



Don't Know What You Got (Till It's Gone): Is OSHA Required to Give Managers and Supervisors Their Rights Before Interviewing Them?

Insights

6.24.19

When an inspector from the Occupational Safety and Health Administration (OSHA) shows up at your workplace, know this: everything—and we mean everything—that a manager or supervisor says at any point to the inspector will bind the company and may be used against the company to support a citation.

Two Examples

Imagine an OSHA inspector shows up at your workplace and presents his credentials to the plant manager. The opening conference begins with the OSHA inspector, the plant manager, and safety director present. The inspector explains that he has received a complaint of employee exposure to methylenedianiline (MDA) at the workplace. The complaint is vague and does not specify where in the facility the exposure occurred. Trying to be helpful and point the OSHA inspector to the right area of the facility, the safety director says, “Oh, yeah. I know the area they’re talking about. That’s in the back of the facility near where we produce the polymers. It’s a recent issue because we just changed suppliers.”

Here’s another example: an OSHA inspector is in the middle of conducting an inspection related to a complaint of asbestos exposure concerning the removal of pipes at a facility. During the walk-through with a facility owner, the inspector discovers that a contractor’s employees worked in the area of alleged exposure. The contractor’s site superintendent is onsite and joins the walk-around inspection. When the inspector gets to the area of the alleged exposure, the contractor’s superintendent says, “We removed the pipes, but the host employer told us they had hired an asbestos removal company to abate the asbestos insulation on the pipes we removed.”

Is there an issue with either the safety director’s or site superintendent’s comments?

The Law

OSHA must prove the following four elements to establish a *prima facie* case that a standard was violated: (1) the standard applied to the cited condition; (2) the terms of the standard were violated; (3) one or more employees had access to the relevant hazard; and (4) the employer knew or, with the exercise of reasonable diligence, could have known of the presence of the violation. *EMCON/OWT, Inc. v. Sec’y of Labor*, 224 Fed. App’x 875, 875-76 (11th Cir. 2007).

To prove these four elements, OSHA can rely on statements made by the employer's managers at any time during the inspection. There are no guidelines and few legal prohibitions on OSHA using any and all statements made by managers. In contrast, OSHA's Field Operations Manual has detailed guidelines regarding conducting non-manager interviews, but those guidelines are meant to keep the contents of those interviews confidential from the employer—a concern not present with manager interviews or statements. Simply put, it does not matter if the manager makes the comment during the opening conference, during the walk-around, in an email follow up after the walk-around, during idle chit chat, or during a formal interview—it can all be used against the employer.

Did the Managers' Statements Increase the Risk of a Citation?

In both of our examples, the OSHA inspector has not conducted any "interviews" of the employers' managers. Yet in each case, the manager has helped prove OSHA's case for a citation by indicating that the employer may have had knowledge of a possible violation. The safety director admitted that there has been a "recent issue" with MDA that he was aware of, and the site superintendent acknowledged that he knew of the presence of asbestos in the facility prior to work beginning. While both managers were just trying to be helpful, they have inadvertently helped OSHA support their citations and could have set up willful violations (with much higher penalties), which require OSHA to show prior knowledge of a hazard, against the company. To paraphrase the 80s hair band *Cinderella*, they didn't know what they said "till it's gone."

Best Practices and Take Aways

We recommend the following best practices to minimize the risk of manager statements being used to support a citation:

- If you are able and time permits, have an attorney present during the OSHA inspection and have him or her be the person who provides most of the information to the OSHA inspector. OSHA generally cannot use statements made by attorneys as evidence. Formal interviews of managers can be arranged later.
- If a manager must speak during the opening conference and walk-around—a circumstance that is very difficult to avoid—limit what is said only to matters that are necessary to directing the inspector to the area of the facility within the scope of the inspection and to arrange hourly employee interviews if requested.
- Do not make any comments regarding what you may know of any hazard, how machines work or are guarded, how machines are locked out, etc. These are all questions that are not necessary for the OSHA inspector to conduct his walk-around. You can answer these questions at a later date after speaking with your attorney.

OSHA inspections may appear straightforward, but they have complicated aspects where even an innocuous comment can result in significant consequences. Seek legal counsel should you have any questions regarding these issues.

Related People



David Klass
Partner
704.778.4163
[Email](#)



Travis W. Vance
Regional Managing Partner
704.778.4164
[Email](#)

Service Focus

Workplace Safety and Catastrophe Management