OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION
OSHA SAFETY DAY
OHIO STATE UNIVERSITY
FAWCETT CENTER

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I. ACCIDENT INVESTIGATIONS

An employer's accident investigation can be a crucial risk management tool to assist the employer with determining causes of an accident, dealing with regulatory agencies (OSHA, State of Ohio, US Chemical Safety Board, etc.) and assisting legal counsel in defense or prosecution of lawsuits arising from serious or fatal workplace accidents. Accident investigations also assist employers in addressing worker's compensation matters.

These materials will address routine, non-OSHA reportable accidents, OSHA reportable accidents and accidents/fatalities occurring on multi-employer worksites (both construction and general industry).

Liability issues will be addressed along with suggestions to help employers prepare for investigating serious injuries/fatalities.

II. ACCIDENT INVESTIGATION OF OSHA NON-REPORTABLE ACCIDENTS

This Section addresses the typical trip/fall, back strain, shoulder strain, laceration type of injuries.

Every Ohio employer should have safety policies requiring employees to immediately report a workplace injury to a supervisor, safety person or human resources. The Employment Policy should also require any employee who witnesses another employee injured to immediately report the injury. Depending on the nature/severity of the injury, the employer should decide if the employee should go to the hospital.

If the employer participates in Ohio's drug free workplace program, (OAC 123:1-76-01; Ohio Revised Code, Section 4123.54), the employer/hospital should follow the testing protocol. Timely notice and quick investigation are key even if the purported injury does not appear significant. What might seem like a simple back strain claim can result in temporary total disability benefits, medical expenses, permanent partial disability and even permanent and total disability.

A hypothetical is the 50 year old employee who likely has pre-existing osteoarthritis, who walking out the door Monday tells his supervisor that he pulled his back out Friday afternoon at work, only for the employer to later find that over the weekend the employee was riding bulls at the rodeo.

An Ohio Worker's Compensation claimant must show by a "preponderance of the evidence" not only that his injury arose out of and in the course of his employment but that a direct or proximate cause/relationship existed between his/her accidental injury and his/her harm or disability.

Both prongs of this test must be satisfied.

Ohio Worker's Compensation Act does not create a general insurance fund for the compensation for injuries in general to employees, but only for those injuries which occur in the course or and arise out of the employment.

What Is Or Isn't An "Injury" For Purposes Of Participating In Ohio's Worker's Compensation Fund

"Injury" means any injury, whether caused by external accidental means or accidental in character received in the course of and arising out of the injured employee's employment.

Under Ohio's Worker's Compensation Statute, "Injury" does not include injury or disability caused primarily by the natural deterioration of tissue, an organ or a part of the body, including the back or spine.

Also, as a general rule, a workplace injury which results from an idiopathic condition is not compensable. Idiopathic for worker's compensation purposes, refers to an employee's pre-existing physical weakness or disease which contributes to the accident.

Ohio's Workers Compensation Statute also provides that "Injury" does not include a condition that pre-existed an injury unless that pre-existing condition is "substantially" aggravated by the injury. Such a "substantial aggravation" must be documented by objective findings, objective clinical findings or objective test results. Subjective complaints may be evidence of such a substantial aggravation. However, subjective complaints without objective diagnostic findings, objective clinical findings, or objective test results are insufficient to substantiate "substantial aggravation."

Where medical testimony is necessary to demonstrate causation, the medical expert must testify that the injury was more likely than not caused by or substantially aggravated by the workplace accident.

III. EXAMPLES OF REQUIRED ACCIDENT REPORTING

- Punch Press Amputation Report
  29 CFR 1910.217(9)

  Thirty days after a point of operation injury, the employer must report the injury to the Director of Standards & Guidance (Washington, D.C.) or to the appropriate state OSHA agency if the employer is in an OSHA State Plan State.

- Process Safety Management Incident Report
  29 CFR 1910.119

  Employers that fall under OSHA's process safety management regulations must, within 48 hours, report any near miss or potential catastrophic release of highly hazardous chemicals.

- U.S. Chemical Safety Board Reports

  The release or potential release of hazardous chemicals may transfer a reporting requirement with the U.S. Chemical Safety Board.

- OSHA
  29 CFR 1904.39

  All employers are required to notify OSHA when an employee is killed on the job or suffers work related hospitalization, amputation or loss of an eye. A fatality must be reported within 8 hours.

  An in-patient hospitalization, amputation of eye loss must be reported within 24 hours.

  OSHA "800" number: 1-800-321-6742

What must be reported:

- Establishment name
- Location of incident
- Time of incident
- Type of event (fatality, in-patient hospitalization, amputation or loss of an eye)
- Number of employees who suffered fatality or injury
- Names
- Employer Contact/phone number
- Brief description of workplace accident/incident

IV. ACCIDENT INVESTIGATIONS FOR ACCIDENTS THAT MUST BE REPORTED TO OSHA

This Section deals with investigation of more serious accidents that result in fatalities or serious injuries-triggering a reporting requirement to OSHA pursuant to 29 CFR 1904.39.

For general industry, that might be amputations, crush injuries, electrocutions, forklift accidents, burn injuries, confined space, etc.

For construction, it might be trenching/excavating, confined space, falls, roadway work, struck by accidents, etc.

Thorough and prompt accident investigation is key. Photos/videos, witness statements, drug/ alcohol testing, employee safety training documentation, equipment maintenance records, surveillance videos, preserving the scene; subrogation issues, equipment failure, contract issues.

Significant employee accidents raise numerous employer liability issues:

1) OSHA/OSHA defenses
2) VSSR claims/VSSR defenses
3) Employer Intentional Tort claims
   (Ohio Revised Code Section 2745.01)
4) Spoliation claims
5) Product liability claims
6) Subrogation issues
7) Breach of Contract/Subrogation issues

The employer's accident investigation must take all of these liability/risk management issues into account.

Investigation of employee injuries on equipment should include review of the operator's manuals, lock-out/tag out procedures, equipment inspection and maintenance records, employee training records, set-up procedures, prior complaints about the equipment/ machines. For example, Ohio Courts recognize the "one time malfunction" defense which holds that a one-time failure of a safety device will not support an additional award for violation of an Ohio Specific Safety Requirement. *State ex rel. Penwell v. Indus. Comm.* (2015) 142 Ohio St.3d 114.

Prior complaints of a malfunctioning safety device that are not addressed by the employer may give rise to an Ohio Employer Intentional Tort lawsuit by an employee later injured on the machine.

V. ACCIDENTS/FATALITIES ON A MULTI-EMPLOYER WORKSITE CREATE NUMEROUS OSHA REGULATORY, TORT, AND CONTRACT ISSUES

Contractual Subrogation

See, *Cincinnati Bell v. Straley* (1988), 40 Ohio St.3d 372 held: a claim by an Ohio employer against a third party who injures an employer's employee creates a cause of action for breach of contract and allows subrogation to the employer for the employee's injury and workers' compensation claim:

> Where a third party negligently injures an employer's employee and such injury is a direct result of a breach of contract which the third party had with employee's employer, and as a direct result of such breach the employer suffers damages, such damages are recoverable against the third party in an action for breach of contract. *(Midvale Coal Co. v. Cardox Corp.* (1949), 152 Ohio St. 437, 40 0.0. 428, 89 N.E.2d 673, approved).

General Contractors/Subcontractors Can Sometimes Be Liable For Ohio VSSR Penalties For Injuries To Another Employer's Worker Under Certain Circumstances

An employer who neither owns nor is responsible for the condition and maintenance of a device used by his employee who is doing work for the owner thereof, which device as constructed is violative of a specific safety requirement imposed by law or by an order of the Industrial Commission of Ohio, and the employee is injured in its use and because of its condition, such employer is not the "employer" comprehended by Ohio Const. art. II, § 35, for whose disregard of a specific safety requirement the Industrial Commission is empowered to make an additional compensation award to the injured employee.

A company which has no "authority to alter or correct" a defective condition should not be unfairly termed the employer for purposes of a safety violation. The converse is held to be true. The negative implication is that an employer who owns or is responsible for the condition and maintenance of a device used by his employee is an "employer" potentially liable under § 35. A general contractor may have the requisite degree of responsibility to justify imposition of employer status when scaffolding constructed by a subcontractor proves defective. Thus, the "authority to alter or correct" is a primary factor in determining who is the responsible party. *State ex rel. Lyburn Const. v. Indus. Comm.* (1985), 18 Ohio St. 3d 27. See also *State ex rel. Zito* (1980), 64 Ohio St. 2d 53; *State ex rel. Grunau Fire Protection v. Indus Comm,* (1992), 65 Ohio St. 3d 320.

A VSSR claimant must prove not only a violation of a specific safety regulation that proximately caused the claimant's injury; **but that the claimant must also prove that it was the claimant's employer and not some other contractor who violated the specific safety requirement. *State ex rel. Grunau Fire Protection Systems, Inc. v. Indus. Comm.*, (1992) 65 Ohio St.3d 320.**

For example, in a case involving a floor opening and claim of a lack of guardrail or toeboards, a claimant must prove that it was the claimant's employer who created the unsafe condition and who was in control of the work area at the time the unsafe condition was created, as opposed to some other contractor. *State ex rel. Warr v. Indus. Comm.* (1977) 49 Ohio St.2d at 269-270.

Subcontractors/Owners/General Contractors May Be Liable for Accidents/Fatalities on a Multi-Employer Worksite

Ohio law holds that a subcontractor on a multi-employer worksite must exercise ordinary care not to injure employees of another subcontractor. See, *Cole v. Contract Framing, Inc.*, 162 Ohio App.3d 612 (Franklin Cty. 2005); *Nibert v. Columbus/Worthington Heating & Air*, 2010 Ohio App. Lexis 1051 (12th Dist.):

> "One who engages the services of an independent contractor and who actually participates in the job operation performed by such contractor and thereby fails to eliminate a hazard which he, in the exercise of ordinary care, could have eliminated can be held responsible for the injury or death of an employee of an independent contractor.

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> Surely subcontractors in a non-supervisory position can "actively participate" in the performance of another subcontractor's work and, as such, must exercise a duty of ordinary and reasonable care when executing their job functions in an inherently dangerous work environment. To declare otherwise would allow non-supervising subcontractors to complete their work without regard for others on the job site." (Slip op at p. 7).

As to owners and general contractors, generally neither is liable for injuries to employees of an independent contractor unless the owner or general contractor "actively participates" in the work of the independent contractor's employees or exerts control over a critical variable in the work environment. (Such as the sole authority to de-energize electric.) See, *Sopkovich v. Ohio Edison* (1988) 81 Ohio St.3d 628; *Bond v. Howard* (1995) 72 Ohio St.3d 332; *Michaels v. Ford Motor Company* (1995) 72 Ohio St.3d 475.

NOTE: Monitoring a multi-employer worksite by a general contractor for safety issues does not equate to "active participation."

An Accident/Fatality on a Multi-Employer Worksite May Raise Contractual Indemnity Issues

Ohio Revised Code Section 2305.31 Promisee Indemnified Against Damage Liability.

A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the design, planning, construction, alteration, repair, or maintenance of a building, structure, highway, road, appurtenance, and appliance, including moving, demolition, and excavating connected therewith, pursuant to which contract or agreement the promisee, or its independent contractors, agents or employees has hired the promisor to perform work, purporting to indemnity the promise, its independent contractors, agents, employees, or indemnities against liability for damages arising out of bodily injury to persons or damage to property initiated or proximately caused by or resulting from the negligence of the promise, its independent contractors, agents, employees, or indemnities is against public policy and is void. Nothing in this section shall prohibit any person from purchasing insurance from an insurance company authorized to do business in the state of Ohio for his own protection or from purchasing a construction bond.

