# FIELD OPERATIONS MANUAL

**TENNESSEE OCCUPATIONAL SAFETY AND HEALTH PLAN – PART V**

**April 1, 2016**

**STATE OF TENNESSEE**
**DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT**
**Division of Occupational Safety and Health**

**This manual is intended to provide guidance regarding some of the internal operations of the Division of Occupational Safety and Health (TOSHA), and is solely for the benefit of the Government of the State of Tennessee. No duties, rights, or benefits, substantive or procedural are created by this manual. The contents of this manual are not enforceable by any person or entity against the Department of Labor and Workforce Development or the State of Tennessee. Guidelines which reflect current Tennessee Occupational Safety and Health Review Commission or court precedents do not necessarily indicate acquiescence with those precedents.**

**Where a conflict may exist between the contents of this manual and Rules of the Department of Labor and Workforce Development, Occupational Safety and Health, Chapter 0800-01-01 et seq. or Tennessee Code Annotated, Title 50, Chapter 3 (T.C.A. §§50-3-101 – 50-3-1008 and 50-3-2001) or Chapter 4 (T.C.A. §§50-4-101 – 50-4-108), the provisions of the rule or the Code shall take precedence.**

# RECORD OF CHANGES/ADDITIONS

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# Chapter 1 - Introduction

**I.** **Purpose**. The Tennessee Department of Labor and Workforce Development, Division Occupational Safety and Health (TOSHA) Field Operations Manual (FOM) consists of TOSHA's enforcement policies and procedures which provides TOSHA compliance personnel a reference document for identifying the responsibilities associated with the majority of their inspection duties as they relate to compliance activities. The policies and procedures contained in this manual are supplemented with numerous other official documents that are referenced throughout the FOM.

**II.** **Background.** This manual cancels and replaces TOSHA Field Operations Manual (FOM), Tennessee Occupational Safety and Health Plan - Part V, September 15, 2009 with changes through February 12, 2014. It constitutes TOSHA's general enforcement policies and procedures manual for use by the field offices in conducting inspections, issuing citations and proposing penalties. This version of, the FOM, incorporates many of the program directives and memoranda, and provides a single, updated source of instruction on enforcement policies and procedures.

**III.** **Disclaimer.** This manual is intended to provide instruction regarding some of the internal operations of the Tennessee Occupational Safety and Health Administration (TOSHA), and is solely for the benefit of the Government. No duties, rights, or benefits, substantive or procedural, are created or implied by this manual. The contents of this manual are not enforceable by any person or entity against the Department of Labor and Workforce Development or the State of Tennessee. Statements which reflect current Tennessee Occupational Safety and Health Review Commission or court precedents do not necessarily indicate acquiescence with those precedents.

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# Chapter 2
# PROGRAM PLANNING

**I. Introduction**. TOSHA's mission is to assure the safety and health of Tennessee's working men and women by promulgating and enforcing standards and regulations; providing training, outreach, and education; establishing cooperative programs; and encouraging continual improvement in workplace safety and health as well as the development of comprehensive safety and health management systems. Effective and efficient use of resources requires careful, flexible planning. In this way, the overall goal of hazard abatement and employee protection is best served.

**II. Outreach and Assistance.**

**A. Providing Assistance to Small Employers.** TOSHA provides small businesses guidance and compliance assistance with occupational safety and health issues upon request. These programs also provide information on and advice about compliance with the statutes and regulations; interpretations; and applications of the law to specific sets of facts supplied by the small entity.

**B. Outreach Program**. TOSHA maintains an outreach program appropriate to local conditions. The plan may include compliance assistance services including assistance in developing compliance safety and health management systems, training and education services, referral services, cooperative programs, abatement assistance, and technical services.

**C. Responding to Requests for Assistance**. All requests from employers or employees for compliance information or assistance shall receive timely, accurate, and helpful responses from TOSHA. See section IV.B.4. *Employer Information Requests* of this chapter for additional information.

**III. TOSHA Cooperative Programs Overview**. TOSHA offers a number of avenues for businesses and organizations to work cooperatively with TOSHA. Compliance Officers should discuss the various cooperative programs with employers.

**A. Voluntary Protection Program (Volunteer STAR)**. The Voluntary Protection Program (VPP) is designed to recognize and promote effective safety and health management. A hallmark of VPP is the principle that management, labor, and TOSHA can work together in pursuit of a safe and healthy workplace. A VPP participant is an employer that has successfully designed and implemented an effective health and safety management system at its worksite and has been verified by TOSHA and approved by the Commissioner of Labor and Workforce Development. Volunteer STAR participants are exempt from TOSHA programmed inspections.

*NOTE: See CSP-TN 03-01-003, Voluntary Protection Programs (VPP): Policies and Procedures Manual, for additional information.*

**B. Onsite Consultation Program.**

**1.** TOSHA offers an onsite consultation program under a Section 21(d) agreement with Federal OSHA.

a. The Onsite Consultation Program offers a variety of services at no cost to employers. These services include assisting in the development and implementation of an effective safety and health management system, and offering training and education to the employer and employees at the worksite. Smaller businesses in high hazard industries or those involved in hazardous operations receive priority.

b. The Onsite Consultation Program is separate from TOSHA's enforcement efforts. Under onsite consultation programs, no citations are issued, nor are penalties proposed.

**2. Safety and Health Achievement Recognition Program (SHARP).**

a. Another program that recognizes employers' efforts to create a safe workplace and ex empts them from programmed inspections is the Safety and Health Achievement Recognition Program (SHARP). This program is administered by the Onsite Consultation Program and funded under Section 21(d) of the OSH Act.

b. SHARP is designed to provide incentives and support those employers that implement and continuously improve effective safety and health management system(s) at their worksite. SHARP participants are exempted from TOSHA programmed inspections.

*NOTE: See CSP 02-00-002, Consultation Policies and Procedures Manual for additional information.*

**C. Strategic Partnerships.** Organizations can enter into Strategic Partnerships with TOSHA to address specific safety and health issues. In these partnerships, TOSHA enters into extended, voluntary, cooperative relationships with groups of employers, employees, and employee representatives (sometimes including other stakeholders, and sometimes involving only one employer) in order to encourage, assist, and recognize efforts to eliminate serious hazards and to achieve a high level of employee safety and health.

*NOTE: See CSP 03-02-002, OSHA Strategic Partnership Program for Worker Safety and Health, for additional information.*

**D. Alliance Program**. Through the Alliance Program, TOSHA works with groups committed to safety and health, including businesses, trade or professional organizations, unions and educational institutions, to leverage resources and expertise to develop compliance assistance tools and resources and share information with employers and employees to help prevent injuries, illnesses and fatalities in the workplace. TOSHA and the organization sign a formal agreement with goals that address training and education, outreach and communication, and promote the national dialogue on workplace safety and health.

*NOTE: See CSP 04-01-001, OSHA Alliance Program, for additional information.*

*NOTE: See section VI.H. Enforcement Scheduling and Interface with Cooperative Program Participants of this chapter for additional information.*

## IV. Enforcement Program Scheduling.

### A. General.

**1.** TOSHA's priority system for conducting inspections is designed to allocate available TOSHA resources as effectively as possible to ensure that maximum feasible protection is provided to working men and women. The Area Supervisor will ensure that inspections are scheduled within the framework of this chapter, that they are consistent with the objectives of TOSHA, and that appropriate documentation of scheduling practices is maintained.

**2.** The Area Supervisor will also ensure that TOSHA resources are effectively distributed during inspection activities. If an inspection is of a complex nature, the Area Supervisor

in consultation with the TOSHA Administrator may consider utilizing additional TOSHA/OSHA resources (e.g., the Federal Health Response Team).

**B.** **Inspection Priority Criteria.** Generally, priority of accomplishment and of assigning staff resources for inspection categories is as shown in Table 2-1 below:

Table 2-1: Inspection Priorities

| Priority | Category |
|---|---|
| First | Imminent Danger |
| Second | Fatality/Catastrophe |
| Third | Complaints/Referrals |
| Fourth | Programmed Inspections |

**1.** **Efficient Use of Resources.** Deviations from this priority list are allowed so long as they are justifiable, lead to the efficient use of resources, and promote effective employee protection. An example of such a deviation would be when the Administrator commits a certain percentage of resources to programmed Special Emphasis Program (SEP) inspections such as a National Emphasis Program (NEP), a Local Emphasis Program (LEP), or Regional Emphasis Program (REP). Inspection scheduling deviations must be documented in the case file.

**2.** **Follow-up Inspections.** In cases where follow-up inspections are necessary, they shall be conducted as promptly as resources permit. In general, follow-up inspections shall take priority over all programmed inspections and any unprogrammed inspection in which the hazards are anticipated to be other-than-serious.

*NOTE: See Chapter 7, Post-Citation Procedures and Abatement Verification, for additional information.*

**3.** **Monitoring Inspections.** When a monitoring inspection is necessary, the priority is the same as for a follow-up inspection.

*NOTE: See Chapter 7, Post-Citation Procedures and Abatement Verification, for additional information.*

**4.** **Employer Information Requests**. Contacts for technical information initiated by employers or their representatives will not trigger an inspection, nor will such employer inquiries protect the requesting employer against inspections conducted pursuant to existing policy, scheduling guidelines and inspection programs established by TOSHA.

**5.** **Reports of Imminent Danger, Catastrophe, Fatality, Amputations, Accidents, Referrals or Complaints**. The Area Supervisor will act in accordance with established inspection priority procedures.

*NOTE: See Section V. Unprogrammed Activity – Hazard Evaluation and Inspection Scheduling of this chapter for additional information.*

**C.** **Effect of Contest**. If an employer has contested a citation and/or a penalty from a previous inspection at a specific worksite, and the case is still pending before the Review Commission, the following guidelines apply to additional inspections of the employer at that worksite:

**1.** If the employer has contested the penalty only, the inspection will be scheduled as if there were no contest;

**2.** If the employer has contested the citation itself or any items therein, then programmed and unprogrammed inspections will be scheduled, but all items under contest will be excluded from the inspection unless a potential imminent danger is involved.

*NOTE: See Paragraph IV.B., Inspection Priority Criteria, of this chapter for additional information.*

**D. Enforcement Exemptions and Limitations.**

**1.** In providing funding for OSHA and subsequently TOSHA, Congress has consistently placed restrictions on enforcement activities for two categories of employers: small farming operations and small employers in low-hazard industries. Congress may place exemptions and limitations on OSHA/TOSHA activities through the annual Appropriations Act.

**2.** Before initiating an inspection of an employer in these categories the Area Office will evaluate whether the Appropriations Act for the fiscal year would prohibit the inspection. Where this determination cannot be made beforehand, the CSHO will determine the status of the small farming operation or a small employer in a low-hazard industry upon arrival at the workplace. If the prohibition applies, the inspection shall immediately be discontinued.

*NOTE: See CPL-TN 02-00-051, Enforcement Exemptions and Limitations under the Appropriation Act, for additional information.*

**E. Preemption by Another Agency.**

**1.** T.C.A. Section 50-3-104 states that the Tennessee Occupational Safety and Health Act of 1972 (Act) does not apply to working conditions over which other agencies exercise statutory responsibility to prescribe standards for safety and health. The determination of preemption by another agency is, in many cases, a highly complex matter.

**2.** If a question arises, usually upon receipt of a complaint, referral, or other inquiry, consult the list of Memorandums of Understanding (MOU) on the OSHA Website to determine if the issue has been previously addressed. A MOU is an agreement created to address/resolve coverage issues and to improve the working relationships between other Federal agencies and organizations regarding employee safety and health.

**3.** At times, an inspection may have already begun when the coverage jurisdiction question arises. Any such situation will be brought to the attention of the Area Supervisor as soon as they arise, and dealt with on a case-by-case basis.

