Don't Be Bringin' on the Heartbreak: Are Statements Made During OSHA Informal Conferences Admissible?

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The Occupational Safety and Health Administration (OSHA) has conducted an inspection of your plant after one of your employees amputated part of his finger trying to clean around a sprocket with the machine still running. OSHA issues a serious citation to your company for a machine guarding violation.

Your company contests the citation because no one works around the sprocket when the machine runs, because company policy, on which the employee had been trained, required the employee to lock out the machine before cleaning and because no supervisor saw the accident occur. You have in writing the lock-out tag-out (LOTO) policy, the employee's signed training records on the policy, audits showing that the company inspected for compliance with the policy, and disciplinary records showing that the company disciplines its employees for safety infractions.

So you request an informal conference with OSHA to see if a settlement of the citation can be reached or if the citation can be vacated. The corporate safety manager, the plant manager, and, hopefully, your attorney, attend the conference. During the conference, the plant manager lets slip that he is aware that employees have occasionally cleaned the machine without locking and tagging it out because it is easier to clean the chain on the machine while it is running.

OSHA pounces and does not offer any meaningful settlement. At trial, OSHA tries to introduce the manager's statement during the informal conference that the company's employees are known by plant management to clean the machine without guarding in place. Can OSHA introduce that evidence? Is the plant manager's statement, in the immortal words of Def Leppard, *Bringin' on the Heartbreak* for the company?

Informal Conferences are Settlement Discussions

Informal conferences are conducted "for the purpose of discussing any issues raised by an inspection, citation, notice of proposed penalty, or notice of intention to contest." 29 C.F.R. § 1903.20.

The purpose of an informal conference generally is to negotiate a settlement of the case before proceeding through litigation. The Occupational Safety and Health Review Commission (OSHRC) does not have a specific procedural rule regarding the admissibility of statements made during settlement negotiations generally or informal conference specifically.

OSHRC Rule 120 provides that statements made during settlement conferences before judges with the OSHRC are "confidential and shall not be divulged outside" of the settlement conference. 29 C.F.R. § 2200.120(d)(3). Further, OSHRC Rule 71 provides that the Federal Rules of Evidence apply to proceedings. 29 C.F.R. § 2200.71.

Under Federal Rule of Evidence 408, neither (1) an offer or acceptance of an offer to settlement a claim nor (2) "conduct or a statement made during compromise negotiations about the claim" are admissible "to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction." Fed. R. Evid. 408(a).

In other words, the fact that your company makes an offer to settle at an informal conference is not admissible to prove that the citation is valid. Similarly, statements made during informal conferences cannot be used to prove that the citation is valid. In the example described above, OSHA cannot introduce the plant manager's statement to prove that the company violated the machine guarding standard.

There is, of course, an exception to the rule. Under Rule 408, conduct and statements made during settlement negotiations, as well as offers to settle, can be admitted "for another purpose, such as proving a witness's bias or prejudice." Fed. R. Evid. 408(b). An example of a statement that may fit under this exception would be if the OSHA inspection resulted from a complaint from a union, and the plant manager made a statement that you cannot trust anything a union says; this statement could potentially be introduced to show the plant manager's bias.

You Got the Best of OSHA? Nope.

The plant manager's statement at the informal conference may not be admissible, but it still was not a smart thing to say. While OSHA likely cannot use the statement at trial, the plant manager just gave OSHA a roadmap for conducting discovery. OSHA may be able to obtain evidence supporting the plant manager's statement in discovery—such as through issuing interrogatories and conducting depositions—and then introduce that independent evidence at trial.

Best Practices for Informal Conferences

There are two principal best practices when pursuing settlement at informal conferences.

First, if you contest the citations, you should seriously consider retaining legal counsel. The attorney can represent you and speak on your behalf at the informal conference. The attorney also should know what OSHA must prove for each citation and can identify weaknesses in OSHA's position at the informal conference.

Second, have your attorney do most if not all of the talking at the informal conference. Generally, what the attorney says is inadmissible, and the attorney is much less likely to divulge information that could assist OSHA in prosecuting its case. Experienced counsel can most effectively advocate

for your interests, protect against unintended disclosures, and avoid bringin' on the heartbreak of not favorably settling a case.

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