Ohio law generally prohibits indemnity agreements in construction related contracts where the independent contractor agrees to indemnify the owner/general contractor for the negligence of the owner or general contractor. *Kendall v. U.S. Dismantlers Co.*, (1985) 20 Ohio St.3d 61; *Buckeye Union Ins. Co. v. Zauarella Brothers*, 121 Ohio App.3d 147 (8th Dist. 1997); *Durgin v. Dugan & Myers Constr.*, 7 Ohio App. 3d 326 (Franklin Cty. 1982).

OSHA's Multi-Employer Enforcement Policy
CPL 02-00-124

A. **Multi-employer Worksites**. On multi-employer worksites (in all industry sectors), more than one employer may be citable for a hazardous condition that violates an OSHA standard. A two-step process must be followed in determining whether more than one employer is to be cited.

1. Step One. The first step is to determine whether the employer is a creating, exposing, correcting, or controlling employer. The definitions in paragraphs (B) – (E) below explain and give examples of each. Remember that an employer may have multiple roles (see paragraph H). Once you determine the role of the employer, go to Step Two to determine if a citation is appropriate (NOTE: only exposing employers can be cited for General Duty Clause violations).

2. Step Two. If the employer falls into one of these categories, it has obligations with respect to OSHA requirements. Step Two is to determine if the employer's actions were sufficient to meet those obligations. The extent of the actions required of employers varies based on which category applies. Note that the extent of the measures that a controlling employer must take to satisfy its duty to exercise reasonable care to prevent and detect violations is less than what is required of an employer with respect to protecting its own employees.

B. The Creating Employer

1. Step 1: Definition: The employer that caused a hazardous condition that violated an OSHA standard.

2. Step 2: Actions Taken: Employers must not create violative conditions. An employer that does so id citable even if the only employees exposed are those of other employers at the site.

C. The Exposing Employer

1. Step 1: Definition: An employer whose own employees are exposed to the hazard. See Chapter III, section (C)(1)(b) for a discussion of what constitutes exposure.

2. Step 2: Actions taken: If the exposing employer created the violation, it is citable for the violation as a creating employer. If the violation was created by another employer, the exposing employer is citable if it (1) knew of the hazardous condition or failed to exercise reasonable diligence to discover the condition, and (2) failed to take steps

consistent with its authority to protect is employees. If the exposing employer has authority to correct the hazard, it must do so. If the exposing employer lacks the authority to correct hazard, it is citable if it fails to do each of the following: (1) ask the creating and/or controlling employer to correct the hazard; (2) inform its employees of the hazard; and (3) take reasonable alternative protective measures. In extreme circumstances (e.g., imminent danger situations), the exposing employer is citable for failing to remove its employees from the job to avoid the hazard.

D. The Correcting Employer

1. Step 1: Definition: An employer who is engaged in a common undertaking, on the same worksite, as the exposing employer and is responsible for correcting a hazard. This usually occurs where an employer is given the responsibility of installing and/or maintaining particular safety/health equipment or devices.

2. Step 2: Actions taken: The correcting employer must exercise reasonable care in preventing and discovering violations and meet its obligations of correcting the hazard.

E. The Controlling Employer

1. Step 1: Definition: An employer who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them. Control can be established by contract or, in the absence of explicit contractual provisions, by the exercise of control in practice. Descriptions and examples of different kinds of controlling employers are given below.

2. Step 2: Actions Taken: A controlling employer must exercise reasonable care to prevent and detect violations on the site. The extent of the measures that a controlling employer must implement to satisfy this duty of reasonable care is less than what is required of an employer with respect to protecting its own employees. This means that the controlling employer is not normally required to inspect for hazards as frequently or to have the same level of knowledge of the applicable standards or of trade expertise as the employer it has hired.

3. Factors Relating to Reasonable Care Standard. Factors that affect how frequently and closely a controlling employer must inspect to meet its standard of reasonable care include:

   a. The scale of the project;

b. The nature and pace of the work, including the frequency with which the number or types of hazards change as the work progresses;
c. How much the controlling employer knows both about the safety history and safety practices of the employer it controls and about that employer's level of expertise.
d. More frequent inspections are normally needed if the controlling employer knows that the other employer has a history of non-compliance. Greater inspection frequency may also be needed, especially at the beginning of the project, if the controlling employer has never before worked with this other employer and does not know its compliance history.
e. Less frequent inspections may be appropriate where the controlling employer sees strong indications that the other employer has implemented effective safely and health efforts. The most important indicator of an effective safety and health effort by the other employer is a consistently high level of compliance. Other indicators include the use of an effective, graduated system of enforcement for non-compliance with safety and health requirements coupled with regular jobsites safety meetings and safety training.

4. **Evaluating Reasonable Care**. In evaluating whether a controlling employer has exercised reasonable care in preventing and discovering violations, consider questions such as whether the controlling employer;

   a. Conducted periodic inspections of appropriate frequency (frequency should be based on the factors listed in G.3);

   b. Implemented an effective system for promptly correcting hazards;

5. **Types of Controlling Employers**

   a. Control Established by Contract. In this case, **the Employer Has a Specific Contract Right to Control Safety:** To be a controlling employer, the employer must itself be able to prevent or correct a violation or to require another employer to prevent or correct the violation. One source of this ability is explicit contract authority. This can take the form of a specific contract right to require another employer to adhere to safety and health requirements and to correct violations the controlling employer discovers.

   b. Control Established by a Combination of Other Contract Rights: Where there is no explicit contract provision granting the right to control safety, or where the contract says the employer does not have such a right, an employer may

still be a controlling employer. The ability of an employer to control safety in this circumstance can result from a combination of contractual rights that, together, give it broad responsibility at the site involving almost all aspects of the job. Its responsibility is broad enough so that its contractual authority necessarily involves safety. The authority to resolve disputes between subcontractors, set schedules and determine construction sequencing are particularly significant because they are likely to affect safety. (NOTE: citations should only be issued in this type of case after consulting with the Regional Solicitor's office).

c. Architects and Engineers: Architects, engineers, and other entities are controlling employers only if the breadth of their involvement in a construction project is sufficient to bring them within the parameters discussed above.

d. Control Without Explicit Contractual Authority. Even where an employer has no explicit contract rights with respect to safety, an employer can still be a controlling employer if, in actual practice, it exercises broad control over subcontractors at the site (see Example 9). NOTE: Citations should only be issued in this type of case after consulting with the Regional Solicitor's office.

F. Multiple Roles

1. A creating, correcting or controlling employer will often also be an exposing employer. Consider whether the employer is an exposing employer before evaluating its status with respect to these other roles.

VI. AUTHORITY OF STATE OF OHIO BWC SAFETY INVESTIGATORS TO INVESTIGATE WORKPLACE INJURIES/FATALITIES

4121.14 Investigating Agent.

For the purpose of making any investigation with regard to any employment or place of employment, the administrator of workers' compensation may appoint, by an order in writing, any employee of the bureau of workers' compensation, any deputy, who is a citizen of the state, or any other competent person who is a resident of the state, as an agent whose duty shall be prescribed in the order.

In the discharge of his duties, the agent shall have every power whatsoever of an inquisitorial nature granted in sections 4101.01 to 4101.16 and 4121.01 to 4121.29 of the Revised Code to the bureau, and the same powers as a master commissioner appointed by a court of common pleas with regard to taking testimony.

The bureau may conduct any number of investigations contemporaneously through different agents, and may delegate to agents the taking of all testimony bearing upon any investigation or hearing.

The decision of the bureau shall be based upon its examination of all testimony and records. The recommendations made by agents shall be advisory only and shall not preclude the taking of further testimony if the bureau orders, nor further investigation.

4121.15 Power To Administer Oaths, Issue Subpoenas, And Compel Attendance Of Witnesses.

The administrator of workers' compensation and his designees, for the purposes mentioned in sections 4121.01 to 4121.29 of the Revised Code may administer oaths, certify to official acts, issue subpoenas, and compel attendance of witnesses and the production of papers, books, accounts, documents, and testimony. In case of the failure of any person to comply with any order of the bureau of workers' compensation or any subpoena lawfully issued, or upon the refusal of any witness to testify to any matter regarding which he may be lawfully interrogated, the judge of the court of common pleas of any county in this state, on the application of the bureau, shall compel obedience by attachment proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from the court or a refusal to testify therein.

4121.17 Examination Of Place of Employment Upon Petition That Some Is Unsafe.

(A) Upon petition by any person that any employment or place of employment is not safe or is injurious to the welfare of any employee or frequenter, the bureau of workers' compensation shall proceed with or without notice to make an investigation as is necessary to determine the matter complained of.
(B) After such hearing as is necessary, the bureau may enter any necessary order relative thereto to render the employment or place of employment safe and not injurious to the welfare of the employees therein or frequenters thereof.
(C) Whenever the bureau learns that any employment or place of employment is not safe or is injurious to the welfare of any employee or frequenter, it may of its own motion summarily investigate the same, with or without notice, and issue such order as is necessary thereto.

Ohio workplace accidents are investigated by the Ohio Bureau of Workers' Compensation Special Investigations Department and Safety Violations Investigation Unit.

VII. AUTHORITY OF FEDERAL OSHA TO INVESTIGATE WORKPLACE INJURIES/FATALITIES

OSHA Inspections are governed by 29 C.F.R. 1903.3 and 29 C.F.R. 1903.4.

29 C.F.R. 1903.3 Authority for Inspection:

(a) Compliance Safety and Health Officers of the Department of Labor are authorized to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment, and all pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein; to question privately any employer, owner, operator, agent or employee; and to review records required by the Act and regulations published in this chapter, and other records which are directly related to the purpose of the inspection.

29 C.F.R. 1903.4 Objection to Inspection:

(a) Upon a refusal to permit the Compliance Safety and Health Officer, in exercise of his official duties, to enter without delay and at reasonable times any place of employment or any place therein, to inspect, to review records, or to question any employer, owner, operator, agent or employee, in accordance with Section 1903.3 or to permit a representative of employees to accompany the Compliance Safety and Health Officer during the physical inspection of a workplace in accordance with Section 1903.8, the Safety and Health Officer shall terminate the inspection or confine the inspection to other areas, conditions, structures, machines, apparatus, devices, equipment, materials, records, or interviews concerning which no objection is raised. The Compliance Safety and Health Officer shall endeavor to ascertain the reason for such refusal and shall immediately report the refusal and the reason therefor to the Area Director. The Area Director shall consult with the Regional Solicitor, who shall take appropriate action, including compulsory process, if necessary.

VIII. LEGAL COUNSEL SHOULD BE IMMEDIATELY CONTACTED IN THE EVENT OF A SIGNIFICANT WORKPLACE ACCIDENT OR FATALITY

Federal and State Courts and the Occupational Safety and Health Review Commission all recognize Attorney-Client Privilege and Work Product Privilege.

Communications with legal counsel and the management/safety team are privileged. Investigations directed by legal counsel are privileged from disclosure. Work performed by experts at the direction of legal counsel is also privileged from disclosure.