**4.** Examples of MOUs and other jurisdictional documents include the following:

*a. Jurisdictional Coverage Reference - US DOL/OSHA and TDLWD/TOSHA, TOSHA Directive CSP-TN 01-03-003.*

b. *Mine Safety and Health Administration - Interagency Agreement between the Mine Safety and Health Administration and OSHA, dated March 29, 1979.*

**F. United States Postal Service.** TOSHA elected not to cover the U.S. Postal Service. Thus, Federal OSHA retains authority to cover the U.S. Postal Service in Tennessee including U.S. Postal Service employees and contract employees engaged in U.S. Postal Service mail operations. Coverage includes contractor-operated facilities engaged in mail operations, postal stations in public or commercial facilities, and all other employers performing any type work at these

facilities. Consult the TOSHA directive *Jurisdictional Coverage Reference - US DOL/OSHA and TDLWD/TOSHA, TOSHA Directive CSP-TN 01-03-003.*

**G. Home-Based Worksites.**

**1.** TOSHA will not perform any inspections of employees' home offices. A home office is defined as office work activities in a home-based setting/worksite (e.g., filing, keyboarding, computer research, reading, writing) and may include the use of office equipment (e.g., telephone, facsimile machine, computer, scanner, copy machine, desk, file cabinet).

**2.** TOSHA will only conduct inspections of other home-based worksites, such as home manufacturing operations, when it receives a complaint or referral alleging that a violation of a safety or health standard exists that threatens physical harm, that an imminent danger is present, or that there was a work-related fatality.

*NOTE: See CPL-TN 02-00-125, Home-Based Worksites, for additional information.*

**H. Inspection/Investigation Types.**

**1. Unprogrammed.**

a. Inspections scheduled in response to alleged hazardous working conditions identified at a specific worksite are classified as unprogrammed. This type of inspection responds to:

(i) Imminent Dangers;

(ii) Fatalities/catastrophes;

(iii) Complaints; and

(iv) Referrals.

b. It also includes follow-up and monitoring inspections scheduled by the Area Office.

*NOTE: This category includes all employers/employees directly affected by the subject of the unprogrammed inspection activity, and is especially applicable on multi-employer worksites.*

*NOTE: Not all complaints and referrals qualify for an inspection. See Chapter 9, Complaint and Referral Processing, for additional information.*

*NOTE: See CPL 02-00-124, Multi-Employer Worksite Citation Policy, for additional information.*

**2. Unprogrammed Related.**

a. Inspections of employers at multi-employer worksites whose operations are not directly addressed by the subject of the conditions identified in a complaint, accident, or referral are designated as unprogrammed related.

b. An example would be: A trenching inspection conducted at the unprogrammed worksite where the trenching hazard was not identified in the complaint, accident report, or referral.

3. **Programmed.** Inspections of worksites which have been scheduled based upon objective or neutral selection criteria are programmed inspections. The worksites are selected according to national scheduling plans for safety and for health or under local, regional, and national special emphasis programs.

4. **Program Related**. Inspections of employers at multi-employer worksites whose activities were not included in the programmed assignment, such as a low injury rate employer at a worksite where programmed inspections are being conducted for all high rate employers.

**V. Unprogrammed Activity** – Hazard Evaluation and Inspection Scheduling. Enforcement procedures relating to unprogrammed activity are located in subject specific chapters of this manual:

**A.** Imminent Danger, see Chapter 11, Imminent Danger, Fatality, Catastrophe, and Emergency Response.

**B.** Fatality/Catastrophe, see Chapter 11, Imminent Danger, Fatality, Catastrophe, and Emergency Response.

**C.** Emergency Response, see Chapter 11, Imminent Danger, Fatality, Catastrophe, and Emergency Response.

**D.** Complaint/Referral Processing, see Chapter 9, Complaint and Referral Processing.

**E.** Whistleblower Complaints, see Chapter 9, Complaint and Referral Processing.

**F.** Follow-ups and Monitoring, see Chapter 7, Post-Citation Procedures and Abatement Verification.

**VI. Programmed Inspections.**

**A. Scheduling for Construction Inspections**. Due to the mobility of the construction industry, the transitory nature of construction worksites, and the fact that construction worksites frequently involve more than one employer, inspections are scheduled from a list of construction worksites rather than construction employers. The OSHA National Office will provide to each Area Office a randomly selected list of construction projects from identified or known covered active projects. This list will contain the projected number of sites which the field office has reported it plans on inspecting during the next month. Projects are selected in accordance with the inspection schedule for construction.

*NOTE: See CPL 02-00-141, Inspection Scheduling for Construction.*

**B. Scheduling for Maritime Inspections.** Marine inspection activities are not included in the Tennessee State Plan. Marine cargo handling industry, shipbreaking and shipyard employment inspections in Tennessee are conducted by federal OSHA.

**C. Special Emphasis Programs (SEPs)**. Special Emphasis Programs provide for programmed inspections of establishments in industries with potentially high injury or illness rates that are not covered by other programmed inspection scheduling systems or, if covered, where the potentially high injury or illness rates are not addressed to the extent considered adequate under the specific circumstances. SEPs are also based on potential exposure to health hazards. Special emphasis programs may also be used to develop and implement alternative scheduling procedures or other departures from national procedures. Special emphasis programs can include National Emphasis Programs, Regional Emphasis Programs and Local Emphasis Programs.

**1.** **Identification of Special Emphasis Programs.** The description of the particular Special Emphasis Program shall be identified by one or more of the following:

a. Specific industry;

b. Trade/craft;

c. Substance or other hazard;

d. Type of workplace operation;

e. Type/kind of equipment; and

f. Other identifying characteristic.

**2.** **Special Emphasis Program Scope**. The reasons for and the scope of a Special Emphasis Program shall be described; and may be limited by geographic boundaries, size of worksite, or similar considerations.

**3.** **Pilot Programs.** Pilot programs may also be established under Special Emphasis Programs. Such programs may be conducted for the purpose of assessing the actual extent of suspected or potential hazards, determining the feasibility of new or experimental compliance procedures, or for any other legitimate reason.

**D.** **National Emphasis Programs (NEPs)**. OSHA develops National Emphasis Programs to focus outreach efforts and inspections on specific hazards in a workplace.

**E.** **Local Emphasis Programs (LEPs) and Regional Emphasis Programs (REPs).**

**1.** TOSHA may participate in federal LEPs and/or REPs at the discretion of the TOSHA Administrator. LEPs and REPs are types of special emphasis programs. LEPs and REPs are generally based on knowledge of local industry hazards or local industry injury/illness experience

*NOTE: See CPL 04-00-001, Procedures for Approval of Local Emphasis Programs (LEPs), for additional information.*

**2.** OSHA directives include topic specific scheduling procedures in addition to the general information provided in this section.

**F.** **Other Special Programs.** TOSHA may develop programs to cover special categories of inspections which are not covered under a Special Emphasis Program.

**G.** **Inspection Scheduling and Interface with Cooperative Program Participants.**

**1.** Employers who participate in voluntary compliance programs may be exempt from programmed inspections and eligible for inspection deferrals or other enforcement incentives. The Area Supervisor will determine whether the employer is actively participating in a Cooperative Program that would impact inspection and enforcement activity at the worksite being considered for inspection. Where possible, this determination should be made prior to scheduling the inspection.

**2.** Information regarding a facility's participation in the following programs should be available prior to scheduling inspection activity:

a. VPP Program;

b. Pre-SHARP and SHARP Participants;

c. Consultation 90-Day Deferrals.

**3. Voluntary Protection Program (Volunteer STAR).**

a. **VPP Manager Responsibilities**. The VPP manager must keep the TOSHA Administrator informed regarding VPP applicants and the status of participants in the VPP. This will prevent unnecessary scheduling of programmed inspections at VPP sites and ensure efficient use of resources. The Administrator should be informed:

(i) That the site can be removed from the programmed inspection list. Such removal may occur no more than 75 days prior to the onsite evaluation;

(ii) Of the site's approval for the VPP program;

(iii) Of the site's withdrawal or termination from the VPP program; and

(iv) If the VPP Manager is the first person notified by the site of an event requiring enforcement, the VPP Manager must instruct the site to contact the appropriate Area Office.

b. **Programmed Inspections and VPP Participation.**

(i) **Inspection Deferral**. Approved sites must be removed from any programmed inspection lists for the duration of participation, unless a site chooses otherwise. The applicant worksite will be deferred starting no more than 75 calendar days prior to the commencement of its scheduled pre-approval onsite review.

(ii) **Inspection Exemption.** The exemption from programmed inspections for approved VPP sites will continue for as long as they continue to meet VPP requirements. Sites that have withdrawn or have been terminated from VPP will be returned to the programmed inspection list, if applicable, at the time of the next inspection cycle.

c. **Unprogrammed Enforcement Activities at VPP Sites**. When an Area Supervisor receives a complaint, or a referral other than from the TOSHA VPP onsite team, or is notified of a fatality, catastrophe, or other event requiring an enforcement inspection at a VPP site, the Area Supervisor or designee must initiate the inspection following normal TOSHA enforcement procedures.

(i) The Area Supervisor must immediately notify the VPP Manager of any fatalities, catastrophes or other accidents or incidents occurring at a VPP worksite that require an enforcement inspection; as well as of a referral or complaint that concerns a VPP worksite, including complaint inquiries that would receive a letter response.

(ii) If the VPP Manager is the first person notified by the site of an event requiring an enforcement inspection, the VPP Manager must instruct the site to contact the appropriate Area Office.

(iii) The inspection will be limited to the specific issue of the unprogrammed activity. If citations are issued as a result of the inspection, a copy of the citation will be sent to the VPP Manager. See *CSP-TN 03-01-003, Voluntary Protection Programs (VPP): Policies and Procedures Manual*.

(iv) The Compliance Manager will notify the VPP Manager of any report resulting from an enforcement case.

**4. Consultation.**

a. **Consultation Visit in Progress.**

(i) If an onsite consultation visit is in progress, it will take priority over TOSHA programmed inspections as outlined below. An onsite consultation visit will be considered "in progress" in relation to the working conditions, hazards, or situations covered by the visit from the beginning of the opening conference through the end of the correction due dates and any extensions thereof. If an onsite consultation visit is already in progress it will terminate when the following type of TOSHA compliance inspection is about to take place:

(1) Imminent danger inspection;

(2) Fatality/catastrophe inspection;

(3) Complaint inspections; and/or

(4) Other critical inspections, as determined by the TOSHA Administrator.

(ii) Other “such critical inspections” may include, but are not limited to, referrals as defined in Chapter 9, Complaint and Referral Processing. Following an evaluation of the hazards alleged in a referral, if the Administrator determines that enforcement action is required prior to the end of an abatement period established by consultation, the consultation visit in progress shall be immediately terminated to allow for an enforcement inspection.

(iii) For purposes of efficiency and expediency, an employer’s worksite shall not be subject to concurrent consultation and enforcement-related visits. The following excerpts from *CSP 02-00-002, Consultation Policies and Procedures Manual, Chapter 7: Relationship to Enforcement*, to clarify the interface between enforcement and consultation activity at the worksite:

(1) **Full Service Onsite Consultation Visits**. While a worksite is undergoing a full service onsite consultation visit for safety and health, programmed enforcement activity may not occur until after the end of the worksite’s visit “In Progress” status.

(2) **Full Service Safety or Health Onsite Consultation Visits**. When an onsite consultation visit “in Progress” is discipline-related, whether for safety or health; programmed enforcement activity may not proceed until after the end of the worksite’s

visit "in Progress" status, and is limited to the discipline examined, safety or health.

(3) **Limited Service Onsite Consultation Visits**. If a worksite is undergoing a limited service onsite consultation visit, whether focused on a particular type of work process or a hazard, programmed enforcement activity may not proceed while the consultant is at the worksite. The re-scheduled enforcement activity must be limited only to those areas that were not addressed by the scope of the consultative visit (posted List of Hazards).

(4) **Enforcement Follow-Up and Monitoring Inspections.** If an enforcement follow-up or monitoring inspection is scheduled while a worksite is undergoing an onsite consultation visit, the inspection shall not be deferred; however, its scope shall be limited only to those areas required to be covered by the follow-up or monitoring inspection. In such instances, the consultant must halt the onsite visit until the enforcement inspection is completed. In the event TOSHA issues a citation(s) as a result of the follow-up or monitoring inspection, an onsite consultation visit may not proceed until the citation(s) becomes a final order(s).

b. **Onsite Consultation and 90-Day Deferral.**

(i) If an establishment has requested an initial full-service comprehensive consultation visit for safety and health from the TOSHA Consultation Program, a programmed inspection may be deferred for 90 calendar days from the date of the notification to the Central Office. No extension of the deferral beyond the 90 calendar days is possible, unless the consultation visit is "in progress."

