Living with OSHA:

If you decide to fight, arrive at the battle field on time

By Mari M. Gursky *

In the last two segments on Living with OSHA, I have dealt with ways of preventing or limiting citations for OSHA violations—from intervening early in the regulatory process to limiting or preventing the inspections. In this last part of the series I will deal with how to fight citations by OSHA for supposed violations it has discovered during an inspection.

After inspecting your premises, the OSHA inspector may issue citations which range from non-serious to willful and with penalties of no more than $10,000 for each willful violation. Where there is a fatality, a willful violation can result in a referral to the Justice Department for criminal prosecution. The citation may also contain an abatement date (a date by which the violation is to be corrected).

If citations are issued, you will have the opportunity to attend an informal conference at which you are to be afforded the right to present your view and perhaps resolve disagreements between you and OSHA respecting citations, abatement periods, and penalties. Whether or not to attend the informal conference is a decision that must be made on a case by case basis.

OSHA fishing trip?

Some feel the conference is just a fishing expedition for OSHA to find out information to build its case against the employer. Others feel it is useful. It gives the Area Director the opportunity to hear the employer’s side. When negotiated with, OSHA almost uniformly reduces its penalties—often substantially.

If you decide on an informal conference, it should take place within 15 days of the citation. If all matters respecting the citation are not resolved, the employer must formally file a Notice of Contest within 15 days or the citation, abatement, and penalty become final.

The 15-day limitation means that at times an employer may have to file his Notice of Contest to protect himself before he has finally decided whether to battle the citation. The Notice must be filed and filed properly during this time period or your rights to contest may be lost. In *Fitchburg Foundry, Inc.*, (July, 1979), an employer was found to have lost its right to contest 75 violations and penalties of $5,985, because it had filed its Notice of Contest with the Commission rather than the Area Director, and it was not clear from the record that even this filing was done within the 15-day time period. The Commission said that good faith is not an excuse for an employer’s late filing.

The employer must notify his affected employees and the Union of any citation that he is contesting. Unions, as the representative of affected employees, have a right to participate in the citation proceeding, and many unions are taking an active role in these proceedings.

Confine your liability

Citations can result from violations of standards, rules or regulations promulgated under the Act or under the “general duty clause.” That clause requires that “each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees.”

Where there is no specific construction standard, an employer can be held to the “general industry standard,” *Western Waterproofing, Inc.*, (July, 1979). Where there is no “general industry standard,” an employer can still be held liable under the “general duty clause.”

This general duty clause has raised a great number of questions because there is often a dispute about what is “recognized hazard” under that clause.

For contractors in the construction area, the literal interpretation of the clause poses the potential of creating an impossible situation. Since the employees of contractors often work at multi-employer sites, each contractor cannot insure that his employees are not exposed to recognized hazards since he does not have control over the whole site. Nor does the subcontractor in one area—for example, electrical work—have the expertise or the knowledge to comply with standards in another—for example, demolition.

Yet, until 1975, subcontractors working at multi-employer construction sites were cited and held liable for penalties for violations of OSHA standards and the general duty clause where the subcontractor neither created nor was contractually responsible for the “hazard” to which his employees were exposed.

Relief arrives

Finally in 1975, some relief came. In *Anning-Johnson Co. v. United States Occupational Safety and Health Review Commission*, (7th Cir. 1975), a federal Court of Appeals held that where a non-serious violation of a standard promulgated by the Secretary of Labor exists, a

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subcontractor who has not created and who is not contractually responsible for abating the hazard cannot be held liable by OSHA for violating that standard. Contract managers, however, are still held responsible for safety violations on their site, even in areas where they are not contractually responsible for safety compliance: Bechtel Power Corp., (March, 1976); Vappi & Co., Inc., (July, 1976).

Things to do

In the early stages of negotiating contractual duties and obligations, define as specifically as possible which subcontractor has safety responsibility for which areas. If areas of responsibility and safety obligations are clearly defined, it will help protect each party from liability for non-compliance in an area about which he has little knowledge and avoid several employers being cited for the same violation.

Be sure to object if you are cited for violations of standards in areas that are not your responsibility. Some OSHA inspectors may need to be reminded of this distinction.

Try to broaden the reach of Anning-Johnson. Anning-Johnson specifically does not protect subcontractors from violations of the general duty clause even if they did not cause the hazard or were not contractually responsible for the violation. However, just as it makes no sense to place responsibility for compliance with OSHA regulations on those employers who neither created nor had responsibility for abating the hazard, it makes no sense to hold non-responsible employers responsible under the general duty clause. An employer should not be expected to be familiar with all recognized hazards in fields that are not his own.

Conclusions

A good way, then, to deal with the potential expense and trouble posed by OSHA and its sprawling regulations and regulators (discussed in Part One of this series) is to plan ahead as an association, as a group at a multi-employer site and even as an individual employer. Taking an active role, perhaps as a group, in monitoring developments in areas of interest, and in participating in standard-setting can help create the kind of standards you can tolerate.

Planning ahead for OSHA inspections (discussed in Part Two) and contesting citations, when appropriate, are also important in living with OSHA.