Involvement of legal counsel in accident investigations protects the employer's investigation process from disclosure. Investigations conducted in anticipation of litigation are protected by the work product doctrine.

Investigations conducted by an employer/legal counsel in anticipation of OSHA citations are also protected by the work product doctrine.

See 26(B)(3) and (5)(6) of the Ohio Rules of Civil Procedure.

See RULE 26 of the Federal Rules of Civil Procedure.

OSHRC Rule 2200.2 states that the Review Commission follows the Federal Rules of Civil Protection for OSHA matters.

OSHRC Rule 2200.52(d) addresses issues of privilege in OSHA matters.

IX. KNOWLEDGE AND STATEMENTS OF SUPERVISORS, SUPERINTENDENTS, SAFETY DIRECTORS AND LEAD PERSONS ARE CONSIDERED ADMISSIONS OF THE EMPLOYER PURSUANT TO OHIO EVIDENCE RULE 801(D)(2), FEDERAL EVIDENCE RULE 801(d)(2) AND OSHRC LAW

The testimony of management or supervisory personnel can be a binding admission of a party opponent pursuant to Ohio Evidence Rule 801(D)(2). *Eberly v. A-P Controls, Inc.*, 61 Ohio St.3d 27 (1001); *Jack F. Neff Sand & Gravel v. Great Lakes Crushing Ltd.*, 2014 Ohio 2875 (11th Dist.); *Jelinek v. Abbott Labs*, 2013 Ohio App. Lexis 1537 (10th Dist.); *Moebius v. General Motors Corp.*, 2002 Ohio 3918 (2nd Dist.) (held: supervisors' statements admissible as admissions by a party opponent under Ohio Evidence Rule 801(D)(2).)

Ohio Evidence Rule 80(D)(2):

(D) Statements which are not hearsay. A statement is not hearsay if:

(2) Admission by party-opponent. The statement is offered against a party and is (a) the party's own statement, in either an individual or a representative capacity, or (b) a statement of which the party has manifested an adoption or belief in its truth, or **(c) a statement by a person authorized by the party to make a statement concerning the subject, (d) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship**, or (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy.

Federal Evidence Rule 801(d)(2):

(d) **Statements That Are Not Hearsay**. A statement that meets the following conditions is not hearsay:

(2) ***An Opposing Party's Statement.*** The statement is offered against an opposing party and: (A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) **was made by the party's agent or employee on a matter within the scope of that relationship and while it existed**; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy. Hearings before the Occupational Safety & Health Review Commission are governed by the Federal Rules of Evidence. See Commission Rule 2200.71.

Also, under OSHRC law governing the Sixth Circuit Court of Appeals, (Ohio), knowledge of any employee with supervisory authority is imputed as knowledge of the Employer.

See the following excerpts from *Secretary of Labor v. Quandel Construction Group, Inc.*, OSHRC Docket No. 14-1434 (2015), Occupational Safety & Health Review Commission (Note: After OSHA trial, OSHRC vacated the case against Quandel:)

A preponderance of the evidence establishes Havens was responsible for the project's exterior work to ensure the work being performed was done so "properly and safety." It is not disputed he was leadman for the exterior work, only that he was not a foreman. That he did not possess the title of foreman is not determinative. **An employee who has been delegated authority over another employee, even if only temporarily, is considered to be a supervisor for purposes of imputing knowledge to an employer.** ***American Engineering & Development Corp.*****, 23 BNA OSHC 2093, 2012 (No. 10—359, 2012);** ***Diamond Installations, Inc.*****, 21 BNA OSHC 1688 (Nos. 02-2080 & 02-2081, 2006);** ***Tampa Shipyards, Inc.*****, 15 BNA OSHC 1533 (Nos. 86-360 and 86-469, 1992).** The employer's job function rather than title is determinative. Therefore, the Commission has imputed the knowledge of a "working leader," because although not a full-time supervisor he was a supervisor at the time of the alleged violation. Havens as leadman had authority over the helper in the aerial lift and the employee cutting the pieces on the ground, and as such is a supervisor for purposes of imputing knowledge to Quandel. The Court therefore must determine whether as supervisor Haven's knowledge of his own misconduct may be imputed to Quandel.

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The instant case arises in the Sixth Circuit which has held in a case involving supervisory misconduct "knowledge of a supervisor may be imputed to the employer. Because Wagner was a foreman and knew of his own failure to wear personal protective equipment, this failure may be imputed to Danis-Shook." *Danis-Shook Joint Venture XXV,* 319 F.3d 805 (6th Cir. 2003).

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The Courts and Commission are divided on the issue of whether a supervisor's knowledge of his or her own malfeasance is imputable to the employer. As shown in *Danis-Shook, supra,* the Sixth Circuit agrees with the Secretary that this knowledge is imputable. Since the Courts and the Commission are divided on this issue, in ruling on the issue, the Commission has deferred to the holding of the applicable circuit. Because this case arose in the Sixth Circuit, deferring to the holding in that Circuit, Haven's misconduct is imputed to Quandel. The Secretary has established a prima facie case regarding the Citation issued to Quandel.

Secretary of Labor v. Quandel, OSHRC Docket Number 14-1434, Slip Op. at pages 8-9.

Since even lead persons have the ability to bind the employer/company, legal counsel should be present whenever Federal OSHA investigators or Ohio Safety Investigators question any employee with supervisory authority.

For this very same reason, accident reports, including opinions from management, the safety director or persons with supervisory authority may be treated as admissions by the employer/ company. Employers must be careful not to put opinions about an accident into an initial accident report.

Arguably, an employer's failure to contest OSHA citations, allowing the citations to become a Final Order of a Federal agency, may be treated as an admission by the employer that the facts set out in the OSHA citations are not disputed.

X. MAKING FALSE STATEMENTS TO OSHA INVESTIGATORS OR SUBMITTING FALSE RECORDS IS A VIOLATION OF NUMEROUS OSHA CRIMINAL STATUTES

Note that Federal Statutes impose criminal liability on anyone who violates certain OSHA statutes; employer or employee.

- **29 U.S.C. Sec. 666(g) (Part of Federal OSHA Statute)** states as follows:

Whoever knowingly makes any false statement, misrepresentation, or certification in any application, record, report, plan or other document filed or required to be maintained pursuant to this chapter shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

- **28 U.S.C. Sec. 201** states that it shall be unlawful to bribe a public official to influence any official's action or to induce the public official to do or omit to do any act required by Federal law.

- **18 U.S.C. Sec. 1001** states as follows:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses

any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned note more than five years, or both.

On December 17, 2015, the United States Department of Labor and the Justice Department entered into a Memorandum of Understanding to coordinate an enhanced program to pursue criminal prosecutions for OSHA and workplace safety violations.

Representative OSHA-Related Criminal Cases:

- Case Note: **In July 1998, a construction company owner was indicted by the U.S. Justice Department for obstruction of justice and the construction supervisor/foreman pled guilty to making false statements to OSHA investigators following a fall accident and fatality at a job site near Cincinnati, Ohio. The foreman falsely told OSHA investigators that fall protection was in place prior to the accident, when, in fact, the employees were not utilizing fall protection.**

- Case Note: In 1998, the President of a painting company was fined $100,000.00 and sentenced after pleading no contest to criminal charges that he falsified employee training certificates and sent them to the Charleston, WV OSHA Office.

- Case Note: April 2000 — A Federal Judge sentenced an Idaho man to 17 years in prison for environmental/OSHA crimes that left a 24-year-old employee with permanent brain damage from cyanide poisoning.

  The employer was also convicted of making false statements to OSHA by fabricating and backdating a safety plan for entering a confined space and falsely stating that employees had been given safety equipment before entering a tank that contained cyanide gas.

- Case Note: On December 6, 1999, a Florida bridge painting company agreed to pay $500,000 in criminal fines for submitting falsified lead blood level test results. The employer altered lab results to show employee blood levels under the 40 microgram action level when, in fact, actual employee blood lead levels were from 45 to 73 micrograms per deciliter of whole blood. *United States v. Datnalas, Inc,* **Case No. 99-412-CR-J-25-F (M.D. Fla.) OR-4-95-107.**

- Case Note: December 29, 1999 — A Florida subcontractor was sentenced to house arrest followed by three years' probation for a criminal OSHA violation following a willful failure to comply with OSHA's confined space regulations, leading to an explosion that killed an employee.

  The subcontractor also pled guilty to a felony for falsifying records submitted to OSHA in an attempt to cover up the cause of the worker's death.

- Case Note: November 22, 1999 — U.S. District Court Judge Sandra Beckwith of the Southern District of Ohio sentenced two employees of a steel erection company to probation, fined both employees, fined the company $300,000 and placed the company on five years' probation following a fatality in Mason, Ohio on August 9, 1996. The safety director and regional manager were both sentenced to six months imprisonment, three years supervised probation and fined. The job foreman was sentenced previously following a guilty plea to making false statements to OSHA about the accident.

- Case Note: On March 18, 1999, the owner of a construction company was sentenced to twelve months of incarceration after he attempted to bribe an OSHA Compliance Officer who had cited one of the company's construction sites (auto dealership) and who conducted a follow-up inspection and who was going to again cite the employer. The owner attempted to bribe the CSHO $1,000 not to write the follow-up citations and then attempted to bribe the assistant Area Director. The CSHO had tipped off the F.B.I. and that Assistant Area Director was wearing a wire at the time of the second bribe.

- Case Note: On July 31, 2001, an Iowa company and senior executive pled guilty in Federal Court to obstructing an OSHA investigation following an accident that resulted in the death of a firefighter. After an Illinois grain elevator explosion, a salvage company employee entered the damaged grain bin and collapsed from carbon monoxide exposure. A firefighter who went in to rescue the employee died of carbon monoxide poisoning. The salvage company then conspired to go back and create a bogus confined space entry permit. *United States v. Stickle Enterprise, Ltd.,* Case No. 00 CR 50061 (N.D. OR-4-95-107.

- Case Note: On April 11, 2001, a Texas executive was sentenced to six months incarceration for hiring ten illegal aliens to perform asbestos abatement with no P.P.E. A supervisor also pled guilty to making false statements under oath during the course of the related OSHA proceeding. The supervisor was fined and placed on one year's probation. *United States v. Ha;* Case No. CRH-00-183 (S.D. Tx).

- **Case Note: On December 9, 2015, the owner of a Pennsylvania based roofing company pled guilty to four counts of making false statements, one count of obstruction of justice and one count of willfully violating an OSHA regulation causing the death of an employee who fell 45 feet to his death while working on a roof with no fall protection.**

  The owner falsely stated to OSHA investigators that the roofing employees were wearing fall protection and the owner attempted to coerce employees into telling OSHA that the employees were wearing fall protection.

Case Note:

- **In October of 2018, two executives of a Youngstown manufacturing facility were Federally indicted for allegedly covering up circumstances in the death of an employee caused by unsafe machinery.**

  The indictments were issued against the plant manager and safety director.

  The indictment alleges that the plant manager and safety director made false statements to OSHA investigators, withheld emails from employees about the machine being unsafe and persuaded/pressured employees to recant their previous email warnings about the machine's safety, including suggesting their jobs might be in jeopardy.

  The indictment alleges that the plant manager and safety director also withheld an email from the plant manager where the plant manager acknowledged safety problems with the dangerous conveyor system and knowingly chose not to fix it.

  The plant manager and safety director each face three counts of obstructing justice and OSHA proceedings and for making false statements.