(ii) TOSHA may, however, in exercising its authority to schedule inspections, assign a lower priority to worksites where consultation visits are scheduled.

*NOTE: See CSP 02-00-002, Consultation Policies and Procedures Manual, Chapter 7: Relationship to Enforcement, for additional information.*

**5. Pre-Safety and Health Achievement Recognition Program (Pre-SHARP) Status.**

a. Those employers who do not meet the SHARP requirements, but who exhibit a reasonable promise of achieving agreed-upon milestones and time frames for SHARP participation, may be granted Pre-SHARP status. Pre-SHARP participants receive a full service, comprehensive consultation visit that involves a complete safety and health hazard identification survey, including a comprehensive assessment of the worksite's safety and health management system.

b. Upon achieving Pre-SHARP status, employers may be granted a deferral from TOSHA programmed inspections. The deferral time frame recommended by the Consultation Project Manager must not exceed a total of 18 months from the expiration of the latest hazard correction due date(s), including extensions. The

following types of incidents can trigger a TOSHA enforcement inspection at Pre-SHARP sites:

(i) Imminent danger;

(ii) Fatality/catastrophe; and

(iii) Formal complaints.

6. **Safety and Health Achievement Recognition Program (SHARP).** SHARP is designed to provide support and incentives to those employers that implement and continuously improve effective safety and health management system(s) at their worksite. SHARP participants are exempted from TOSHA programmed inspections, see §1908.7(b)(4).

a. **Duration of SHARP Status.** All initial approvals of SHARP status will be for a period of up to two years, commencing with the date the TOSHA Administrator approves an employer's SHARP application. After the initial approval, all SHARP renewals will be for a period of up to three years.

b. **TOSHA Inspection(s) at SHARP Worksites**. As noted above, employers that meet all the requirements for SHARP status will have the names of their establishments deleted from TOSHA's Programmed Inspection Schedule. However, pursuant to §1908.7(b)(4)(ii), the following types of incidents can trigger a TOSHA enforcement inspection at SHARP sites:

(i) Imminent danger;

(ii) Fatality/catastrophe; or

(iii) Formal complaints.

*NOTE: See CSP 02-00-002, Consultation Policies and Procedures Manual, Chapter 8: OSHA's Safety and Health Achievement Recognition Program (SHARP) and Pre-SHARP, for additional information.*

7. **TOSHA/OSHA Strategic Partnership Program (OSP).**
**TOSHA Strategic Partnerships (OSPs) will not include any programmed inspection deferral or deletion provisions. Only active VPP or SHARP worksites are eligible for this incentive. (See CSP 03-02-003, OSHA Strategic Partnership Program for Worker Safety and Health for additional information.**

8. **Alliances.** Unlike OSP, VPP, and SHARP programs, Alliances do not require applications, data collection, verification, or evaluation. Alliances also do not offer incentives, such as focused inspections or inspection deferral, to their signatories.

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# Chapter 3
# INSPECTION PROCEDURES

**I. Inspection Preparation**. The conduct of effective inspections requires judgment in the identification, evaluation, and documentation of safety and health conditions and practices. Inspections may vary considerably in scope and detail depending on the circumstances of each case.

**II. Inspection Planning**. It is important that the Compliance Officer (CSHO) adequately prepare for each inspection. Due to the wide variety of industries and associated hazards likely to be encountered, pre-inspection preparation is essential to the conduct of a quality inspection.

**A. Review of Inspection History**.

**1.** Compliance Officers will carefully review data available at the Area Office for information relevant to the establishment scheduled for inspection. This may include inspection files and source reference material relevant to the industry. CSHOs will also conduct an establishment search by accessing the OIS database. CSHOs should use name variations and address-matching in their establishment search to maximize their efforts due to possible company name changes and status (e.g., LLC, Inc.).

**2.** If an establishment has an inspection history that includes citations received, CSHOs should be aware of this information. This inspection history may be used to document an employer's heightened awareness of a hazard and/or standard in order to support the development of a willful citation and may be considered in determining eligibility for the history penalty reduction. However, federal or other state plan citations may not be used to support a repeat violation.

**B. Review of Cooperative Program Participation**. CSHOs will obtain information about employers who are currently participating in cooperative programs. CSHOs will verify whether the employer is a current program participant during the opening conference. CSHOs will be mindful of whether they are preparing for a programmed or unprogrammed inspection, as this may affect whether the inspection should be conducted and/or its scope. See Paragraph V.D., Review of Voluntary Compliance Programs, of this chapter for additional information.

**C. Safety and Health Issues Relating to CSHOs.**

**1. Hazard Assessment.** If the employer has a written certification that a hazard assessment has been performed pursuant to §1910.132(d), the CSHO shall request a copy. If the hazard assessment itself is not in writing, the CSHO shall ask the person who signed the certification to describe all potential workplace hazards and then select appropriate protective equipment. If there is no hazard assessment, the CSHO will determine potential hazards from sources such as the OSHA 300 Log of injuries and illnesses and shall select personal protective equipment accordingly.

**2. Respiratory Protection.** CSHOs must wear respirators when and where required, and must care for and maintain respirators in accordance with the CSHO training provided.

a. CSHOs should conduct a pre-inspection evaluation for potential exposure to chemicals. Prior to entering any hazardous areas, the CSHO should identify those work areas, processes, or tasks that require respiratory protection. The hazard assessment requirement in §1910.132(d) does not apply to respirators; see *CPL-TN 02-02-054, Respiratory Protection Program Guidelines*. CSHOs should review all pertinent information contained in the establishment file and appropriate reference sources to become knowledgeable about the industrial

processes and potential respiratory hazards that may be encountered. During the opening conference, a list of hazardous substances should be obtained or identified, along with any air monitoring results.

CSHOs should determine if they have the appropriate respirator to protect against chemicals present at the work site.

b. CSHOs must notify their supervisor or the respiratory protection program administrator:

(i) If a respirator no longer fits well (CSHOs should request a replacement that fits properly);

(ii) If CSHOs encounter any respiratory hazards during inspections or on-site visits that they believe have not been previously or adequately addressed; or

(iii) If there are any other concerns regarding the program.

**3.** **Safety and Health Rules and Practices**. TOSHA Rule 0800-01-04-.08(3) requires that CSHOs comply with all safety and health rules and practices at the establishment and wear or use the safety clothing or protective equipment required by TOSHA standards or by the employer for the protection of employees.

**4.** **Restrictions.** CSHOs will not enter any area where special entrance restrictions apply until the required precautions have been taken. It shall be the Area Supervisor's responsibility to determine that an inspection may be conducted without exposing the CSHO to hazardous situations and to procure whatever materials and equipment are needed for the safe conduct of the inspection.

**5.** **Workplace violence.** CSHO's will refer to CPL-TN 02-01-*052 Enforcement Procedures for Investigating or Inspecting Workplace Violence* when inspections or investigations are conducted at facilities where incidents of workplace violence precipitated the inspections. If at any time a CSHO believes their personal safety is at risk the CSHO shall leave the site immediately and contact their supervisor.

## D. Advance Notice.

### 1. Policy.

a. T.C.A. Section 50-3-306 and TOSHA Rule 0800-01-04-.07 contain a general prohibition against the giving of advance notice of inspections, except as authorized by the Commissioner or the Commissioner's designee. The Tennessee Occupational Safety and Health Act of 1972 (Act) regulates many conditions that are subject to speedy alteration and disguise by employers. To forestall such changes in worksite conditions, the Act prohibits unauthorized advance notice.

b. **Advance Notice Exceptions**. There may be occasions when advance notice is necessary to conduct an effective investigation. These occasions are narrow exceptions to the statutory prohibition against advance notice. Advance notice of inspections may be given only with the authorization of the TOSHA Administrator and only in the following situations:

(i) In cases of apparent imminent danger to enable the employer to correct the danger as quickly as possible;

(ii) When the inspection can most effectively be conducted after regular business hours or when special preparations are necessary;

(iii) To ensure the presence of employer and employee representatives or other appropriate personnel who are needed to aid in the inspection; and

(iv) When giving advance notice would enhance the probability of an effective and thorough inspection; e.g., in complex fatality investigations.

c. **Delays**. Advance notice exists whenever the Area Supervisor sets up a specific date or time with the employer for the CSHO to begin an inspection. Any delays in the conduct of the inspection shall be kept to an absolute minimum. Lengthy or unreasonable delays shall be brought to the attention of the TOSHA Administrator. Advance notice generally does not include non-specific indications of potential future inspections.

In unusual circumstances, the TOSHA Administrator may decide that a delay is necessary. In those cases the employer or the CSHO shall notify affected employee representatives, if any, of the delay and shall keep them informed of the status of the inspection.

**2.** **Documentation.** The conditions requiring advance notice and the procedures followed shall be documented in the case file.

**E. Pre-Inspection Compulsory Process.**

**1.** TOSHA Rule 0800-01-04-.05(2) authorizes the agency to seek a warrant in advance of an attempted inspection if circumstances are such that "preinspection process (is) desirable or necessary." T.C.A. Section 50-3-302(a) authorizes the agency to issue administrative subpoenas to obtain relevant information.

**2.** Although the agency generally does not seek warrants without evidence that the employer is likely to refuse entry, the Area Supervisor may seek compulsory process in advance of an attempt to inspect or investigate whenever circumstances indicate the desirability of such warrants.

*NOTE: Examples of such circumstances include evidence of denied entry in previous inspections, or awareness that a job will only last a short time or that job processes will be changing rapidly.*

**3.** Administrative subpoenas may also be issued prior to any attempt to contact the employer or other person for evidence related to a TOSHA inspection or investigation. See Chapter 15, *Legal Issues*.

**F. Personal Security Clearance.** Some establishments have areas that contain material or processes that are classified by the U.S. Government in the interest of national security. Whenever an inspection is scheduled for an establishment containing classified areas, the Area Supervisor shall assign a CSHO who has the appropriate security clearances. The TOSHA Administrator shall ensure that an adequate number of CSHOs with appropriate security clearances are available and that the security clearances are current.

**G. Expert Assistance.**

**1.** The Section Manager shall arrange for a specialist and/or specialized training, preferably from within TOSHA/OSHA, to assist in an inspection or investigation when the need for such expertise is identified.

**2.** TOSHA/OSHA specialists may accompany CSHOs or perform their tasks separately. CSHOs must accompany outside consultants. Specialists and outside consultants shall be briefed on the purpose of the inspection and personal protective equipment to be utilized.

**III. Inspection Scope.** Inspections, either programmed or unprogrammed, fall into one of two categories depending on the scope of the inspection:

**A. Comprehensive.** A comprehensive inspection is a substantially complete and thorough inspection of all potentially hazardous areas of the establishment. An inspection may be deemed comprehensive even though, as a result of professional judgment, not all potentially hazardous conditions or practices within those areas are inspected.

**B. Partial.** A partial inspection is one whose focus is limited to certain potentially hazardous areas, operations, conditions or practices at the establishment.

**1.** A partial inspection may be expanded based on information gathered by the CSHO during the inspection process consistent with the Act and Area Office priorities.

**2.** CSHOs shall use pre-determined criteria from their offices to determine the necessity for expanding the scope of an inspection, based on information gathered during records or program review and walkaround inspection.

**IV. Conduct of Inspection.**

**A. Time of Inspection.**

**1.** Inspections shall be made during regular working hours of the establishment except when special circumstances indicate otherwise.

**2.** The Area Supervisor and the CSHO shall determine if alternate work schedules are necessary regarding entry into an inspection site during other than normal working hours.

**B. Presenting Credentials.**

**1.** CSHOs are to present their credentials whenever they make contact with management representatives, employees (to conduct interviews), or organized labor representatives while conducting their inspections.

**2.** At the beginning of the inspection, the CSHO shall locate the owner representative, operator or agent in charge at the workplace and present credentials. On construction sites this will most often be the representative of the general contractor.

