

## WEB EXCLUSIVE: IF I COULD TURN BACK TIME: CAN YOU FIND A WAY TO CORRECT ERRONEOUS ACCIDENT OR INJURY REPORTS TO AVOID AN OSHA INSPECTION?

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An accident happens at your workplace, leading to an employee injury. During the hectic response, incorrect information funnels its way up to the safety director charged with notifying OSHA of reportable injuries and accidents, and that person is told that it looks like the employee's finger has been amputated or is admitted for in-patient hospitalization. Attempting to meet the statutory deadline, the safety director reports to OSHA that an amputation or in-patient hospitalization has occurred.

The next day, however, when the dust settles, it becomes apparent that the employee's finger was not amputated nor was he admitted to a hospital as an in-patient. But an OSHA compliance officer soon shows up, demanding to inspect the worksite. Can you stop the inspection? Can you, in Cher's immortal words, *turn back time*?

### INJURY RECORDING AND REPORTING REQUIREMENTS

Generally speaking, companies must record injuries if they result in death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness. 29 C.F.R. § 1904.7(a). But companies also must report more significant injuries to OSHA.

When a fatality occurs, the company must report the fatality to the Occupational Safety and Health Administration

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(OSHA) within eight hours of becoming aware of the fatality. 29 C.F.R. § 1904.39(a)(1). When an employee suffers an amputation or a loss of an eye, or is admitted to in-patient hospitalization, the company must report the injury to OSHA within 24 hours of becoming aware that the injury is reportable. 29 C.F.R. § 1904.39(a)(2). To report an injury to OSHA, a company can choose either to call OSHA or to report the injury on OSHA's website. 29 C.F.R. § 1904.39(a)(3).

## Service Focus

### Workplace Safety

## OSHA'S AUTHORITY TO CONDUCT AN INSPECTION

Under the Occupational Safety and Health Act of 1970 (the OSH Act), OSHA is authorized to conduct two types of inspections of workplaces. First, OSHA can conduct a programmed inspection according to a general administrative plan based upon neutral criteria. *See* 29 U.S.C. § 657(a). Second, OSHA can conduct an unprogrammed inspection where there is specific evidence of an existing violation. *See* 29 U.S.C. § 657(f). *See also Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061, 1068 (11th Cir. 1982). Unprogrammed inspections arise from reported accidents and injuries, complaints, and referrals.

To conduct an inspection based upon a report of injury, complaint, or referral, generally there must be reasonable grounds to believe that a violation of the OSH Act has occurred or that there exists an imminent danger of death or serious injury under Section 8(f)(1) of the OSH Act. Courts have held that it is not enough for OSHA to believe that a hazard may exist. Rather, there must be reasonable grounds that a violation of an occupational safety and health standard exists. *See United States v. Mar-Jac Poultry, Inc.*, No. 16-17745, slip op. at 8 (11th Cir. Oct. 9, 2018).

## OSHA INSPECTIONS BASED UPON ERRONEOUS REPORT

Getting back to our hypothetical then, it is important to note that OSHA does not investigate all reportable injuries, but rather makes a judgment based upon the information reported to determine whether it believes a violation of the OSH Act may exist, therefore warranting an inspection. If an OSHA inspector shows up at your worksite after reporting an injury, the agency has decided it has reasonable grounds to believe a violation may exist.

So if you know at the time the OSHA inspector shows up to conduct an inspection that the initial report of injury was incorrect—that the employee did not receive an amputation or was not admitted in-patient, for example—it will still be very difficult to prevent OSHA from conducting an inspection to investigate the cause of the injury. It is our experience that once the horse is out of the barn (because an accident of some sort has occurred, regardless of severity), OSHA is unlikely to cancel the workplace inspection. That is because, while the severity of the injury may affect how a citation is classified (serious, other-than-serious, etc.), the inspector will still be curious to know whether an underlying violation may exist. That determination can only be made by further examination into whatever else you have reported to OSHA regarding the cause of the injury.

## WHAT CAN YOU DO?

While you likely cannot turn back time (sorry, Cher), you can take precautionary steps to prevent erroneous reports from occurring in the first place.

First, you have 24 hours from the time you know that the injury is reportable to report to OSHA. **The clock does not begin to run once the injury occurs.** Therefore, you should take the time to confirm the nature of the injury before trying to report the injury hastily to OSHA. If you patiently wait to have the status of the injury confirmed before reporting the event to OSHA, chances are good the report will be accurate.

Second, you should call legal counsel once a potentially reportable injury has occurred. Experienced legal counsel can guide you through the process of OSHA reporting and ensure that the report, if necessary, is done in a way to minimize the chances of an inspection.

As noted, OSHA will not investigate every report of injury, but will instead make its determination based upon what is said in the report regarding the cause and circumstances of the injury. Experienced legal counsel can help you find a way to properly report the information to OSHA.

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