XI. OSHA DRONE POLICY

During a recent construction fatality that Hahn Loeser is involved in, the Cleveland OSHA office indicated that the compliance officer wanted to use a drone to fly over the site to photograph and videotape the site and the equipment involved in the fatality. OSHA agreed to share the drone footage with the employers involved in the OSHA investigation. This request came as part of OSHA's new inspection procedure.

On May 11, 2018, OSHA's Director of Enforcement Programs issued a memorandum to all of the OSHA Regional Administrators addressing the use of Unmanned Aircraft Systems (DRONES) as a method for OSHA to collect evidence during inspections.

Currently, the OSHA compliance memorandum requires OSHA to obtain express consent from the employer prior to using any drone on an OSHA inspection. But, what about expanded use of drones by OSHA for inspections and compliance in the future?

OSHA's drone inspection memorandum (attached) states that OSHA may use drones for compliance assistance and inspections and that OSHA is exploring obtaining a blanket certificate of operation from the FAA to use drones nationwide.

What Are The Legal Implications For Employers?

First, a property owner has a reasonable expectation of privacy for its property and the immediate airspace pursuant to the 4th Amendment. As such, many states are enacting drone statutes precluding law enforcement from utilizing drone photos/videos taken without first

obtaining a warrant to use the drones. For example, Florida's Drone Search and Seizure Statute (Fla Statute 934.550) reads in pertinent part:

> (3) PROHIBITED USE OF DRONES
>
> (a) A law enforcement agency may not use a drone to gather evidence or other information.
> (b) A person, a state agency, or a political subdivision as defined in s. 11.45 may not use a drone equipped with an imaging device to record an image of privately owned real property or of the owner, tenant, occupant, invitee, or licensee of such property with the intent to conduct surveillance on the individual or property captured in the image in violation of such person's reasonable expectation of privacy without his or her written consent. For purposes of this section, a person is presumed to have a reasonable expectation of privacy on his or her privately owned real property if he or she is not observable by persons located at ground level in a place where they have a legal right to be, regardless of whether he or she is observable from the air with the use of a drone.
>
> (4) EXCEPTIONS. – This section does not prohibit the use of a drone:
>
> (a) To counter a high risk of a terrorist attack by a specific individual or organization if the United States Secretary of Homeland Security determines that credible intelligence indicates that there is such a risk.
> (b) If the law enforcement agency first obtains a search warrant signed by a judge authorizing the use of a drone.
> (c) If the law enforcement agency possesses reasonable suspicion that, under particular circumstances, swift action is needed to prevent imminent danger to life or serious damage to property, to forestall the imminent escape of a suspect or the destruction of evidence, or to achieve purposes including, but not limited to, facilitating the search for a missing person.

How these statutes would affect a Federal Agency such as OSHA is currently unknown.

Second, just as planes and helicopters fly over property, if the FAA grants OSHA the right to use drones nationwide in a particular airspace, OSHA could argue that an employer or property owner would not have a reasonable expectation of privacy in the airspace immediately above a worksite. The question would become how low the drones are allowed to fly.

Third, such drone use by OSHA might contravene certain inspection safeguards contained in the 4th Amendment and contained in existing OSHA regulations. See, 29 CFR Part 1903.

In *Marshall v. Barrows, Inc.*, 436 US 307 (1978), the U.S. Supreme Court held that warrantless worksite inspections by OSHA violate the 4th Amendment rights of the employer.

However, the Court in *Barrow* and numerous Occupational Safety & Health Review Commission decisions hold that OSHA can site employers for workplace hazards observable by the public and on worksites open to the public, as the employer would have no reasonable expectation of privacy. *Secretary v. Bast Hartfield, Inc.*, 18 OSH (as (BNA) 1848 (1999)); *Secretary v. Drum Construction Co., Inc.*, 18 OSH (BNA) 1927 (1999).

For observations not in plain view, OSHA inspections are governed by 29 CFR 1903.3 and 29 CFR 1903.4.

29 CFR 1903.3 Authority for Inspection:

> (a) Compliance Safety and Health Officers of the Department of Labor are authorized to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment, and all pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein; to question privately any employer, owner, operator, agent or employee; and to review records required by the Act and regulations published in this chapter, and other records which are directly related to the purpose of the inspection. . .

29 CFR 1903.4 Objection to Inspection:

> (a) Upon a refusal to permit the Compliance Safety and Health Officer, in exercise of his official duties, to enter without delay and at reasonable times any place of employment or any place therein, to inspect, to review records, or to question any employer, owner, operator, agent or employee, in accordance with Section 1903.3 or to permit a representative of employees to accompany the Compliance Safety and Health Officer during the physical inspection of an workplace in accordance with Section 1903.8, the Safety and Health Officer shall terminate the inspection or confine the inspection to other areas, conditions, structures, machines, apparatus, devices, equipment, materials, records, or interviews concerning which no objection is raised. The Compliance Safety and Health Officer shall endeavor to ascertain the reason for such refusal and shall immediately report the refusal and the reason therefor to the Area Director. The Area Director shall consult with the Regional Solicitor, who shall take appropriate action, including compulsory process, if necessary.

Drone use could also run afoul of other OSHA inspection regulations and Federal Statutes. The Uniform Trade Secrets Act, 18 USC Section 1905, 29 CFR 1903.9 and OSHA's Field Operations Manual preclude OSHA from taking videos/photos of an employer's trade secret and

proprietary processes without coordination with the employer and without procedural safeguards put in place.

Another consideration is sound recording of employees, foremen, superintendents. Will OSHA be using drones to sound record? Employees are entitled to have a management representative and/or legal counsel present when OSHA interviews anyone with supervisory authority. Typically, if the employer is a union company, OSHA allows a union rep to be present for rank and file employee interviews.

For now, OSHA's use of drones is limited to specific instances and requires the employer's express consent. OSHA's use of drones in the future may change and create legal/regulatory issues that bear monitoring.

XII. EMPLOYER CONTEST OF OSHA CITATIONS AS A DISCOVERY TOOL

Very often, contesting OSHA citations issued to an employer provides the employer with perhaps the only real opportunity to obtain OSHA's file and obtain information about OSHA's investigation of an accident.

29 C.F.R. 2.21 provides that an employee of the Department of Labor served with a discovery request or subpoena shall immediately notify the Office of the Solicitor.

29 C.F.R. 2.22 provides that no employee or former employee of the Department of Labor shall, in response to the demand of a Court or other authority, disclose files or information contained in any Department of Labor files (including OSHA files) without approval of the Deputy Solicitor of Labor.

Federal Courts have repeatedly quashed subpoenas when litigants attempt to obtain OSHA files or attempt to compel OSHA compliance officers to sit for a deposition for use in a related civil matter. See, *Reynolds Metals Co. v. Crowther*, 572 F. Supp. 288, 290 (D. Mass 1982):

> "If OSHA employees were routinely permitted to testify in private civil suits, significant loss of manpower hours would predictably result."

See also, *United States ex rel. Touhy v. Ragan*, 340 U.S. 462 (1951); *Manzo v. Stanley Black & Decker, Inc.*, Case No. 2:13-CV-03963 (US District, E.D. NY 2017). (See also OSHA January 6, 2003 letter).

To the contrary, an employer who contests OSHA citations is afforded the ability to conduct full discovery of the U.S. Department of Labor, including obtaining OSHA files, photos, videos, witness statements, expert reports and depositions under oath of OSHA Compliance Officers and other witnesses. See. Occupational Safety and Health Review Commission procedural rules. See, 29 C.F.R. Part 2200.

XIII. SUGGESTIONS FOR ACCIDENT INVESTIGATIONS

A. Have A Team Put Together Ahead Of Time For Handling Accidents/Fatalities And Accident Investigations

Each employer should have an accident team in place – management, supervisors, safety directors, legal counsel, in-house counsel, consultants, insurance claims representatives/broker, public relations personnel and other key people, worker's compensation administrators, etc. This team should be in place to handle accidents/fatalities.

Every person on the team should have a master list of telephone numbers and email addresses. Consider having in place a conference call number with moderator and participant passcodes. The team should confer as soon as possible in the event that any team member learns of a significant workplace accident or fatality.

B. Other Suggestions for Accident Investigations

- Decide who will be the liaison or employer representative to handle interaction with OSHA investigators and Ohio Safety investigators.
- Have a plan in place to address the OSHA and/or State of Ohio Safety Investigators' Opening Conference.
- Discuss in advance if any workplace inspection may implicate the employer's proprietary and trade secret processes.
- As soon as possible, under the direction of legal counsel, record the scene, including photos, video and measurements.
- As soon as possible, under the direction of legal counsel, secure the accident scene and do not let anything be moved or removed from the accident scene until all evidence is recorded and OSHA gives the ok that the scene may be opened back up to work activity.
- As soon as possible, under the direction of legal counsel, interview supervisors, lead persons and employee witnesses to the accident.
- In the event of a serious injury or fatality, notify the employer's insurance carrier as soon as possible. The carrier may want to participate in the investigation or retain forensic experts to participate in the accident investigation.
- Legal counsel should coordinate and participate in OSHA's or the Ohio Safety Investigator's interviews of management, superintendents, supervisors or any lead persons.
- Legal counsel should meet with rank and file employees who witnessed the accident.
- The team, if possible, should try to interview employees of other employer's on a multi-employer worksite.
- Keep in mind that Ohio's Safety investigators are likely to show up on an accident site before OSHA gets there. Emergency responders, hospitals, coroners, police often notify Ohio's Safety investigators soon after an accident.

- The entire team should collaborate on the preparation of the initial accident report and final accident report.
- The team should expect media inquiry and should collaborate on media response or a press release.
- "No comment" is not an effective media response.
- The team needs to cooperate with OSHA investigators and Ohio Safety investigators and act with the utmost of professionalism.
- In the event of a serious accident or fatality, the team needs to designate a liaison or advocate for the worker's family.
- In the event that an accident or fatality might have been caused by a defect or malfunction in a piece of equipment or machinery, the equipment/machinery should be secured, examined by OSHA/Ohio, experts and everyone involved, held and cannot be disposed of (spoliation).
- In the construction setting, OSHA must obtain the employer's express consent to utilize a drone to photograph/video the scene.
- Team representatives should photograph/video everything that the OSHA investigators or Ohio Safety investigators record or measure.
- In many circumstances, it is necessary to contest any OSHA citations arising from an accident in order to obtain necessary information/discovery.
- Obtain information from police and first responders.
- Police officers often have dash cams and portable microphones attached to their uniforms to record communications. Obtain the videos.
- Locate and secure any interview or exterior surveillance cameras/videos that might have recorded any part of the accident.
- Pull any employee safety training records and sign off documentation for the injured/deceased employee.
- If the accident involves a piece of equipment or machinery, pull the operators manual, training records, purchase orders, invoices and inspection/maintenance records.
- If the accident/fatality occurs on a multi-employer jobsite, pull all contracts and subcontracts.
- If the accident/fatality occurs on a multi-employer worksite, pull any site-specific safety programs, records of safety meetings, site safety audits, disciplinary actions, etc.
- If the employer uses a safety consultant, the safety consultant should be made a part of the investigation team.
- The initial accident report should only contain facts. Sometimes it takes months of investigation and discovery to get to the root cause of an accident.
- Injury/fatality may create biohazard and blood borne pathogens issues at the accident scene.
- Employer investigation of an employee accident should include review of the employee's cell phone/photos/emails/texts.