**3.** When neither the person in charge nor a management official is present, contact may be made with the employer to request the presence of the owner, operator or management official. The inspection shall not be delayed unreasonably to await the arrival of the employer representative. This delay should normally not exceed one hour. On occasions when the CSHO is waiting for the employer representative, the workforce may begin to leave the jobsite. In this situation the CSHO should contact the Area Supervisor for guidance. If the person in charge at the workplace cannot be determined, record the extent of the inquiry in the case file and proceed with the physical inspection.

**C. Refusal to Permit Inspection and Interference**. T.C.A. Section 50-3-301 provides that CSHOs may enter without delay and at reasonable times any establishment covered under the Act for the purpose of conducting an inspection. Unless the circumstances constitute a recognized exception to the warrant requirement (i.e., consent, third party consent, plain view, open field, or exigent circumstances) an employer has a right to require that the CSHO seek an inspection warrant prior to entering an establishment and may refuse entry without such a warrant.

**1. Refusal of Entry or Inspection.**

a. When the employer refuses to permit entry upon being presented proper credentials, or allows entry but then refuses to permit or hinders the inspection in some way, an attempt shall be made to obtain as much information as possible about the establishment. See Chapter 15, *Legal Issues.*

b. If the employer refuses to allow an inspection of the establishment to proceed, the CSHO shall leave the premises and immediately report the refusal to the Area Supervisor. The Area Supervisor shall notify the Section Manager who will then notify the TOSHA Attorney.

c. If the employer raises no objection to inspection of certain portions of the workplace but objects to inspection of other portions, this shall be documented. Normally, the CSHO shall continue the inspection, confining it only to those certain portions to which the employer has raised no objections.

d. In either case, the CSHO shall advise the employer that the refusal will be reported to the Area Supervisor and that the agency may take further action, which may include obtaining legal process.

e. On multi-employer worksites, valid consent can be granted by the owner, or another employer with employees at the worksite, for site entry.

**2. Employer Interference**. Where entry has been allowed but the employer interferes with or limits any important aspect of the inspection, the CSHO shall determine whether or not to consider this action as a refusal. Examples of interference are refusals to permit the walkaround, the examination of records essential to the inspection, the taking of essential photographs and/or videotapes, the inspection of a particular part of the premises, private employee interviews, or the refusal to allow attachment of sampling devices. See TOSHA Rule 0800-01-04-.08.

**3. Forcible Interference with Conduct of Inspection or Other Office Duties**. Whenever a TOSHA employee encounters forcible resistance, opposition, interference, etc., or is assaulted or threatened with assault while engaged in the performance of official duties, all investigative activity shall cease.

a. If a CSHO is assaulted while attempting to conduct an inspection, they shall contact the proper authorities such as the local police and immediately notify the Area Supervisor.

b. Upon receiving a report of such forcible interference, the Area Supervisor shall immediately notify the TOSHA Administrator.

c. If working at an offsite location, CSHOs should leave the site immediately pending further instructions from the Area Supervisor.

**4. Obtaining Compulsory Process.** If it is determined, upon refusal of entry or refusal to produce evidence required by subpoena, that a warrant will be sought, the Area

Supervisor shall proceed according to guidelines and procedures established. See Chapter 15, *Legal Issues*.

**D.** **Employee Participation**. CSHOs shall advise employers that T.C.A. Section 50-3-303 and TOSHA Rule 0800-01-04-.09 require that an employee representative be given an opportunity to participate in the inspection.

**1.** CSHOs shall determine as soon as possible after arrival whether the employees at the inspected worksite are represented and, if so, shall ensure that employee representatives are afforded the opportunity to participate in all phases of the inspection.

**2.** If an employer resists or interferes with participation by employee representatives in an inspection and the interference cannot be resolved by the CSHO, the resistance shall be construed as a refusal to permit the inspection and the Area Supervisor shall be contacted.

**E.** **Release for Entry.**

**1.** CSHOs shall not sign any form or release or agree to any waiver. This includes any employer forms concerned with trade secret information.

**2.** CSHOs may obtain a pass or sign a visitor's register, or any other book or form used by the establishment to control the entry and movement of persons upon its premises. Such signature shall not constitute any form of a release or waiver of prosecution of liability under the Act.

**F.** **Bankrupt or Out of Business**.

**1.** If the establishment scheduled for inspection is found to have ceased business and there is no known successor, the CSHO shall report the facts to the Area Supervisor.

**2.** If an employer, although bankrupt, is continuing to operate on the date of the scheduled inspection, the inspection shall proceed.

**3.** An employer must comply with the Act until the day the business actually ceases to operate.

**G.** **Employee Responsibilities.**

**1.** T.C.A. Section 50-3-106(1) states: "*Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to such employee's own actions and conduct*." The Act does not provide for the issuance of citations or the proposal of penalties against employees. Employers are responsible for employee compliance with the standards.

**2.** In cases where CSHOs determine that employees are systematically refusing to comply with a standard applicable to their own action and conduct, the matter shall be referred to the Area Supervisor who shall consult with the Section Manager and the TOSHA Administrator.

**3.** Under no circumstances are CSHOs to become involved in an onsite dispute involving labor-management issues or interpretation of collective-bargaining agreements. CSHOs are expected to obtain sufficient information to assess whether the employer is using its authority to ensure employee compliance with the Act. Concerted refusals to comply by employees will not bar the issuance of a citation if the employer has failed to exercise its control to the maximum extent reasonable, including discipline and discharge.

**H.** **Strike or Labor Dispute.** Plants or establishments may be inspected regardless of the existence of labor disputes, such as work stoppages, strikes or picketing. If the CSHO identifies an unanticipated labor dispute at a proposed inspection site, the Area Supervisor shall be consulted before any contact is made.

**1.** **Programmed Inspections**. Programmed inspections may be deferred during a strike or labor dispute, either between a recognized union and the employer or between two unions competing for bargaining rights in the establishment.

**2.** **Unprogrammed Inspections.**

a. Unprogrammed inspections (complaints, fatalities, referrals, etc.) will be performed during strikes or labor disputes. However, the credibility and veracity of any complaint shall be thoroughly assessed by the Area Supervisor prior to scheduling an inspection.

b. If there is a picket line at the establishment, CSHOs shall attempt to locate and inform the appropriate union official of the reason for the inspection prior to initiating the inspection.

c. During the inspection, CSHOs will make every effort to ensure that their actions are not interpreted as supporting either party or the labor dispute.

**I.** **Variances**. The employer's requirement to comply with a standard may be modified through granting of a variance, as outlined in T.C.A. Sections 50-3-601 through 50-3-606.

**1.** An employer will not be subject to citation if the observed condition is in compliance with an existing variance issued to that employer.

**2.** In the event that an employer is not in compliance with the requirement(s) of the issued variance, a violation of the applicable standard shall be cited with a reference in the citation to the variance provision that has not been met.

## V. Opening Conference.

**A.** **General.** CSHOs shall attempt to inform all affected employers of the purpose of the inspection, provide a copy of the complaint if applicable, and include any employee representatives, unless the employer objects. The opening conference should be brief so that the compliance officer may quickly proceed to the walkaround. Conditions of the worksite shall be noted upon arrival, as well as any changes that may occur during the opening conference. At the start of the opening conference, CSHOs will inform both the employer and the employee representative(s) of their rights during the inspection, including the opportunity to participate in the physical inspection of the workplace.

CSHOs shall request a copy of the written certification that a hazard assessment has been performed by the employer in accordance with §1910.132(d). CSHOs should then ask the person who signed the certification about any potential worksite exposures and select appropriate personal protective equipment.

**1.** **Attendance at Opening Conference**.

a. CSHOs shall conduct a joint opening conference with employer and employee representatives unless either party objects.

b. If there is objection to a joint conference, the CSHO shall conduct separate conferences with employer and employee representatives.

2. **Scope of Inspection.** CSHOs shall outline in general terms the scope of the inspection, including the need for private employee interviews, physical inspection of the workplace and records, possible referrals, rights during an inspection, discrimination complaints, and the closing conference(s).

3. **Video/Audio Recording**. CSHOs shall inform participants that a video camera and/or an audio recorder may be used to provide a visual and/or audio record, and that the videotape and audiotape may be used in the same manner as handwritten notes and photographs in TOSHA inspections.

   *NOTE: If an employer clearly refuses to allow videotaping during an inspection, CSHOs shall contact the Area Supervisor to determine if videotaping is critical to documenting the case. If it is, this may be treated as a denial of entry.*

4. **Immediate Abatement.** CSHOs should explain to employers the advantages of immediate abatement, including that there are no certification requirements for violations quickly corrected during the inspection. See Chapter 7, *Post-Inspection Procedures and Abatement Verification.*

5. **Recordkeeping Rule**.

   a. The recordkeeping rule at 0800-01-09 states that once a request is made, an employer must provide the required recordkeeping records within four (4) business hours.

   b. Although the employer has four hours to provide injury and illness records, the compliance officer is not required to wait until the records are provided before beginning the walkaround portion of the inspection. As soon as the opening conference is completed the compliance officer is to begin the walkaround portion of the inspection.

6. **Abbreviated Opening Conference.** An abbreviated opening conference shall be conducted whenever the CSHO believes that circumstances at the worksite dictate the walkaround begin as promptly as possible.

   a. In such cases, the opening conference shall be limited to presenting credentials, purpose of the visit, explanation of rights, and a request for employer and employee representatives. All other elements shall be fully addressed in the closing conference.

   b. Pursuant to TOSHA Rule 0800-01-04-.09(1), the employer and the employee representatives shall be informed of the opportunity to participate in the physical inspection of the workplace.

**B.** **Review of Appropriations Act Exemptions and Limitation.** CSHOs shall determine if the employer is covered by any exemptions or limitations noted in the current Appropriations Act. See *CPL-TN 02-00-051, Enforcement Exemptions and Limitations under the Appropriations Act*

**C.** **Review Screening for Process Safety Management (PSM) Coverage.** CSHOs shall request a list of the chemicals on site and their respective maximum intended inventories. CSHOs shall review the list of chemicals and quantities, and determine if there are highly hazardous chemicals (HHCs) listed in §1910.119, Appendix A or flammable liquids or gases at or above the specified threshold quantity. CSHOs may ask questions, conduct interviews, or a walkaround to confirm the information on the list of chemicals and maximum intended inventories.

**1.** If there is an HHC present at or above threshold quantities, CSHOs shall use the following criteria to determine if any exemptions apply:

a. CSHOs shall confirm that the facility is not a retail facility, oil or gas well drilling or servicing operation, or normally unoccupied remote facility (§1910.119(a)(2)). If the facility is one of these types of establishments, PSM does not apply.

b. If management believes that the process is exempt, CSHOs shall ask the employer to provide documentation or other information to support that claim.

**2.** According to §1910.119 (a)(1)(ii), a process could be exempt if the employer can demonstrate that the covered chemical(s) are:

a. Hydrocarbon fuels used solely for workplace consumption as a fuel (e.g., propane used for comfort heating, gasoline for vehicle refueling), if such fuels are not a part of a process containing another highly hazardous chemical covered by the standard, or

b. Flammable liquids with a flashpoint below 100 °F (37.8°C) stored in atmospheric tanks or transferred, which are kept below their normal boiling point without the benefit of chilling or refrigeration.

NOTE: Current agency policies for applying exemptions can be found on the OSHA website. See CPL 03-00-010, *Petroleum Refinery Process Safety Management National Emphasis Program*

**D.** **Review of Voluntary Compliance Programs**. Employers who participate in selected voluntary compliance programs may be exempted from programmed inspections. CSHOs shall determine whether the employer falls under such an exemption during the opening conference.

**1.** **OSHA On-Site Consultation Visits.**

a. In accordance with §1908.7 and *Chapter VII of CSP 02-00-002, The Consultation Policies and Procedures Manual*, CSHOs shall ascertain at the opening conference whether an OSHA-funded consultation visit is in progress. A consultation Visit in Progress extends from the beginning of the opening conference to the end of the correction due dates (including extensions).

b. Programmed inspections will not be made when an on-site consultation visit is in progress. Imminent danger investigations, fatality/catastrophe investigations, complaint investigations, and other critical inspections as determined by the TOSHA Administrator as noted in §1908.7(b)(2) will be conducted.

