



If I Could Turn Back Time: Can Employers Find a Way to Correct an Erroneous Accident or Injury Report to OSHA and Avoid an Inspection?

Insights

3.04.19

An accident happens at your workplace, and an employee is injured. During the hectic response, incorrect information funnels its way up to the safety director or person 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 then reports to OSHA that an amputation or in-patient hospitalization has occurred.

After several hours or the next day, however, it becomes apparent that the employee's finger was not amputated or he was not admitted to a hospital as an in-patient. Not only that, but an OSHA compliance officer shows up, demanding to inspect the worksite. Can you stop the inspection? Can you, in Cher's immortal words, *turn back time*? Probably not.

Injury 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).

Companies also must report more significant injuries to OSHA. When a fatality occurs, the company must report the fatality to OSHA within 8 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).

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 an Erroneous Report of Injury

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, and therefore that an inspection is warranted. If an OSHA inspector shows up at your worksite after reporting an injury, OSHA has decided it has reasonable grounds to believe a violation may exist.

If a company knows at the time the OSHA inspector shows up to conduct an inspection that the initial report of injury was incorrect—and 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—that an accident has occurred, regardless of severity—OSHA is unlikely to agree not to inspect the workplace. That is because, while the severity of the injury may affect how a citation is classified (serious, other-than-serious, etc.), whether a violation may exist is based on the fact of injury itself as well as what else the company has reported to OSHA regarding the cause of the injury.

What Can a Company Do?

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

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

Second, companies should call legal counsel once an injury has occurred that may be reportable. Experienced legal counsel can guide companies through the process of reporting to OSHA 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 make its determination based upon what is said in the report regarding the cause and circumstances of the injury. Experienced legal counsel can assist companies regarding what information is reported to OSHA.

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