XIV. OSHA CITATIONS ARE OFTEN ADMITTED INTO COURT AS EVIDENCE OF STANDARDS OF CARE

Courts are split on how they treat admission of OSHA citations and OSHA files in civil proceedings. A majority of Courts allow the admission of OSHA regulations as evidence of negligence. Some states hold that evidence that a defendant in a tort case paid an OSHA fine was admissible as a declaration against interest. *Industrial Tile, Inc. v. Stewart*, 388 So.3d 171 (Ala. 1980). See *Angel v. U.S.*, 775 F.2d 136 (6th Cir. 1985); *Teal v. E.I. DuPont & Co.*, 728 F.2d 799 (6th Cir. 1984); *Wren v. Sullivan Elec.*, 797 F.2d 323 (6th Cir. 1986); *Masemer v. Delmaria Power & Light Co.*, 723 F.Supp. 1019 (D. Del. 1989); *Hines v. Brandon Steel Decks, Inc.*, 754 F.Supp. 199 (M.D. Ga 1991).

While the Ohio Supreme Court has ruled that a violation of the Occupational Safety & Health Act, Title 29, U.S. Codes does not constitute negligence per se, *Hernandez v. Martin Chevrolet* (1995), 72 Ohio St.3d 302; a number of Ohio Courts allow OSHA citations and OSHA investigation files into evidence in civil cases.

In *Feldene v. Ashland Chemical Co.*, 91 Ohio App.3d 48 (Ct. App. Cuyahoga Cty. 1993), the Court of Appeals upheld the trial court's decision to allow the employee to introduce the OSHA investigation file into evidence and to discuss the employer's violation of OSHA regulations. The Court held that the OSHA investigation file was admissible as both a public record and business record. The Court also held that the OSHA file was evidence of the employer's knowledge of unsafe working conditions. *Feldene,* 91 Ohio App.3d at 62.

Similarly, in *Dirskin v. Blue Chip Architectural Products*, 100 Ohio App.3d 213 (Ct. App. Butler Cty. 1994), evidence of an employer's prior violation of OSHA regulations was relevant and admissible to prove an employer's knowledge of applicable safety regulation that should have been followed. See also, *Estate of Merrell v. M. Weingold & Co.*, 8th Dist. WL 1776357; *Brookover v. Flexmag Industries, Inc.*, 4th Dist., 2002 Ohio App. Lexis 2424 (held: OSHA citations are relevant and admissible to show that an employer committed an employer intentional tort; failure to comply with OSHA safety regulations is relevant to show that an employer required an employee to perform a dangerous task knowing of the substantial certainty of injury. See also, *Logan v. Birmingham Steel*, 8th Dist., 2003 Ohio 5068; *Medina v. Harold J. Becker*, 163 Ohio App.3d 832 (1st Dist.); *Haldeman v. Cross Enterprises, Inc.*, 5th Dist. 2004 Ohio 4997; *Neil v. Shook, Inc.*, 2nd Dist., Case No. 16422 – all holding OSHA citations against employers are admissible in intentional tort cases.

Ohio Courts routinely allow workplace safety experts to rely on OSHA citations and OSHA inspection records in providing opinion testimony about a workplace accident. *Dirksting v. Blue Chip Architectural Product,* 100 Ohio App.3d 213 (Butler Cty. 1994).

Some Employer Defenses To OSHA Citations Overlap With Employer Defenses To Other Civil Claims (Ohio VSSR Claims)

Some employer affirmative defenses to OSHA citations mirror employer defenses to other Ohio civil or administrative claims.

A. Unforeseeable Employee Misconduct – OSHA

As an example of how employer OSHA defenses may overlap with state law defenses, **the Sixth Circuit Court of Appeals and the Occupational Safety and Health Review Commission recognize an employer's affirmative defense of unforeseen/unpreventable employee misconduct, which, if established by the employer by a preponderance of the evidence, justifies that the citations be vacated.** See *Brock v. L.E. Myers Co.,* 818 F.2d 1270 (6th Cir. 1987); *Jenson Constr. Co. v. OSHRC,* 7 BNA OSHC 1477 (1979); *SK Construction,* 1993 OSAHRC Lexis 152 (Judge Frye), *Floyd S. Pike Electrical Contractors, Inc.,* 6 BNA OSHC 1675 (1978), *Metric Constructors,* 1993 OSAHRC Lexis 157 (Judge Spies); *Nooter Const. Co.*, 16 BNA OSHC 1572, 1994 OSAHRC Lexis 2 (1994). See also, *New York State Elec. & Gax v. Secretary of Labor*, 88 F.3d 98 2d Cir. 1996).

According to the Sixth Circuit and the Review Commission, once an employer sets out the affirmative defense of unforeseeable employee misconduct by a preponderance or greater weight of the evidence, the OSHA citations must be vacated unless the defense is then rebutted by the Secretary of Labor. See, *e.g., Brock v. L.E. Myers Co.,* 818 F.2d at 1276 (6th Cir. 1987):

> (A)n employer may defend the citation on the grounds that, due to the existence of a thorough and adequate safety program which is communicated and enforced as written, the conduct of its employees in violating that policy was idiosyncratic and unforeseeable.
>
> * * *
>
> If the employer's evidenced preponderates, it has successfully established the defense of unforeseen employee misconduct.

The Sixth Circuit and Review Commission recognize four elements to the OSHA unforeseen/unpreventable employee misconduct defense:

1. Established work rules to prevent the violation;
2. Communication of the work rules to employees;
3. Steps taken to discover violations;
4. Enforcement of the safety rules when safety violations are discovered.
5.

The employer's unforeseeable employee misconduct defense involving a Central Ohio general contractor was more recently discussed in *Secretary of Labor v. Quandel Construction Group, Inc.*, OSHRC Docket Number 14-1434:

Employee Misconduct (Isolated Incident)

Quandel contends the cited violation was the result of an isolated incident of unpreventable employee misconduct. **To prove this defense, "an employer must show that is established a work rule to prevent the violation; adequately communicated the rule to its employees, including supervisors; took reasonable steps to discover violations of the rule; and effectively enforced the rule."** *Schuler-Haas Elec. Corp.,* 21 BNA OSHC 1489, 1494 (No. 03-

0322, 2006) (citations omitted). An employer may rebut the Secretary's prima facie showing with evidence that it took reasonable measures to prevent the occurrence of the violation. In addition, the employer has the burden showing "that the violative conduct of the employee was idiosyncratic and unforeseeable." *L.E. Myers Co.*, 16 BNA OSHC 1037, 1040 (No. 90-945, 1993).

Work Rule

At the hearing the Secretary admitted that Quandel had a safety rule (Tr. 85, 248). The CSHO testified Quandel had an applicable work rule addressing fall protection for employees while working in an aerial lift (Tr. 85). The evidence adduced shows Quandel has a safety program and safety rules specifically regarding fall protection (Exh. R-B). Its safety rule when working from aerial lifts provides:

> Employees working above 6' on any raised platform must wear a full-body harness attached to a lanyard – which is attached to the work platform on an anchor point provided by the manufacturer. (Note - wrapping (choking) the lanyard around the cage railing is not acceptable.)

(Exh. R-B, p. 93). Merely having a work rule, however, is not enough. A work rule is defined as "an employer directive that requires or proscribes certain conduct and that is communicated to employees in such a manner that its mandatory nature is made explicit and its scope clearly understood." *J.K. Butler Builders, Inc.*, 5 BNA OSHC 1075, 1076 (No. 12354, 1977). An employer's work rule must be clear enough to eliminate the employers' exposure to the hazard covered by the standard and must be designed to prevent the cited violation. *Beta Constr. Co.*, 16 BNA OSHC 1434, 1444 (No. 91-102, 1993). The undersigned finds Quandel's work rule is clear and was designed to prevent the cited violation.

Adequately Communicated

The employer must show that it communicated the specific rule or rules that are in issue. *Hamilton*, 16 BNA OSHC at 1090; *N.Y. State Elec. & Gas Corp.*, 17 BNA OSHC 1129, 1134 (No. 91-2897, 1995). **The communication element of the misconduct defense is met when the employees are well-trained, experienced and know the work rules.** *Texland Drilling Corp.*, 9 BNA OSHC 1023, 1026 (No. 76-5037, 1980). Although Havens had been employed by Quandel only since December 2013, he had previous experience in operating aerial lifts(Tr. 92-94). Havens testified since his employment with Quandel he had received site specific safety training on the use of the lifts on the jobsite, and less than a month prior to the inspection he had taken the week long fall safety course through OSHA (Tr. 102-103). Just prior to that, he finished two toolbox talks addressing fall restraints and operating lifts. Also during his employment he had received safety training which included fall protection by Quandel consisting of an hour and a half long safety video, weekly toolbox talks, safety manuals on jobs and weekly training meetings at the shop (Tr. 94-95). Havens further testified he recalled having toolbox safety discussions about using fall harnesses in the aerial lifts, and it was Quandel's safety policy for employees to tie off the body harness to an aerial lift when working in it (Tr. 95, 127).

Further evidence of Haven's experience was testimony from field manager Peck that he observed Havens operating the aerial lift on many occasions – "he was in a lift every day" (Tr. 217).

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Superintendent Collins communicated his notations of fall hazards to the subcontractors' safety person (Tr. 193-194). Field Manager Peck and foreman Jolly utilized toolbox talks to communicate safety rules on the hhgregg jobsite (Tr. 213-214). The Courts finds Quandel's work rule was adequately communicated.

Enforcement

Commission precedent allows consideration of both pre- and post-inspection discipline. *See American Engineering & Development Corp.*, 23 BNA OSHC 2093, 2097 (No. 10-0359, 2012) (finding that one instance of delayed discipline two months after the inspection did not undermine its otherwise strong enforcement policy). However, post-inspection discipline is not a substitute for an effective enforcement program prior to the inspection. *See Jersey Steel Erectors*, 16 BNA OSHC 1162, 1165 n.3 (No. 90-1307, 1993), *aff'd in unpublished opinion*, 19 F.3d 643 (3rd Cir. 1994) (finding termination of foreman following OSHA inspection did not make up for ineffective enforcement policy prior to inspection).

Collins testified that Quandel safety policies are enforced by use of the three strike rule which involved a verbal warning, written warning and then the third time you are taken off the job (Tr. 147; Exh. R-B, p. 19). As project superintendent he was responsible for implementing and enforcing the safety rules and regulations (Exh. R-B, p. 14). Havens testified when Quandel employees were found violating a company safety rule they were disciplined and warned. "Your first time would be a written warning – it's kind of like a three strikes and you're out rule." (Tr. 96). Havens received a written warning for his violation of the work rule the day after the OSHA inspection, and was provided refresher training by Field Manager Peck (Tr. 86, 97, 221); (Exh. R-C, p. 3). Later, on or about August 12, 2014, an employee of SPS was observed not wearing a harness or was not connected to a boom lift, and as a result was removed from the lift immediately, as were employees observed not being tied off on May 20, 2014 (Tr. 150-151; Exh. R-C, pp 16, 42). This is evidence of good enforcement before the violation at issue here.

The Court finds Quandel effectively enforced its work rules.