**2.** **Safety and Health Achievement Recognition Program (SHARP).**

a. Upon verifying that the employer is a current participant, the CSHO shall notify the Area Supervisor so that the company can be removed from the TOSHA General Programmed Inspection Schedule for the approved exemption period, which begins on the date the Commissioner approves the employer's participation in SHARP.

b. The initial exemption period is one year. The renewal exemption period is one to three years, based on the recommendation of the Consultation Project Manager.

**3.** **Voluntary Protection Program (VPP)**. Inspections at a VPP site may be conducted in response to referrals, formal complaints, fatalities, and catastrophes.

*NOTE: A Compliance Officer who was previously a VPP on-site team member typically will not conduct an enforcement inspection at that VPP site for the following 2 years or until the site is no longer a VPP participant, whichever occurs first. See CSP-TN 03-01-003, Voluntary Protection Programs (VPP): Policies and Procedures Manual.*

**E.** **Disruptive Conduct**. CSHOs may deny the right of accompaniment to any person whose conduct interferes with a full and orderly inspection. See TOSHA Rule 0800-01-04-.09. If disruption or interference occurs, the CSHO shall contact the Area Supervisor as to whether to suspend the walkaround or take other action. The employee representative shall be advised that during the inspection matters unrelated to the inspection shall not be discussed with employees.

**F.** **Classified Areas**. In areas containing information classified by an agency of the U.S. Government in the interest of national security, only persons authorized to have access to such information may accompany a CSHO on the inspection. See TOSHA Rule 0800-01-04-.09(4).

## VI. Review of Records.

### A. Injury and Illness Records.

**1. Collection of Data.**

a. At the start of each inspection, the CSHO shall review the employer's injury and illness records for three prior calendar years and include the information in the case file. This shall be done for all general industry and agriculture inspections and investigations.

b. CSHOs shall use these data to calculate the Days Away, Restricted, or Transferred (DART) rate and to observe trends, potential hazards, types of operations and work-related injuries.

**2. Information to be Obtained.**

a. CSHOs shall request copies of the OSHA-300 Logs, the total hours worked and the average number of employees for each year, and may request a roster of current employees for purposes, such as to select employees to interview.

b. If CSHOs have questions regarding a specific case on the log, they shall request the OSHA-301s or equivalent form for that case.

c. CSHOs shall check if the establishment has an on-site medical facility and/or the location of the nearest emergency room where employees may be treated.

*NOTE: The total hours worked and the average number of employees for each year can be found on the OSHA-300A for all past years.*

**3. Automatic DART Rate Calculation**. CSHOs will not normally need to calculate the Days Away, Restricted, or Transferred (DART) rate since it is automatically calculated when the OSHA-300 data are entered into OIS. If one of the three years is a partial year, so indicate and the software will calculate accordingly.

**4. Manual DART Rate Calculation**. If it is necessary to calculate rates manually, the CSHO will need to calculate the DART Rates individually for each calendar year onsite using the following procedures. The DART rate includes cases involving days away from work, restricted work activity, and transfers to another job.

The formula is:

(N/EH) x (200,000) where:

- N is the number of cases involving days away and/or restricted work activity and job transfers.
- EH is the total number of hours worked by all employees during the calendar year; and
- 200,000 is the base number of hours worked for 100 full-time equivalent employees.

**EXAMPLE 3-1**: Employees of an establishment (XYZ Company), including management, temporary and leased workers, worked 645,089 hours at XYZ company. There were 22 injury and illness cases involving days away and/or restricted work activity and/or job transfer from the OSHA-300 Log (total of column H plus column I). The DART rate would be (22÷645,089) x (200,000) = 6.8.

**5.** **Construction**. For construction inspections/investigations, only the OSHA-300 information for the prime/general contractor need be recorded where such records exist and are maintained. It will be left to the discretion of the Area Supervisor or the CSHO as to whether OSHA 300 data should also be recorded for any of the subcontractors.

**B.** **Recording Criteria**. Employers must record new work-related injuries and illnesses that meet one or more of the general recording criteria or meet the recording criteria for specific types of conditions.

**1.** Death;

**2.** Days Away from Work;

**3.** Restricted Work;

**4.** Transfer to another job;

**5.** Medical treatment beyond first aid;

**6.** Loss of consciousness;

**7.** Diagnosis of a significant injury or illness; or

**8.** Meet the recording criteria for Specific Cases noted in TOSHA Rule 0800-01-03-.03(6) through 0800-01-03-.03(9).

**C.** **Recordkeeping Deficiencies.**

**1.** If recordkeeping deficiencies are suspected, the CSHO and the Area Supervisor may request assistance from the Section Manager. If there is evidence that the deficiencies or inaccuracies in the employer's records impairs the ability to assess hazards, injuries and/or illnesses at the workplace, a comprehensive records review shall be performed.

**2.** Other information related to this topic:

a. *See CPL 02-00-135, Recordkeeping Policies and Procedures Manual and CPL 02-02-072 Rules of Agency Practice and Procedure concerning OSHA Access to*

*Employee Medical Records for Policy Regarding Review of Medical and Exposure Records.*

b. Other TOSHA and OSHA programs and records will be reviewed including hazard communication, lockout/tagout, emergency evacuation and personal protective equipment. Additional programs will be reviewed as necessary.

c. Many standard-specific directives provide additional instruction to CSHOs requesting certain records and/or documents at the opening conference.

**VII. Walkaround Inspection**. The main purpose of the walkaround inspection is to identify potential safety and/or health hazards in the workplace. CSHOs shall conduct the inspection in such a manner as to avoid unnecessary personal exposure to hazards and to minimize unavoidable personal exposure to the extent possible.

**A. Walkaround Representatives**. Persons designated to accompany CSHOs during the walkaround are considered walkaround representatives, and will generally include those designated by the employer and employees. At establishments where more than one employer is present or in situations where groups of employees have different representatives, it is acceptable to have a different employer/employee representative for different phases of the inspection. More than one employer and/or employee representative may accompany the CSHO throughout or during any phase of an inspection if the CSHO determines that such additional representatives will aid, and not interfere with, the inspection. See TOSHA Rule 0800-01-04-.09(1).

**1. Employees Represented by a Certified or Recognized Bargaining Agent**. During the opening conference, the highest ranking union official or union employee representative onsite shall designate who will represent the bargaining agent in the walkaround. TOSHA Rule 0800-01-04-.09(2) gives the CSHO the authority to resolve all disputes as to whom is the representative authorized by the employer and employees. TOSHA Rule 0800-01-04-.09(3) states that the representative authorized by the employees shall be an employee of the employer. If in the judgment of the CSHO, good cause has been shown why accompaniment by a third party who is not an employee of the employer (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such third party may accompany CSHOs during the inspection.

**2. No Certified or Recognized Bargaining Agent**. Where employees are not represented by an authorized representative, there is no established safety committee, or employees have not chosen or agreed to an employee representative for TOSHA inspection purposes (regardless of the existence of a safety committee), CSHOs shall determine if other employees would suitably represent the interests of employees on the walkaround. If selection of such an employee is impractical, CSHOs shall conduct interviews with a reasonable number of employees during the walkaround.

**3. Safety Committee.** Employee members of an established plant safety committee or employees at large may designate an employee representative for TOSHA inspection purposes.

**B. Evaluation of Safety and Health Management System.** The employer's safety and health management system shall be evaluated to determine its good faith for the purposes of penalty calculation. See Chapter 6, *Penalties and Debt Collection*.

**C. Record All Facts Pertinent to a Violation.**

**1.** Safety and health violations shall be brought to the attention of employer and employee representatives at the time they are documented.

**2.** CSHOs shall record, at a minimum, the identity of the exposed employee(s), the hazard to which the employee(s) was exposed, the employee's proximity to the hazard, the employer's knowledge of the condition, and the manner in which important measurements were obtained and how long the condition has existed.

**3.** CSHOs will document interview statements in a thorough and accurate manner; including names, dates, times, locations, type of materials, positions of pertinent articles, witnesses, etc.

*NOTE: If employee exposure to hazards is not observed, the CSHO shall document facts on which the determination is made that an employee has been or could be exposed. See Chapter 4, Violations and Chapter 5, Case File Preparation and Documentation.*

**D.** **Testifying in Hearings.** CSHOs may be required to testify in hearings on TOSHA's behalf, and shall be mindful of this fact when recording observations during inspections. The case file shall reflect conditions observed in the workplace as accurately and detailed as possible.

**E.** **Trade Secrets**. A trade secret, as referenced in T.C.A. Section 50-3-914, includes information concerning or related to processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association.

**1.** **Policy.** It is essential to the effective enforcement of the Act that CSHOs and TOSHA personnel preserve the confidentiality of all information and investigations which might reveal a trade secret.

**2.** **Restriction and Controls**. When the employer identifies an operation or condition as a trade secret, it shall be treated as such. Information obtained in such areas, including all negatives, photographs, videotapes, and TOSHA documentation forms, shall be labeled:

> **"ADMINISTRATIVELY CONTROLLED**
> **RESTRICTED TRADE INFORMATION"**

a. Under T.C.A. Section 50-3-914, all information reported to or obtained by CSHOs in connection with any inspection or other activity which contains or which might reveal a trade secret shall be kept confidential. Such information shall not be disclosed except to other TOSHA officials concerned with the enforcement of the Act or, when relevant, in any proceeding under the Act.

b. A violation of this section is a Class A misdemeanor.

c. Trade secret materials shall not be labeled as "Top Secret," "Secret," or "Confidential," nor shall these security classification designations be used in conjunction with other words unless the trade secrets are also classified by an agency of the U.S. Government in the interest of national security.

**3.** If the employer objects to the taking of photographs and/or videotapes because trade secrets would or may be disclosed, CSHOs should advise the employer of the protection against such disclosure afforded by T.C.A. Section 50-3-914 and TOSHA Rule 0800-01-04-.10. If the employer still objects, CSHOs shall contact the Area Supervisor.

**F.** **Collecting Samples.**

**1.** CSHOs shall determine whether sampling such as, but not limited to, air sampling and surface sampling is required, by utilizing the information collected during the walk around and from the pre-inspection review.

**2.** Summaries of the results shall be provided on request to the appropriate employees, including those exposed or likely to be exposed to a hazard, employer representatives and employee representatives.

**G. Photographs and Videotapes.**

**1.** Photographs and/or videotapes, whether digital or otherwise, shall be taken whenever CSHOs determine there is a need.

a. Photographs that support violations shall be properly labeled, and referenced to the appropriate violation worksheet.

b. CSHOs shall ensure that any photographs relating to confidential or trade secret information are identified as such and are kept separate from other evidence.

**2.** All film and photographs or videotape shall be retained in the case file. If lack of storage space does not permit retaining the film, photographs or videotapes with the file, they may be stored elsewhere with a reference to the corresponding inspection. Videotapes shall be properly labeled. For more information regarding guidelines for case file documentation with video, audio and digital media, see *OSHA Instruction CPL 02-00-098, Guidelines for Case File Documentation for Use with Videotapes and Audiotapes*, and any other directives related to photograph and videotape retention.

**H. Violations of Other Laws**. If a CSHO observes apparent violations of laws enforced by other government agencies, such cases shall be referred to the appropriate agency. Referrals shall be made using appropriate procedures.

**I. Interviews**. A free and open exchange of information between CSHOs and employees is essential to an effective inspection. Interviews provide an opportunity for employees to supply valuable factual information concerning hazardous conditions, including information on how long workplace conditions have existed, the number and extent of employee exposure(s) to a hazardous condition, and the actions of management regarding correction of a hazardous condition.

**1. Background**.

a. T.C.A. Section 50-3-301(2) authorizes CSHOs to question any employee privately during regular working hours or at other reasonable times during the course of a TOSHA inspection. The purpose of such interviews is to obtain whatever information CSHOs deem necessary or useful in carrying out inspections effectively. The mandate to interview employees in private is TOSHA's right.

b. Employee interviews are an effective means to determine if an advance notice of inspection has adversely affected the inspection conditions, as well as to obtain information regarding the employer's knowledge of the workplace conditions or work practices in effect prior to, and at the time of, the inspection. During interviews with employees, CSHOs should ask about these matters.

c. CSHOs should also obtain information concerning the presence and/or implementation of a safety and health system to prevent or control workplace hazards.

d. If an employee refuses to be interviewed, the CSHO shall use professional judgment, in consultation with the Area Supervisor, in determining the need for the interview.

