including access areas), recognizes hazards, and develops and communicates specific work rules to employees, the better your chances of raising a multi-employer defense.

Feasibility:

Although OSHA does not consider the expense of correcting a hazard to be justification for not addressing it, operations in construction cannot always be made 100% safe. Notwithstanding the possibility that an employer or his industry is unable to devise protection methods at a given time, advancements of technology and construction methodology dictate that employers exercise ongoing diligence in exploring alternative methods to safeguard workers. As an example, although it has been argued over the years that overhand bricklaying methods performed at unprotected floor edges cannot allow for the installation of a guardrail and that the use of a safety harnessing system would pose a "greater hazard" because of its tripping potential, it could be also shown that a scaffold or catch platform installed in the unprotected opening is feasible, albeit in some cases expensive.

An employer has not discharged his/her safety responsibility to provide a safe workplace by arguing about what is practical. Feasibility is something entirely different and can be argued only when it is shown that:

- **The employer has recognized and evaluated a hazardous condition or operation; and**

- **Short of simply not performing the work, he/she has determined from available knowledge that no less hazardous, alternative method of accomplishing the task exists.**

It goes without saying that of all the affirmative defenses against OSHA citations, feasibility is probably the most difficult to prove. It is always advisable to ask an OSHA Compliance Officers how he or she would correct a hazard. Although they are not allowed to specify a particular method of abatement, they are hardly worth their salt if they can't tell you what they've seen in the past. If you have questions about hazard abatement methods, contact your MCAA safety hotline.

As with all defenses, it is critical that your site supervisors be prepared to raise them at the time of inspection and insist that compliance officers document these discussions in their files.

In the scheme of things, OSHA is a small part of the safety equation. The Agency's penalties are certainly higher, but so are the costs of workers compensation and loss of productive hours. Remember that the true success of your safety program doesn't hinge on written procedures in an attractive binder. Success of your safety efforts will hinge on:

- **An investment in your site supervisor's training in safety hazard recognition and the time and resources you give them to**

inspect and correct unsafe acts and conditions;

- **Training your employees and involving them in safety planning. They are your other sets of eyes and ears. Quality of the work will increase in the bargain.**
- **Developing a reputation among workers in your industry as a contractor with strictly enforced safety rules but one with an eye on an important objective - getting everyone home to their families, free from harm.**

Philip Colleran, an OSHA Compliance Officer for 17 years, is now a private consultant specializing in construction safety and health issues. He is the author of numerous articles on workplace safety and health.