Foreseeability and Preventability

The defense of unforeseeable employee misconduct requires "that the violative conduct of the employee was idiosyncratic and unforeseeable." *L.E. Myers*, 16 BNA OSHC at 1040. By the time of the OSHA inspection Havens had been employed with Quandel for six months (Tr. 92-93). Havens testified that other than the instant situation, he does not recall another incident on the jobsite where he had been in and out of the aerial lift without attaching his fall harness (Tr. 128). Havens' uncontroverted testimony was he had never committed a safety infraction before or since this one (Tr. 136). Field Manager Peck confirmed they had never had another problem or issue on the hhgregg jobsite with Havens afterwards (tr. 222). Project Superintendent Collins

testified he never observed Havens operating an aerial lift without his fall harness attached to the anchorage point on the lift and he had no reason to believe that on the morning of July 24, 2014, Havens and other carpenters were going to work out of the aerial lift without utilizing their fall protection (Tr. 152, 202-203).

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The Court finds this uncontroverted evidence compelling and supportive of finding that it was not foreseeable Havens would work in an aerial lift without his fall harness being connected to an anchorage point.

The Court further finds Quandel exercised reasonable diligence in inspecting the worksite and taking measures to prevent hazards to its employees. "Reasonable diligence" includes the employer's "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence." *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981).

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The record is replete with evidence that Quandel conducted inspections on the jobsite, had a detailed safety program addressing fall protection and other issues, trained its employees, had a progressive discipline program to address violations, and Havens received a written warning consistent with the policy.

The Commission has held that "[r]easonable steps to monitor compliance with safety requirements are part of an effective safety program." *Southwestern Bell Tel. Co.*, 19 BNA OSHC 1097, 1099 (No. 98-1748, 2000) (citations omitted), *aff'd without published opinion,* 277 F.3d 1374 (5th Cir. 2001). The record shows Quandel had an effective safety program and has established the defense of unforeseeable employee misconduct, thereby rebutting the Secretary's prima facie case.

Item 1 of the citation is vacated.

Secretary of Labor v. Quandel, OSHRC Docket Number 14-1434, Slip op p. 10-14.

B. Unilateral Employee Negligence is a Defense to an Ohio VSSR Claim

In comparison, the Ohio Supreme Court has held that an employee's unilateral negligence and failure to abide by the employer's safety rules and failure to utilize safety equipment provided by the employer precludes a VSSR claim. *State ex. rel. Frank Brown & Sons, Inc.* (1988), 37 Ohio St.3d; *State ex rel. Northern Petrochemical Co.* (1991), 61 Ohio St.3d 453; *State ex rel. Kale v. Indus. Comm.*, 10th Dist. Case No. 83AP-968 (Ct. App. Franklin Cty. 1984); *State ex rel. Lewis v. Indus. Comm.*, 10th Dist. Case No. 83AP-756 (Ct. App. Franklin Cty. 1984); *State ex rel. Danstar Builders v. Industrial Comm.* (2006) 108 Ohio St.3d 315; *State ex rel. Quality Tower v. Indus. Comm.* (2000), 88 Ohio St.3d 190.

In *State ex Rel. Richmond v. Industrial Commission*, 139 Ohio St.3d 157 (2014), the Ohio Supreme Court upheld the denial of a VSSR award to an injured employee because of the employee's unilateral negligence in not following the safety device instructions and for not following the employer's safety training on the use of the safety device.

Richmond harkens back to what the Ohio Supreme Court addressed in *State ex Rel. Quality Tower Service v. Industrial Commission*, 88 Ohio St.3d 190 (2000), which has not been emphasized in later cases interpreting the unforeseeable employee misconduct defense:

> "The employer instead avoids VSSR liability when "[the] employee unilaterally *violates* a safety requirement [emphasis added]." *Cotterman* at 47, 544 N.E.2d at 892; *Pressware* at 288, 707 N.E.2d at 939, **that is, when the employee removes or ignores equipment or instruction that complies with a specific safety requirement.** *Brown* at 164, 524 N.E.2d at 485; *Northern Petrochemical*, 88 Ohio St.3d at p. 193." [*Emphasis supplied.*]

XV. OSHA CITATIONS ARE READILY ADMITTED IN OHIO VSSR ACTIONS

OSHA citations and OSHA files always find their way into Industrial Commission VSSR cases. In *State ex rel. Kenton Structural & Ornamental Iron Works v. Indus. Comm.* (2001), 91 Ohio St.3d 411, the Ohio Supreme Court held that the Industrial Commission could rely upon OSHA citations issued to an employer in assessing an appropriate penalty for a VSSR violation:

> 4. Award Amount
>
> The amount of VSSR award can vary from fifteen to fifty percent, inclusive, of the maximum award established by law. Section 35, Article II, Ohio Constitution. **The commission levied the maximum penalty "because of the extent and serious nature of the injuries involved in the case, the number of violations found by OSHA and the fact OSHA found a number of the violations to be serious." Kenton alleges that the commission abused its discretion in relying in part on OSHA violations. We reject the contention.**

Kenton (2001), 91 Ohio St.3d at 417.

In *Kenton,* the Industrial Commission also relied upon factual portions of OSHA's fatality inspection, with the approval of the Ohio Supreme Court:

> Kenton maintains that because the evidence relied upon by the commission estimated the rigging angle to at "approximately" forty-five degree, it is insufficient to establish that the angle was exactly forty-five degrees . . .we disagree.
>
> * * *

This is not a situation where the commission itself chose a number. OSHA arrived at the forty-five degree figure.

Kenton (2001), 91 Ohio St.3d at 415.

In *State ex rel. Martin Painting & Coating Co. v. Indus. Comm.* (1997), 78 Ohio St.3d 333, the Ohio Supreme Court affirmed a VSSR violation against an employer following an employee fatality. The award was based in part upon evidence OSHA gathered during the fatality investigation.

In *State ex rel. Orbit Mover & Erectors, Inc. v. Indus. Comm.* (1992), 65 Ohio St.3d 344, the Ohio Supreme Court upheld a substantial VSSR award against an employer, relying heavily on the OSHA transcript of the underlying OSHA proceeding.

In *State ex rel. Gilbert v. Industrial Commission* (2007) 116 Ohio St.3d 243, the Ohio Supreme Court upheld the hearing officer's use of OSHA inspection records as evidence going to the employer's VSSR claim based upon respiratory exposure.

XVI. EXHIBITS

State of Ohio
Bureau of Workers' Compensation
Special Investigations Department (SID)
Safety Violations Investigation Unit (SVIU)
30 West Spring Street – Annex
Columbus, OH 43215
Phone: 1-800-686-1507
Fax: 1-614-644-1997

John R. Kasich Governor
Sarah Morrison Administrator/CEO

www.ohiobwc.com 1-800-OHIOBWC

FATAL INJURY INVESTIGATION – INFORMATION REQUEST FORM

OHIO BWC CLAIM NO: _____ **EMPLOYER:** _____

DECEDENT(S): _____

EMPLOYER: The following applicable information is being requested and should be completed by the employer and/or their representative. This information can be submitted to the Safety Violations Investigation Unit at the address above or given to the investigation agent during the on-site visit. Check off each item you are submitting, sign, and return this form with the items submitted. If any item is not available or does not apply, indicate with 'N/A' instead of a checkmark.

CHECK ✓	ITEM#	DESCRIPTION IMPORTANT! PLEASE SUBMIT – SINGLE SIDED COPIES ONLY (NO STAPLES)
	1	COPY OF EMPLOYER'S ACCIDENT OR INJURY REPORTS (including any and all statements and photographs taken).
	2	COPY OF OSHA RECORDS (e.g. 300; 300A; and/or 301), MSHA RECORDS, and/or ANY OTHER LOCAL, STATE, or FEDERAL RECORDS, PERTAINING OR RELATED TO THIS INVESTIGATION.
	3	WRITTEN DESCRIPTION OF INJURY SITE, INCLUDING EQUIPMENT OR MACHINERY INVOLVED IN THE INJURY OF RECORD.
	4	DATE OF PURCHASE OF EQUIPMENT/MACHINERY. MUST BE DOCUMENTED BY COPY OF PURCHASE ORDER, INVOICE OR NOTARIZED STATEMENT.
	5	MANUFACTURER, MODEL AND SERIAL NUMBER OF EQUIPMENT OR MACHINERY INVOLVED.
	6	WRITTEN DESCRIPTION OF USE/OPERATION OF EQUIPMENT OR MACHINERY INVOLVED. Example: mechanical/hydraulic forming machine. Folds, forms & glues plastic coated paperboard food trays for the fast food industry.
	7	WRITTEN DESCRIPTION OF CONSTRUCTION SITE/AREA WHERE INJURY OCCURRED. Example: trench/excavation 30" wide x 60" deep, in hard dry clay, for the installation of a twelve inch (12") water pipe.
	8	COPIES OF MAINTENANCE RECORDS FOR EQUIPMENT OR MACHINERY INVOLVED IN THE INJURY OF RECORD. (Should include records for the time period 6 months prior to the injury of record and any post-injury machinery repairs).
	9	PROVIDE LIST OF EQUIPMENT SUPPLIED BY THE EMPLOYER TO THE INJURED WORKER AND THE EQUIPMENT SUPPLIED BY THE WORKER.
	10	PROVIDE TRAINING DOCUMENTS OF DECEDENT/INJURED WORKER. Example: certificates, licenses, programs completed, etc.
	11	PROVIDE NAMES, ADDRESSES, AND PHONE NUMBERS OF ALL PERSONS NAMED AS WITNESSES (Claimant's and Employer's) OR MAKE WITNESSES AVAILABLE TO THE INVESTIGATOR AT THE TIME OF THE ON-SITE INVESTIGATION.
	12	EMPLOYER'S BWC CERTIFICATE OF COVERAGE.
	13	EMPLOYER'S FEDERAL TAX IDENTIFICATION NUMBER.
	14	ADDITIONAL INFORMATION / DOCUMENTATION.

The checked items listed above are included with this form _____ _____
Employer or Employer's Representative Date

This investigation agent has received the above checked information _____ _____
Special Investigator Date

OSHA's Form 301 (Rev. 04/2004)

Injury and Illness Incident Report

Note: You can type input into this form and save it. Because the forms in this recordkeeping package are "fillable/writable" PDF documents, you can type into the input form fields and then save your inputs using the free Adobe PDF Reader. In addition, the forms are programmed to auto-calculate as appropriate.

Attention: This form contains information relating to employee health and must be used in a manner that protects the confidentiality of employees to the extent possible while the information is being used for occupational safety and health purposes.

U.S. Department of Labor
Occupational Safety and Health Administration

Form approved OMB no. 1218-0176

This *Injury and Illness Incident Report* is one of the first forms you must fill out when a recordable work-related injury or illness has occurred. Together with the *Log of Work-Related Injuries and Illnesses* and the accompanying *Summary*, these forms help the employer and OSHA develop a picture of the extent and severity of work-related incidents.

Within 7 calendar days after you receive information that a recordable work-related injury or illness has occurred, you must fill out this form or an equivalent. Some state workers' compensation, insurance, or other reports may be acceptable substitutes. To be considered an equivalent form, any substitute must contain all the information asked for on this form.

According to Public Law 91-596 and 29 CFR 1904, OSHA's recordkeeping rule, you must keep this form on file for 5 years following the year to which it pertains.

If you need additional copies of this form, you may photocopy the printout or insert additional form pages in the PDF, and then use as many as you need.