**2.** **Employee Right of Complaint**. CSHOs may consult with any employee who desires to discuss a potential violation. Upon receipt of such information, CSHOs shall investigate the alleged hazard, where possible, and record the findings.

**3.** **Time and Location of Interview**. CSHOs are authorized to conduct interviews during regular working hours and at other reasonable times, and in a reasonable manner at the workplace. Interviews often occur during the walkaround, but may be conducted at any time during an inspection. If necessary, interviews may be conducted at locations other than the workplace. CSHOs should consult with the Area Supervisor if an interview is to be conducted someplace other than the workplace. Where appropriate, TOSHA has the authority to subpoena an employee to appear at the Area Office for an interview.

**4.** **Conducting Interviews in Private**. CSHOs shall inform employers that interviews of employees will be conducted in private. CSHOs are entitled to question such employees in private regardless of employer preference. If an employer interferes with a CSHOs ability to do so, the CSHO should request that the Area Supervisor and Section Manager consult with the TOSHA Attorney to determine appropriate legal action. Interference with a CSHO's ability to conduct private interviews with employees includes, but is not limited to, attempts by management officials or representatives to be present during interviews.

**5.** **Conducting Employee Interviews**.

a. **General Protocols.**

(i) At the beginning of the interview CSHOs should identify themselves to the employee by showing their credentials, and provide the employee with a business card. This allows employees to contact CSHOs if they have further information at a later time.

(ii) CSHOs should explain to employees that the reason for the interview is to gather factual information relevant to a safety and health inspection. It is not appropriate to assume that employees already know or understand the agency's purpose. Particular sensitivity is required when interviewing a non-English speaking employee. In such instances, CSHOs should initially determine whether the employee's comprehension of English is sufficient to permit conducting an effective interview. If an interpreter is needed, CSHOs should contact the current interpretation service contracted by the Division for that purpose.

(iii) Every employee should be asked to provide his or her name, home address and phone number. CSHOs may request identification and make clear the reason for asking for this information.

(iv) CSHOs shall inform employees that TOSHA has the right to interview them in private and of the protections afforded under T.C.A. Section 50-3-409.

(v) In the event an employee requests that a representative of the union be present, CSHOs shall make a reasonable effort to honor the request.

(vi) If an employee requests that his/her personal attorney be present during the interview, CSHOs should honor the request and, before continuing with the interview, consult with the Area Supervisor for guidance.

(vii) Rarely, an attorney for the employer may claim that individual employees have also authorized the attorney to represent them. Such a situation creates a potential conflict of interest. CSHOs should ask the affected employees whether they have agreed to be represented by the attorney. If the employees indicate that they have, CSHOs should consult with the Area Supervisor and Section Manager, who will contact the TOSHA Attorney.

b. **Interview Statements.** Interview statements of employees or other persons shall be obtained whenever CSHOs determine that such statements would be useful in documenting potential violations. Interviews shall normally be reduced to writing and written in the first person in the language of the individual. Employees shall be encouraged to sign and date the statement.

(i) Any changes or corrections to the statement shall be initialed by the individual. Statements shall not otherwise be changed or altered in any manner.

(ii) Statements shall include the words, "I request that my statement be held confidential to the extent allowed by law" and end with the following; "I have read the above, and it is true to the best of my knowledge."

(iii) If the person making the declaration refuses to sign, the CSHO shall note the refusal on the statement. The statement shall, nevertheless, be read back to the person in an attempt to obtain agreement and noted in the case file.

(iv) A transcription of any recorded statement shall be made when necessary to the case.

(v) Upon request, if an employee requests a copy of his/her interview statement, one shall be given to them.

(vi) Interview statements should normally be recorded on the TOSHA "Witness Statement - Form LB-0056."

c. **The Informant Privilege.**

(i) The informant privilege allows the government to withhold the identity of individuals who provide information about the violation of laws, including TOSHA rules and regulations. CSHOs shall inform employees that their statements will remain confidential to the extent permitted by law. However, each employee giving a statement should be informed that disclosure of his or her identity may be necessary in connection with enforcement or court actions.

*NOTE: Whenever CSHOs make an assurance of confidentiality as part of an investigation (i.e. informs the person giving the statement that their identity will be protected), the assurance shall be reduced to writing and included in the case file.*

(ii) The privilege also protects the contents of statements to the extent that disclosure may reveal the witness's identity. Where the contents of a statement will not disclose the identity of the informant (i.e., does not reveal the witness' job title, work area, job duties, or other information that would tend to reveal the individual's identity), the privilege does not apply. Interviewed employees shall be told that they are under no legal obligation to inform anyone, including employers, that they provided information to TOSHA. Interviewed employees shall also be informed that if they voluntarily disclose such information to others, it may impair the agency's ability to invoke the privilege.

**J. Multi-Employer Worksites**. On multi-employer worksites (in all industry sectors), more than one employer may be cited for a hazardous condition that violates a TOSHA standard. A two-step process must be followed in determining whether more than one employer is to be cited. See *CPL 02-00-124, Multi-Employer Citation Policy*, for further guidance.

**K. Administrative Subpoena.** Whenever there is a reasonable need for records, documents, testimony and/or other supporting evidence necessary for completing an inspection scheduled in accordance with any current and approved inspection scheduling system or an investigation of any matter properly falling within the statutory authority of the agency, the Commissioner of Labor and Workforce Development may issue an administrative subpoena. See Chapter 15, *Legal Issues*.

**L. Employer Abatement Assistance.**

**1. Policy.** CSHOs may offer appropriate abatement assistance during the walkaround as to how workplace hazards might be eliminated. The information should provide guidance to the employer in developing acceptable abatement methods or in seeking appropriate professional assistance. CSHOs shall not imply TOSHA endorsement of any product through use of specific product names when recommending abatement measures. The issuance of citations shall not be delayed. If appropriate the CSHO should inform the employer of the Onsite Consultation Program and the availability of OSHA trained consultants to assist them with hazard correction.

**2. Disclaimers.** The employer shall be informed that:

a. The employer is not limited to the abatement methods suggested by TOSHA;

b. The methods explained are general and may not be effective in all cases; and

c. The employer is responsible for selecting and carrying out an effective abatement method, and maintaining the appropriate documentation.

## VIII. Closing Conference.

**A. Participants.** At the conclusion of an inspection, CSHOs shall conduct a closing conference with the employer and the employee representatives, jointly or separately, as circumstances dictate. The closing conference may be conducted on-site or by telephone as CSHOs deem appropriate. If the employer refuses to allow a closing conference, the circumstances of the refusal shall be documented in the inspection narrative and the case shall be processed as if a closing conference had been held.

*NOTE: When conducting separate closing conferences for employers and labor representatives (where the employer has declined to have a joint closing conference with employee representatives), CSHOs shall normally hold the conference with employee representatives first,*

*unless the employee representative requests otherwise. This procedure will ensure that worker input is received before employers are informed of violations and proposed citations.*

**B. Discussion Items**.

**1.** CSHOs shall discuss the apparent violations and other pertinent issues found during the inspection and note relevant comments on the violation worksheet, including input for establishing correction dates.

**2.** CSHOs shall give employers the publication, "*Closing Conference Guide*" following a TOSHA Inspection, which explains the responsibilities and courses of action available to the employer if a citation is issued, including their rights. They shall then briefly discuss the information in the booklet and answer any questions. All matters discussed during the closing conference shall be documented in the case file, including a note describing printed materials distributed.

**3.** CSHOs shall discuss the strengths and weaknesses of the employer's occupational safety and health management system and any other applicable programs, and advise the employer of the benefits of an effective program(s) and provide information, such as, OSHA's Website, describing program elements.

**4.** Both the employer and employee representatives shall be advised of their rights to participate in any subsequent conferences, meeting or discussions, and their contest rights. Any unusual circumstances noted during the closing conference shall be documented in the case file.

**5.** Since CSHOs may not have all pertinent information at the time of the first closing conference, a second closing conference may be held by telephone or in person.

**6.** CSHOs shall advise employee representatives that:

a. Under the Tennessee Occupational Safety and Health Review Commission Rule 1030-02, if an employer contests a citation, the employees have a right to elect "party status" before the Review Commission;

b. The employer should notify them if a notice of contest or a petition for modification of abatement date is filed;

c. They have discrimination protection under T.C.A. Section 50-3-409; and

d. They have a right to contest the terms and conditions of the citation. Such contests must be in writing and must be received within 20 calendar days of the date the citation was issued.

**C. Advice to Attendees**.

**1.** The CSHO shall advise those attending the closing conference that a request for an informal conference with the TOSHA Area Supervisor is encouraged as it provides an opportunity to:

a. Resolve disputed citations and penalties without the need for litigation which can be time consuming and costly;

b. Obtain a more complete understanding of the specific safety or health standards which apply;

c. Discuss ways to correct the violations;

d. Discuss issues concerning proposed penalties;

e. Discuss proposed abatement dates;

f. Discuss issues regarding employee safety and health practices; and

g. Learn more of other TOSHA programs and services available.

**2.** If a citation is issued, an informal conference or the request for one does not extend the 20 calendar-day period in which the employer or employee representatives may contest.

**3.** Verbal disagreement with, or intent to, contest a citation, penalty or abatement date during an informal conference does not replace the required written Notice of Intent to Contest.

**4.** Employee representatives have the right to participate in informal conferences or negotiations between the Area Supervisor and the employer in accordance with the guidelines given in Chapter 7, Section II., *Informal Conferences*.

**D.** **Penalties.** CSHOs shall explain that penalties must be paid within 30 calendar days after the employer receives a citation and notification of penalty. If, however, an employer contests the citation and/or the penalty, penalties need not be paid for the contested items until the final order date.

**E.** **Feasible Administrative, Work Practice and Engineering Controls**. Where appropriate, CSHOs will discuss control methodology with the employer during the closing conference.

**1.** **Definitions.**

a. **Engineering Controls.** Consist of substitution, isolation, ventilation and equipment modification.

b. **Administrative Controls**. Any procedure which significantly limits daily exposure by control or manipulation of the work schedule or manner in which work is performed is considered a means of administrative control. The use of personal protective equipment is not considered a means of administrative control.

c. **Work Practice Controls**. A type of administrative controls by which the employer modifies the manner in which the employee performs assigned work. Such modification may result in a reduction of exposure through such methods as changing work habits, improving sanitation and hygiene practices, or making other changes in the way the employee performs the job.

d. **Feasibility**. Abatement measures required to correct a citation item are feasible when they can be accomplished by the employer. The CSHO, following current directions and guidelines, shall inform the employer, where appropriate, that a determination will be made as to whether engineering or administrative controls are feasible.

e. **Technical Feasibility.** The existence of technical know-how as to materials and methods available or adaptable to specific circumstances, which can be applied to a cited violation with a reasonable possibility that employee exposure to occupational hazards will be reduced.

f. **Economic Feasibility**. Means that the employer is financially able to undertake the measures necessary to abate the citations received.

*NOTE: If an employer's level of compliance lags significantly behind that of its industry, allegations of economic infeasibility will not be accepted.*

**2. Documenting Claims of Infeasibility.**

a. CSHOs shall document the underlying facts which give rise to an employer's claim of infeasibility.

b. When economic infeasibility is claimed, the CSHO shall inform the employer that, although the cost of corrective measures to be taken will generally not be considered as a factor in the issuance of a citation, it may be considered during an informal conference or during settlement negotiations.

c. Complex issues regarding feasibility should be referred to the Area Supervisor for determination.

**F. Reducing Employee Exposure.** Employers shall be advised that, whenever feasible, engineering, administrative or work practice controls must be instituted, even if they are not sufficient to eliminate the hazard (or to reduce exposure to or below the permissible exposure limit). They are required in conjunction with personal protective equipment to further reduce exposure to the lowest practical level.

**G. Abatement Verification**. During the closing conference the Compliance Officer should thoroughly explain to the employer the abatement verification requirements. See Chapter 7, *Post Inspection Procedures and Abatement Verification*.

**1. Abatement Certification.** Abatement certification is required for all citation item(s) which the employer received except for those citation items which are identified as "Corrected During Inspection."

**2. Corrected During Inspection (CDI).** The violation(s) that will reflect on-site abatement and will be identified in the citations as "Corrected During Inspection" shall be reviewed at the closing conference.

**3. Abatement Documentation.** Abatement documentation, the employer's physical proof of abatement, is required to be submitted along with each willful, repeat and designated serious violation. To minimize confusion, the distinction between abatement certification and abatement documentation should be discussed.

**4. Placement of Abatement Verification Tags**. The required placement of abatement verification tags or the citation must also be discussed at the closing conference, if it has not been discussed during the walkaround portion of the inspection. See TOSHA Rule 0800-01-04-.23.

**5. Requirements for Extended Abatement Periods.** Where extended abatement periods are involved, the requirements for abatement plans and progress reports shall be discussed.

**H. Employee Discrimination**. The CSHO shall emphasize that the Act prohibits employers from discharging or discriminating in any way against an employee who has exercised any right under the Act, including the right to make safety or health complaints or to request a TOSHA inspection.

## IX. Special Inspection Procedures.

### A. Follow-up and Monitoring Inspections.

**1.** The primary purpose of a follow-up inspection is to determine if the previously cited violations have been corrected. Monitoring inspections are conducted to ensure that hazards are being abated and employees protected, whenever a long period of time is needed for an establishment to come into compliance (or to verify compliance with the terms of granted variances). Issuance of willful, repeated and high gravity serious violations, failure to abate notifications, and/or citations related to imminent danger situations are examples of prime candidates for follow-up or monitoring inspections. These types of inspections will not normally be conducted when evidence of abatement is provided by the employer or employee representatives.

**2. Failure to Abate.**

a. A failure to abate exists when a previously cited violation continues unabated and the abatement date has passed or the abatement date is covered under a settlement agreement, or the employer has not complied with interim measures within the allotted time specified in a long-term abatement plan.

b. If previously cited items have not been corrected, a Notice of Failure to Abate Alleged Violation shall normally be issued. If a subsequent inspection indicates the condition has still not been abated, the TOSHA Attorney shall be consulted for further guidance.

*NOTE: If the employer has demonstrated a good faith effort to comply, a late Petition for Modification of Abatement (PMA) may be considered in accordance with Chapter 7, Section III, Petition for Modification of Abatement (PMA).*

c. If an originally cited violation has at one point been abated but subsequently recurs, a citation for a repeated violation may be appropriate.

**3. Reports.**

a. For any items found to be abated, a copy of the previous violation worksheet or citation can be notated with "corrected" written on it, along with a brief explanation of the abatement measures taken. This information may alternately be included in the narrative of the investigative file.

b. In the event that any item has not been abated, complete documentation shall be included on a violation worksheet.

**4. Follow-up Files**. Follow-up inspection reports shall be placed in a separate case file and copies of FTA citations and violation worksheets placed in the original case file. Citation(s) issued in response to violations observed during the follow up inspection that were not issued during the original inspection shall be issued under the follow up inspection number.

### B. Construction Inspections.

**1. Standards Applicability**. The standards published as 29 CFR Part 1926 have been adopted as occupational safety and health standards under T.C.A. Section 50-3-201 and §1910.12. They shall apply to every employment and place of employment of every employee engaged in construction work, including non-contract construction.

**2.** **Definition**. The term "construction work" as defined by §1926.32(g) means work for construction, alteration, and/or repair, including painting and decorating. These terms are also discussed in §1926.13. If any question arises as to whether an activity is deemed to be construction for purposes of the Act, the Section Manager shall be consulted.

**3.** **Employer Worksite.**

a. Inspections of employers in the construction industry are not easily separable into distinct worksites. The worksite is generally the site where the construction is being performed (e.g., the building site, the dam site). Where the construction site extends over a large geographical area (e.g., road building), the entire job will be considered a single worksite.

b. When a construction worksite extends beyond a single Area Office and the CSHO believes that the inspection should be extended, the affected Area Supervisors shall consult with each other and take appropriate action.

**4.** **Upon Entering the Workplace**.

a. CSHOs shall ascertain whether there is a representative of a state or federal contracting agency at the worksite. If so, they shall contact the representative, advise him/her of the inspection and request that they attend the opening conference.

b. If the inspection is being conducted as a result of a complaint, a copy of the complaint is to be furnished to the general contractor and any affected sub-contractors.

**5.** **Closing Conference**. Upon completion of the inspection, the CSHO shall confer with the general contractors and all appropriate subcontractors or their representatives, together or separately, and advise each one of all the apparent violations disclosed by the inspection to which each one's employees were exposed, or violations which the employer created or controlled. Employee representatives participating in the inspection shall also be afforded the right to participate in the closing conference(s).

# Chapter 4
# VIOLATIONS

## I. Basis of Violations.

### A. Standards and Regulations.

**1.** Tennessee Code Annotated (T.C.A.) Section 50-3-105(2) states that each employer has a responsibility to comply with occupational safety and health standards promulgated under the Tennessee Occupational Safety and Health Act of 1972 (Act), which includes standards incorporated by reference. For example, the American National Standard Institute (ANSI) standard A92.2 – 1969, "*Vehicle Mounted Elevating and Rotating Work Platforms,*" including appendix, is incorporated by reference as specified in §1910.67. Only the mandatory provisions, i.e., those containing the word "shall" or other mandatory language of standards incorporated by reference, are adopted as standards under the Act.

**2.** The specific standards and regulations are found in Title 29 Code of Federal Regulations (CFR) 1900 series. Subparts A and B of 29 CFR 1910 specifically establish the source of all the standards, which serve as the basis of violations. Standards are subdivided as follows per OIS Application. For example, 1910.305(j)(6)(ii)(A)(*2*) would be entered as follows

| Subdivision Naming Convention | Example |
|---|---|
| Title | 29 |
| Part | 1910 |
| Section | 305 |
| Paragraph | (j) |
| Subparagraph | (6) |
| Item | (ii) |
| Subitem | (A) |
| Subitem 2 | *(2)* |

*NOTE: The most specific provision of a standard shall be used for citing violations.*

**3.** **Definition and Application of Vertical and Horizontal Standards.** Vertical standards are standards that apply to a particular industry or to particular operations, practices, conditions, processes, means, methods, equipment, or installations. Horizontal standards are other (more general) standards applicable to multiple industries. See §1910.5(c).

**4.** **Application of Horizontal and Vertical Standards**. If a CSHO is uncertain whether to cite under a horizontal or a vertical standard when both may be applicable, the Area Supervisor shall be consulted. The following guidelines shall be considered:

a. When a hazard in a particular industry is covered by both a vertical (e.g., 29 CFR 1910.213(c)(1) and a horizontal (e.g., 29 CFR 1910.212(a)(1)) standard, the vertical standard shall take precedence even if the horizontal standard is more stringent.

b. In situations covered by both a horizontal (general) and a vertical (specific) standard where the horizontal standard appears to offer greater protection, the horizontal (general) standard may be cited only if its requirements are not inconsistent or in conflict with the requirements of the vertical (specific)

standard. To determine whether there is a conflict or inconsistency between the standards, an analysis of the intent of the two standards must be performed. For the horizontal standard to apply, the analysis must show that the vertical standard does not address the precise hazard involved, even though it may address related or similar hazards.

**EXAMPLE 4-1**: When employees are connecting structural steel, §1926.501(b)(15) may not be cited for fall hazards above 6 feet since that specific situation is covered by §1926.760(b)(1) for fall distances of more than 30 feet.

c. If the particular industry does not have a vertical standard that covers the hazard, then the CSHO shall use the horizontal (general industry) standard.

d. When determining whether a horizontal or a vertical standard is applicable to a work situation, the CSHO shall focus attention on the particular activity an employer is engaged in rather than on the nature of the employer's general business.

*e.* Hazards found in construction work that are not covered by a specific 29 CFR 1926 standard shall not normally be cited under 29 CFR 1910 unless that standard has been identified as being applicable to construction. See *Incorporation of General Industry Safety and Health Standards Applicable to Construction Work, 58 FR 35076 (June 30, 1993).*

f. If a question arises as to whether an activity is deemed construction for purposes of the Act, contact the Section Manager. See §1910.12, *Construction Work.*

**5. Violation of Variances.** The employer's requirement to comply with a standard may be modified through granting of a variance, as outlined in Part 6 of the Act.

a. In the event that the employer is not in compliance with the requirements of the variance, a violation of the controlling standard shall be cited with a reference in the citation to the variance provision that has not been met.

b. If, during an inspection, CSHOs discover that an employer has filed a variance application regarding a condition that is an apparent violation of a standard, the Area Supervisor shall determine whether the variance request has been granted. If the variance has not been granted, a citation for the violative condition may be issued.

**B. Employee Exposure**. A hazardous condition that violates a TOSHA standard or the general duty clause shall be cited only when employee exposure can be documented. Citations must be issued within six months from the date when TOSHA learns, or should have known, of a violative condition. The Section Manager should be consulted in such cases. Typically citations will not be issued where the violative condition existed six (6) months prior to the initiation of the inspection, exceptions must be approved by the section manager.

**1. Determination of Employer/Employee Relationship**. Whether or not exposed persons are employees of a particular employer depends on several factors, the most important of which is who controls the manner in which employees perform their assigned work. The question of who pays these employees may not be the key factor. Determining the employer of exposed employees may be a complex issue, in which case the Area Supervisor shall seek the advice of the Section Manager.

**2.** **Proximity to the Hazard**. The actual and/or potential proximity of the employees to a hazard shall be thoroughly documented. (i.e., photos, measurements, employee interviews).

**3.** **Observed Exposure.**

a. Employee exposure is established if CSHOs witness, observe, or monitor the proximity or access of an employee to the hazard or potentially hazardous condition.

b. The use of personal protective equipment may not, in itself, adequately prevent employee exposures to a hazardous condition. Such exposures may be cited where the applicable standard requires the additional use of engineering and/or administrative (including work practice) controls, or where the personal protective equipment used is inadequate.

**4.** **Unobserved Exposure**. Where employee exposure is not observed, witnessed, or monitored by CSHOs, employee exposure may be established through witness statements or other evidence that exposure to a hazardous condition has occurred or may continue to occur.

a. **Past Exposure**. In fatality/catastrophe (or other "accident/incident") investigations, prior employee exposure(s) may be established if CSHOs establish, through written statements or other evidence, that exposure(s) to a hazardous condition occurred at the time of the accident/incident. Additionally, prior exposures may serve as the basis for a violation when:

(i) The hazardous condition continues to exist, or it is reasonably predictable that the same or similar condition could recur;

(ii) It is reasonably predictable that employee exposure to a hazardous condition could recur when:

(1) The employee exposure has occurred in the previous six months;

(2) The hazardous condition is an integral part of an employer's normal operations; and

(3) The employer has not established a policy or program to ensure that exposure to the hazardous condition will not recur.

b. **Potential Exposure**. Potential exposure to a hazardous condition may be established if there is evidence that employees have access to the hazard, and may include one or more of the following:

(i) When a hazard has existed and could recur because of work patterns, circumstances, or anticipated work requirements;

(ii) When a hazard would pose a danger to employees simply by their presence in an area and it is reasonably predictable that they could come into that area during the course of the work, to rest or to eat, or to enter or exit from an assigned work area; or

(iii) When a hazard is associated with the use of unsafe machinery or equipment or arises from the presence of hazardous materials and it is

reasonably predictable that an employee could again use the equipment or be exposed to the materials in the course of work; however

(iv) If the inspection reveals an adequately communicated and effectively enforced safety policy or program that would prevent or minimize employee exposure, including accidental exposure to the hazardous condition, it would not be reasonably predictable that employee exposure could occur. In such circumstances, no citation should be issued in relation to the condition.

c. **Documenting Employee Exposure**. CSHOs shall thoroughly document exposure, both observed and unobserved, for each potential violation. This includes:

(i) Statements by the exposed employees, the employer (particularly the immediate supervisor of the exposed employee), other witnesses (other employees who have observed exposure to the hazardous condition), union representatives, engineering personnel, management, or members of the exposed employee's family;

(ii) Recorded statements or signed written statements;

(iii) Photographs, videotapes, digital audio/video files, and/or measurements; and

(iv) All relevant documents (e.g., autopsy reports, police reports, job specifications, site plans, OSHA-300/301, equipment manuals, employer work rules, employer sampling results, employer safety and health programs, and employer disciplinary policies, etc.).