Completed by _____

Title _____

Phone ___ - ___ - ____ Date ___ ___ ___
Month Day Year

Information about the employee

1) Full name _____

2) Street _____

City _____ State _____ ZIP _____

3) Date of birth ___ ___ ___
Month Day Year

4) Date hired ___ ___ ___
Month Day Year

5) ○ Male ○ Female

Information about the physician or other health care professional

6) Name of physician or other health care professional

_____

7) If treatment was given away from the worksite, where was it given?

Facility _____

Street _____

City _____ State _____ ZIP _____

8) Was employee treated in an emergency room?
○ Yes
○ No

9) Was employee hospitalized overnight as an in-patient?
○ Yes
○ No

Information about the case

10) Case number from the *Log* _____ *(Transfer the case number from the Log after you record the case.)*

11) Date of injury or illness ___ ___ ___
Month Day Year

12) Time employee began work _____ ○ AM ○ PM

13) Time of event _____ ○ AM ○ PM ○ Check if time cannot be determined

***Re fields 14 to 17:** Please do not include any personally identifiable information (PII) pertaining to worker(s) involved in the incident (e.g., no names, phone numbers, or Social Security numbers).

14)* ***What was the employee doing just before the incident occurred?*** Describe the activity, as well as the tools, equipment, or material the employee was using. Be specific. *Examples:* "climbing a ladder while carrying roofing materials"; "spraying chlorine from hand sprayer"; "daily computer key-entry."

15)* ***What Happened?*** Tell us how the injury occurred. *Examples:* "When ladder slipped on wet floor, worker fell 20 feet"; "Worker was sprayed with chlorine when gasket broke during replacement"; "Worker developed soreness in wrist over time."

16)* ***What was the injury or illness?*** Tell us the part of the body that was affected and how it was affected. *Examples:* "strained back"; "chemical burn, hand"; "carpal tunnel syndrome."

17)* ***What object or substance directly harmed the employee?*** *Examples:* "concrete floor"; "chlorine"; "radial arm saw." *If this question does not apply to the incident, leave it blank.*

18) ***If the employee died, when did death occur?*** Date of death ___ ___ ___
Month Day Year

Save Input | Add a Form Page | Reset

Ohio | Bureau of Workers' Compensation

First Report of an Injury, Occupational Disease or Death

By signing this form, I:

- **Elect to only receive compensation and/or benefits that are provided for in this claim under Ohio workers' compensation laws;**
- **Waive and release my right to receive compensation and benefits under the workers' compensation laws of another state for the injury or occupational disease, or death resulting from an injury or occupational disease, for which I am filing this claim;**
- **Agree that I have not and will not file a claim in another state for the injury or occupational disease or death resulting from an injury or occupational disease for which I am filing this claim;**
- **Confirm that I have not received compensation and/or benefits under the workers' compensation laws of another state for this claim, and that I will notify BWC immediately upon receiving any compensation or benefits from any source for this claim.**

WARNING:
Any person who obtains compensation from BWC or self-insuring employers by knowingly misrepresenting or concealing facts, making false statements or accepting compensation to which he or she is not entitled, is subject to felony criminal prosecution for fraud.

(R.C. 2913.48)

Injured worker and injury/disease/death info.

Last name, first name, middle initial | Social Security number | Marital status ☐ Single ☐ Married ☐ Divorced ☐ Separated ☐ Widowed | Date of birth

Home mailing address | Sex ☐ Male ☐ Female | Number of dependents

City | State | 9-digit ZIP code | Country if different from USA | Department name

Wage rate $ _____ Per: ☐ Hour ☐ Month ☐ Week ☐ Year ☐ Other _____ | What days of the week do you usually work? ☐ Sun ☐ Mon ☐ Tues ☐ Wed ☐ Thur ☐ Fri ☐ Sat | Regular work hours From _____ To _____

Have you been offered or do you expect to receive payment or wages for this claim from anyone other than the Ohio Bureau of Workers' Compensation? ☐ Yes ☐ No If yes, please explain. | Occupation or job title

Employer name

Mailing address (number and street, city or town, state, ZIP code and county)

Location, if different from mailing address

Was the place of accident or exposure on employer's premises? ☐ Yes ☐ No
(If no, give accident location, street address, city, state and ZIP code)

Date of injury/disease | Time of injury _____ ☐ a.m. ☐ p.m. | If fatal, give date of death | Time employee began work _____ ☐ a.m. ☐ p.m. | Date last worked | Date returned to work

Date hired | State where hired | Date employer notified | State where supervised

Description of accident (Describe the sequence of events that directly injured the employee, or caused the disease or death.) | Type of injury/disease and part(s) of body affected (For example: sprain of lower left back)

Benefit application release of information – I am applying for a claim under the Ohio Bureau of Workers' Compensation Act for work-related injuries that I did not inflict. I affirm that I elect to receive compensation and benefits under Ohio's workers' compensation laws for my claim, and I waive and release my right to file for and receive compensation and benefits under the laws of any other state for this claim. I request payment for compensation and/or medical benefits as allowable, and authorize direct payment to my medical providers. I permit and authorize any provider who attends, treats or examines me, the Ohio State Board of Pharmacy, the Ohio Department of Job and Family Services and the Ohio Rehabilitation Services Commission to release medical, psychological, psychiatric, pharmaceutical, vocational and social information. I understand this may include personally identifying information that is casually or historically related to my physical or mental injuries relevant to issues necessary for the administration of my claim to BWC, the Industrial Commission of Ohio, the employer in this claim, the employer's managed care organization and any authorized representatives. My previous or future BWC claims may affect decisions made in this claim. Proper administration of the present claim may require BWC to share claims information with the employers of record (or their authorized representatives) and/or my authorized representative for any and all such previous or future claims. The released claims information may include any record maintained in my claim files.

Injured worker signature | Date | E-mail address | Telephone number | Work number ( )

Treatment info.

Health-care provider name | Telephone number ( ) | Fax number ( ) | Initial treatment date

Street address | City | State | 9-digit ZIP code

Diagnosis(es): Include ICD code(s)

Will the incident cause the injured worker to miss eight or more days of work? ☐ Yes ☐ No | Is the injury causally related to the industrial incident? ☐ Yes ☐ No

E code | 11-digit BWC provider number | Date

Health-care provider signature

Employer info.

Employer policy number | Check if ☐ Employer is self-insuring ☐ Injured worker is owner/partner/member of firm

Telephone number ( ) | Fax number ( ) | E-mail address | Federal ID number | Manual number

Was employee treated in an emergency room? ☐ Yes ☐ No | Was employee hospitalized overnight as an inpatient? ☐ Yes ☐ No

If treatment was given away from work site, provide the facility name, street address, city, state and ZIP code

☐ **Certification** - The employer certifies that the facts in this application are correct and valid.

☐ **Rejection** - The employer rejects the validity of this claim for the reason(s) listed below:

For self-insuring employers only

☐ **Clarification** - The employer clarifies and allows the claim for the condition(s) below:
☐ **Medical only** ☐ **Lost time**

Employer signature and title | Date | OSHA case number

January 6, 2003

Mr. Douglas J. Suter
Isaac, Brant, Ledman, & Teetor, LLP
250 East Broad Street
Columbus, Ohio 43215

Re: Request to testify in private litigation; residential construction; expert witness

Dear Mr. Suter:

This is in response to your letter of October 24, 2002, to Mr. Michael G. Connors. You ask the Occupational Safety and Health Administration (OSHA) to allow Mr. Richard Burns of our Columbus Area Office to participate in a trial as an expert witness.

Because such testimony would divert agency personnel away from government duties, it is OSHA's general policy that federal officials not participate as expert witnesses in private party litigation.[1] Therefore, your request is denied.

If you have further concerns or questions, please feel free to contact us again by fax at: U.S. Department of Labor, OSHA, Directorate of Construction, Office of Construction Standards and Guidance, fax # 202-693-1689. You can also contact us by mail at the above office, Room N3468, 200 Constitution Avenue, N.W., Washington, D.C. 20210, although there will be a delay in our receiving correspondence by mail.

Sincerely,

U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210

MAY 18 2018

MEMORANDUM FOR: REGIONAL ADMINISTRATORS

THROUGH: RICHARD MENDELSON
Acting Deputy Assistant Secretary

FROM: FOR THOMAS GALASSI, Director
Directorate of Enforcement Programs

SUBJECT: OSHA's use of Unmanned Aircraft Systems in Inspections

This memorandum addresses the use of Unmanned Aircraft Systems ("UAS" or "drones") by OSHA. UAS may be used to collect evidence during inspections in certain workplace settings, including in areas that are inaccessible or pose a safety risk to inspection personnel. UAS may also be used for technical assistance in emergencies, during compliance assistance activities, and for training. As a Federal agency, there are currently two legal frameworks available to OSHA under Federal Aviation Administration (FAA) rules for the use of UAS, either as a Public Aircraft Operator (PAO) flying missions that meet the governmental functions listed in the Public Aircraft Statute (49 U.S.C. §§ 40102(a)(41) & 40125), or as a Civil Operator under the civil rules (14 CFR part 107).

OSHA is exploring the option of obtaining a Blanket Public COA to operate UAS nationwide. In the interim, OSHA UAS operations must adhere to the following guidance.

Any Region using UAS will designate a Regional UAS Program Manager (UPM) that will oversee all program elements. The UPM shall ensure that OSHA UAS operations follow all 14 CFR part 107[1] rules which include, but are not limited to, the following:

i. Remote Pilot in Command (RPIC) shall pass an FAA Aeronautical Knowledge Test and obtain a Remote Pilot Certificate with UAS rating.
ii. Register all UAS.
iii. Apply and obtain approval for FAA part 107, subpart D, waiver when unable to operate under part 107 rules.
iv. Establish and maintain logbooks for RPICs and all UAS.
v. Report accidents to FAA (see §107.9).

Prior to using UAS for OSHA inspections, a UAS must be selected that weighs less than 55 pounds and it must be registered[2] with the FAA if it weighs more than 0.55 pounds (8.8 ounces). Each registered UAS must be labeled with the registration number provided by the FAA.

The Regional UPM will coordinate requests for UAS use, and make recommendations to the Regional Administrator regarding the deployment and use of UAS. The UPM will determine whether the request for UAS and mission demands can be successfully fulfilled under the FAA's rules and regulations. The UPM's recommendation will include a cost/benefit analysis and a hazard assessment.

OSHA will obtain express consent from the employer prior to using UAS on any inspection. To ensure the safety and cooperation of individuals that may be affected by the aerial inspection, personnel on site must be notified of the aerial inspection prior to launching a UAS.

The RPIC must inspect all equipment prior to each UAS operation to ensure the functionality and calibration of the UAS. UAS operations will follow the manufacturer's instructions and all applicable FAA, state, and local rules and regulations. The RPIC must comply with the operational limitations found at Subpart B of Part 107. These operational requirements include, but are not limited to:

i. The RPIC must keep a visual line-of-sight with the UAS.
ii. The RPIC must operate the UAS only during the day sunrise until sunset.
iii. Flight speed must not exceed 100 mph.
iv. The RPIC must not operate the UAS higher than 400 feet above ground, except when within 400 feet of a structure. In these cases, it is allowable to fly 400 feet above the structure's immediate uppermost limit.
v. The UAS must yield right of way to manned aircraft.
vi. The UAS may not operate over any persons not directly participating in the operation; unless they are under a covered structure or inside a stationary vehicle that can provide reasonable protection from a falling drone.

Recommended best practices for UAS operations are included in the Appendix to this Memorandum.

If you have any questions, please contact (b) (6) in the Office of Maritime Enforcement at (b) (6) or (b) (6).

[1] https://www.ecfr.gov/cgi-bin/text-idx?SID=e631680c69430f9ba42e321dbd979410&mc=true&node=pt14.2.107&rgn=div5
[2] https://www.faa.gov/uas/getting_started/registration/

Appendix
Recommended Best Practices for OSHA Regional UAS Program

I. Pre-Deployment

A deployment kit should be developed, including the following items:

- Spare / extra batteries.
- Battery chargers.
- Extra memory cards.
- Two way radios.
- Binoculars.
- Laptop.
- Smart Phone or Tablet.
- Spare parts kit (rotor blades, etc.).
- Tool kit.
- UV lenses kit for UAS camera.

Pre- and post-flight checklists should be developed for each Unmanned Aircraft System (UAS) in accordance with the manufacturer's instructions. These procedures will address any ancillary system that may need servicing, for example, the backing up of data and the replacement of batteries in controller equipment.

II. Pre-Flight Operations

Before flight operations begin, the UAS Program Manager (UPM) will ensure that the mission is approved and that a qualified team is available to conduct the operation. The UPM will ensure that the UAS mission is conducted under Part 107 or a COA, but never both. A team will typically include a Remote Pilot in Command (RPIC), a Visual Observer (VO), and a safety monitor. The VO must be an OSHA employee, and may be the CSHO conducting the inspection. The VO will assist the RPIC to identify and avoid other air traffic or objects aloft and/or on the ground. The VO is responsible for notifying the RPIC of any hazardous situations and acts primarily as a safety for the RPIC, other personnel, and equipment in the area of the flight operation. The safety monitor will assist the VO and be used on locations where it is not possible for the VO to maintain visual contact with both the UAS and the RPIC. All team members, as well as other OSHA staff, will be briefed regarding mission parameters and expectations, roles and responsibilities, safety precautions, operating parameters, and limitations. If the flight is to support an inspection, the UPM along with the Compliance Officer (CSHO) will brief the team on the evidence needed and the mission of the flight. The VO must understand the evidence collection system and how to preserve it in order to assist the RPIC.

Prior to launching a UAS, a flight plan and checklist as required under Part 107.49 will be developed and will include:

- The mission to be performed.
- Pre-flight inspection of equipment.
- Go/No-Go conditions, including weather, wind and visibility.
    (a) As a best practice, the RPIC should utilize FAA approved weather resources such as: Meteorological Terminal Aviation Weather Reports (METARS), Terminal Area Forecasts (TAF), Notices to Airmen (NOTAMs), and Temporary Flight Restrictions (TFRs) to obtain the best information.
    (b) Wind conditions do not exceed the aircraft limits stated in the aircraft operations manual/specifications. An anemometer is a low-cost and simple to use tool that can be utilized in order to help determine if the wind speed is within the necessary limits of the UAS being flown.
    (c) The RPIC should ensure that the flight will occur within the weather requirements specified in Part 107.51 (c-d). Basic Visual Flight Rules (VFR) are summarized as three (3) statute miles flight visibility, and the UAS must be kept at least 500 ft. below a cloud and at least 2,000 ft. horizontally from a cloud.
- Aircraft in the area.
- Employer consent to use the UAS.
- Notification of affected personnel on the site.
- Site specific hazards, i.e. cables, antenna, vehicles. Verify through the FAA B4UFly application.
- Job Hazard Analysis (a simple description of potential hazards and mitigation techniques).
- A graphic flight plan to determine routes to be used, and identify what evidence is to be collected. This can be a simple sketch of the site and planned flight routes.
- Establishment of two-way radio communication. Radios are not always required, but serve as effective communication tools when the VO or safety monitor are stationed away from the RPIC.
- A team briefing for all team members.
- Discuss interaction with people interested in the flight operations. Explain what you are doing and why.
- Notification of the operation to local air traffic control towers, including obtaining any necessary waivers.
- Verification with local law enforcement to ensure compliance with state and local ordinances.
- Checking the FAA's Notice to Airman (NOTAM) website for the local operating area. https://notams.aim.faa.gov/notamSearch/nsapp.html#/
- Abort procedures.
- Flight operations.

UAS use on site will be the responsibility of the senior onsite OSHA official. The RPIC will make the final determination if a flight will be conducted. When working in an area with other federal agencies and employers, coordination will be made with all parties onsite prior to using the UAS. When operating under the Incident Command Structure, the Incident Commander must approve UAS use.

All flight operations will be conducted in accordance with Federal Aviation Administration rules, state and local regulations, and applicable OSHA rules, including OSHA's Field Operations Manual. State and local governments may impose stricter guidelines concerning UAS operations. The UPM, Area Director, and RPIC are responsible for identifying and following state and local UAS laws, requirements, restrictions and/or special conditions that may be present in the area of intended operation.

The RPIC's primary mission is to safely complete the flight plan. The RPIC is ultimately responsible for the UAS operation's safety and has the authority to not conduct or abort a mission for any reason. Furthermore, the RPIC will ensure that each UAS mission adheres strictly to the operational limitations set forth in FAA Part 107 rules or any applicable Part 107 waiver. The RPIC will also ensure that UAS missions authorized by Part 107 civil rules remain separate from UAS missions authorized by a COA.

The VO and safety monitor's primary responsibilities are to assist the RPIC in maintaining situational awareness and alerting the RPIC of unsafe or unforeseen circumstances. The VO and safety monitor will make recommendations to the RPIC on conditions at the flight operation site and will invoke the abort procedures if required.

III. Post-Flight Field Procedures

A post-flight field checklist should be followed based on the type of UAS system used. Each UAS should have its own checklist in accordance with manufacturer's instructions. As a minimum, the checklist will address the following:

- Inspection of the UAS airframe, antenna, motors, and electronics for visual damage. Remove debris and clean if necessary.
- Camera is free of damage and lens is clean.
- Gimbal, if equipped, is free of damage and secured for transport.
- Rotor blades are free of damage and clean; remove from UAS for transport.
- Batteries are removed from UAS, and any other equipment (e.g., the camera), visually inspected, and stored for transport.
- Document UAS battery use in maintenance logbook.
- Collect and preserve data from onboard recording systems, if equipped.
- Debrief team members and complete the flight report, which includes mission details, accomplishments, successes/failures, and all equipment used in the operation.
- Reset equipment for use.
- Copy data to CD or other suitable media, and reformat disk(s) as necessary.
- Charge batteries as necessary.

- Clean lenses of cameras, monitors, and any other equipment used for visual awareness during flight.

IV. Post-Flight Office Procedures

After each UAS operation, the team should report to the UPM and the support office. The report should provide the UPM and AD with the following:

- Post-flight briefing, including the documented flight report (see paragraph V.).
- Mission summary description.
- Mission Accomplishments and any outstanding actions.
- Successes/failures for the UAS operation to develop lessons learned.

After each UAS operation, the following items should be completed:

- Copy data to CD or other suitable media, and reformat disk(s) as necessary.
- Charge batteries in accordance with manufacturer's instructions.
- Store equipment in accordance with office procedures and the manufacturer's recommend actions.

V. Flight Report

The RPIC and/or the VO should complete and submit a flight report to the Area Director, with a copy to the UPM, within one business day of the flight. The flight report should discuss the mission and any relevant information about the operation of the UAS or the procedures. The flight report should also include the team members involved in the operation, date and times of flights, location of operation, operational airspace flown in, UAS flight specifics (maximum altitude, maximum distance, weather conditions, cloud/fog clearance, wind speed, and visibility), type of UAS used, identification number of UAS, and a brief description of the information gathered. A copy of the flight report should be placed in the inspection casefile.

VI. Program Monitoring and Evaluation

The UPM should collect and evaluate the flight reports, identify trends, best practices, lessons learned, training issues, planning issues, and any equipment / supply needs. The UPM should report to the Regional Administrator on the status of the program annually.

VII. Training

The key to continued safe operations is through maintaining a professional level of competency. The first step in the process is establishing minimum qualifications for selecting potential operators and crew members, and the second step involves training those personnel.

A Regional training plan shall be developed by the UPM and receive approval from the Regional Administrator. This program shall address the following subjects:

- Initial Training.
- Recurrent Training.
- Training Base Tasks – Pilot [RPIC].
- Training Base Tasks – Visual Observer [VO].

VIII. Recordkeeping

The FAA requires that UAS be maintained according to the manufacturer's recommended maintenance schedule. OSHA UAS will be maintained according to each UAS manufacturer's prescribed maintenance schedule, and maintenance must be performed after each operation. If the manufacturer does not have a prescribed program, the UPM will develop one. Additionally, OSHA should conduct an inspection of each UAS every 20 hours of flight time which includes, but is not limited to, normal maintenance procedures and the following:

- Airframe inspection and replacement of necessary components. Replaced components will be placed out of service.
- On-board and exterior electronic component inspection and replacement of necessary components. Replaced components will be placed out of service.
- Mandatory rotor blade (propeller) replacement. Replaced rotor blades will be placed out of service.
- Testing of all batteries (onboard and exterior) which includes; voltage, amperage testing, and replacement of necessary batteries. Failed batteries will be placed out of service.
- Software and firmware updates to the most current versions for all components and systems.

The FAA requires that logbooks be maintained for each RPIC *and* each UAS.

RPICs are responsible for maintaining their own logbook. RPIC logbooks must contain at a minimum the requirements imposed by the FAA, which includes, but is not limited to:

a. Name and certificate number of the RPIC.
b. UAS name and registration number.
c. Dates of flights.
d. Times of flights, which also includes the duration of each flight.
e. Location of flights, which also includes the total distance of each flight.
f. Weather conditions during flights.
g. Visibility condition during flights.
h. National Airspace System (NAS) operated in.
i. Waivers and/or approvals obtained by the FAA or airport operators.
j. Individuals involved in the operation (i.e. UPM, VO, Safety Monitor, etc.).
k. Day or night (with approved waiver) operation.
l. Notes on any maintenance issues, equipment failures, or accidents.
m. Other aircraft involved in the operation, if any.

The UPM and RPIC are responsible for ensuring that UAS logbooks are kept and maintained according to FAA requirements. The UPM will make logbooks available to be kept for each UAS in the regional fleet. The information logged will include, but is not limited to:

- Field use (missions) and flight time (hours).
- Maintenance performed during operations (pre & post).
- 20 hour maintenance inspection results.
- Document the use of each battery for each UAS system.

IX. Accident Reporting

The FAA requires notification of certain UAS accidents. The applicable FAA regulation under part 107.9 states:

> No later than 10 days after an operation that meets the criteria of either paragraph (a) or (b) of this section, a RPIC must report to the FAA in a manner acceptable to the Administrator, any operation of the UAS involving at least:
>
> (a) Serious injury to any person or any loss of consciousness; or
> (b) Damage to any property, other than the UAS, unless one of the following conditions is satisfied:
>
> (1) The cost of repair (including materials and labor) does not exceed $500; or
> (2) The fair market value of the property does not exceed $500 in the event of total loss.

Accidents of UAS during flight meeting the qualifying factors in this section must submit a report through the **FAA's DroneZone Portal**.

In addition to the FAA required notifications, the Regional Administrator will be notified if an FAA reportable accident occurs. The Regional Administrator will determine if the event is significant enough to report to the National Office.