***C.*** **Regulatory Requirements**. Violations of TOSHA Rules 0800-01-03 and 0800-01-04 shall be documented and cited when an employer does not comply with posting, recordkeeping, and reporting requirements of the rules contained in these parts as provided by agency policy. See CPL 02-00-135, *Recordkeeping Policies and Procedures Manual* (December 30, 2004). See also *CPL 02-00-111, Citation Policy for Paperwork and Written Program Violations, dated November 27, 1995.*

*NOTE: If prior to the lapse of the 8-hour reporting period, the Area Supervisor becomes aware of an incident required to be reported under Rule 0800-01-03-.05(1) through means other than an employer report, there is no violation for failure to report.*

*NOTE: TDLWD Rule 0800-01-03 has new requirements for reporting work-related fatalities, hospitalizations, amputations or losses of an eye. The new rule, which also updates the list of employers partially exempt from OSHA record-keeping requirements, went into effect February 21, 2016, for workplaces under Tennessee OSHA jurisdiction.*

***D.*** **Hazard Communication.** Section 1910.1200 requires chemical manufacturers and importers to assess the hazards of chemicals they produce or import, and applies to these employers even though they may not have their own employees exposed. Violations of this standard by manufacturers or importers shall be documented and cited, irrespective of any employee exposure at the manufacturing or importing location. *See CPL 02-02-079, Inspection Procedures for the Hazard Communication Standard (HCS 2012), dated July 9, 2015.*

**E.** **Employer/Employee Responsibilities**.

**1.** **Employer Responsibilities**. T.C.A. Section 50-3-105(1) states: "Each employer shall furnish to each of its employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or physical harm to its employees." T.C.A. Section 50-3-105(2) states "Each employer shall comply with occupational safety and health standards or regulations promulgated pursuant to this chapter."

**2.** **Employee Responsibilities**.

a. T.C.A. Section 50-3-106(1) states: "Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to such employee's own actions and conduct." The Act does not provide for the issuance of citations or the proposal of penalties against employees. Employers are responsible for employee compliance with the standards.

b. In cases where the CSHO determines that employees are systematically refusing to comply with a standard applicable to their own actions and conduct, the matter shall be referred to the Area Supervisor who shall consult with the Section Manager.

c. The CSHO is expected to obtain information to ascertain whether the employer is exercising appropriate oversight of the workplace to ensure compliance with the Act. Concerted refusals by employees to comply will not ordinarily bar the issuance of a citation where the employer has failed to exercise its authority to adequately supervise employees, including taking appropriate disciplinary action.

**3.** **Affirmative Defenses**. An affirmative defense is a claim which, if established by the employer, will excuse it from a violation which has otherwise been documented by the CSHO. Although affirmative defenses must be proved by the employer at the time of the hearing, CSHOs should preliminarily gather evidence to rebut an employer's potential argument supporting any such defenses. See Chapter 5, Section VI, *Affirmative Defenses*, for additional information.

***4.*** **Multi-Employer Worksites**. On multi-employer worksites in all industry sectors, more than one employer may be cited for a hazardous condition that violates a TOSHA standard. For specific and detailed guidance, see the multi-employer policy contained in *CPL 02-00-124, Multi-Employer Citation Policy*.

## II. Serious Violations.

**A.** **T.C.A. Section 50-3-403 provides that "**If an employer knows or has reason to know that an employment condition or practice in such employer's business seriously endangers the health or safety of such employer's employees, and if such condition or practice is not in compliance with any standard promulgated pursuant to this chapter, a penalty" of up to the maximum permitted by the TOSH Act "shall be assessed for each such violation."

**B.** **Establishing Serious Violations**.

**1.** CSHOs shall consider four factors in determining whether a violation is to be classified as serious. The first three factors address whether there is a substantial probability that death or serious physical harm could result from an accident/incident or exposure relating to the violative condition. The probability that an incident or illness will occur is not to be considered in determining whether a violation is serious, but is considered in determining

the relative gravity of the violation. The fourth factor addresses whether the employer knew or could have known of the violative condition.

**2.** The classification of a violation need not be completed for each instance. It should be done once for each citation or, if violation items are grouped in a citation, once for the group.

**3.** If the citation consists of multiple instances or grouped violations, the overall classification shall normally be based on the most serious item.

**4.** The four-factor analysis outlined below shall be followed in making the determination whether a violation is serious. Potential violations of the general duty clause shall also be evaluated on the basis of these steps to establish whether they may cause death or serious physical harm.

**C. Four Steps to be Documented.**

**1. Type of Hazardous Exposure(s)**. The first step is to identify the type of potential exposures to a hazard that the violated standard or the general duty clause is designed to prevent.

a. CSHOs need not establish the exact manner in which an exposure to a hazard could occur. However, CSHOs shall note all facts which could affect the probability of an injury or illness resulting from a potential accident or hazardous exposure.

b. If more than one type of hazardous exposure exists, CSHOs shall determine which hazard could reasonably be predicted to result in the most severe injury or illness and shall base the classification of the violation on that hazard.

c. The following are examples of some types of hazardous exposures that a standard is designed to prevent:

**EXAMPLE 4-2**: Employees are observed working at the unguarded edge of an open-sided floor 30 feet above the ground in apparent violation of §1926.501(b)(1).The regulation requires that employees be protected from falls by the use of guardrail systems, safety net systems, or personal fall arrest systems. The type of hazard the standard is designed to prevent is a fall from the edge of the floor to the ground below.

**EXAMPLE 4-3**: Employees are observed working in an area in which debris is located in apparent violation of §1910.22(a)(1). The type of hazard the standard is designed to prevent here is employees tripping on debris.

**EXAMPLE 4-4**: An 8-hour time-weighted average sample reveals regular, ongoing employee overexposure to methylene chloride at 100 ppm in apparent violation of §1910.1052. This is 75 ppm above the PEL mandated by the standard.

**2. The Type of Injury or Illness**. The second step is to identify the most serious injury or illness that could reasonably be expected to result from the potential hazardous exposure identified in Step 1.

a. In making this determination, CSHOs shall consider all factors that would affect the severity of the injury or illness that could reasonably result from the

exposure to the hazard. CSHOs shall not give consideration at this point to factors relating to the probability that an injury or illness will occur.

b. The following are examples of types of injuries that could reasonably be predicted to result from exposure to a particular hazard:

**EXAMPLE 4-5**: If an employee falls from the edge of an open-sided floor 30 feet to the ground below, the employee could die, break bones, suffer a concussion, or experience other serious injuries that would substantially impair a body function.

**EXAMPLE 4-6**: If an employee trips on debris, the trip may cause abrasions or bruises, but it is only marginally predictable that the employee could suffer a substantial impairment of a bodily function. If, however, the area is littered with broken glass or other sharp objects, it is reasonably predictable that an employee who tripped on debris could suffer deep cuts which could require suturing.

c. For conditions involving exposure to air contaminants or harmful physical agents, the CSHO shall consider the concentration levels of the contaminant or physical agent in determining the types of illness that could reasonably result from the exposure. *The Chemical Sampling Information* pages on the OSHA website shall be used to determine both toxicological properties of substances listed and a Health Code Number.

d. In order to support a classification of serious, a determination must be made that exposure(s) at the sampled level could lead to illness. Thus, CSHOs must document all evidence demonstrating that the sampled exposure(s) is representative of employee exposure(s) under normal working conditions, including identifying and recording the frequency and duration of employee exposure(s). Evidence to be considered includes:

(i) The nature of the operation from which the exposure results;

(ii) Whether the exposure is regular and on-going or is of limited frequency and duration;

(iii) How long employees have worked at the operation in the past;

(iv) Whether employees are performing functions which can be expected to continue; and

(v) Whether work practices, engineering controls, production levels, and other operating parameters are typical of normal operations.

e. Where such evidence is difficult to obtain or inconclusive, CSHOs shall estimate frequency and duration of exposures from any evidence available. In general, if it is reasonable to infer that regular, ongoing exposures could occur, CSHOs shall consider such potential exposures in determining the types of illness that could result from the violative condition. The following are some examples of illnesses that could reasonably result from exposure to a health hazard:

**EXAMPLE 4-7**: If an employee is exposed regularly to methylene chloride above 25 ppm, it is reasonable to predict that cancer could result.

**EXAMPLE 4-8**: If an employee is exposed regularly to acetic acid at 20 ppm, it is reasonable that the resulting illnesses would be irritation to eyes, nose and throat, or occupational asthma with chronic rhinitis and sinusitis.

**3.** **Potential for Death or Serious Physical Harm**. The third step is to determine whether the type of injury or illness identified in Step 2 could include death or a form of serious physical harm. In making this determination, the CSHO shall utilize the following definition of "serious physical harm:"

"Impairment of the body in which part of the body is made functionally useless or is substantially reduced in efficiency on or off the job. Such impairment may be permanent or temporary, chronic or acute. Injuries involving such impairment would usually require treatment by a medical doctor or other licensed health care professional."

a. Injuries that constitute serious physical harm include, but are not limited, to:

(i) Amputations (loss of all or part of a bodily appendage);

(ii) Concussion;

(iii) Crushing (internal, even though skin surface may be intact);

(iv) Fractures (simple or compound);

(v) Burns or scalds, including electric and chemical burns;

(vi) Cuts, lacerations, or punctures involving significant bleeding and/or requiring suturing;

(vii) Sprains and strains; and

(viii) Musculoskeletal disorders.

b. Illnesses that constitute serious physical harm include, but are not limited, to:

(i) Cancer;

(ii) Respiratory illnesses (silicosis, asbestosis, byssinosis, etc.);

(iii) Hearing impairment;

(iv) Central nervous system impairment;

(v) Visual impairment; and

(vi) Poisoning.

c. The following are examples of injuries or illnesses that could reasonably result from an accident/incident or exposure and lead to death or serious physical harm:

**EXAMPLE 4-9**: If an employee falls 15 feet to the ground, suffers broken bones or a concussion, and experiences substantial impairment of a part of the body requiring treatment by a medical doctor, the injury would constitute serious physical harm.

**EXAMPLE 4-10**: If an employee trips on debris and because of the presence of sharp debris or equipment suffers a deep cut to the hand requiring suturing, the use of the hand could be substantially reduced. This injury would be classified as serious.

**EXAMPLE 4-11**: An employee develops chronic beryllium disease after long-term exposure to beryllium at a concentration in air of 0.004 $mg/m^3$, and his or her breathing capacity is significantly reduced. This illness would constitute serious physical harm.

*NOTE: The key determination is the likelihood that death or serious harm will result IF an accident or exposure occurs. The likelihood of an accident occurring is addressed in penalty assessments and not by the classification.*

**4.** **Knowledge of Hazardous Condition**. The fourth step is to determine whether the employer knew or, with the exercise of reasonable diligence, could have known, of the presence of the hazardous condition.

a. The knowledge requirement is met if it is established that the employer actually knew of the hazardous condition constituting the apparent violation. Examples include the employer saw the condition, an employee or employee representative reported it to the employer, or an employee was previously injured by the condition and the employer knew of the injury. CSHOs shall record any/all evidence that establishes employer knowledge of the condition or practice.

b. If it cannot be determined that the employer has actual knowledge of a hazardous condition, the knowledge requirement may be established if there is evidence that the employer could have known of it through the exercise of reasonable diligence. CSHOs shall record any evidence that substantiates that the employer could have known of the hazardous condition. Examples of such evidence include:

(i) The violation/hazard was in plain view and obvious;

(ii) The duration of the hazardous condition was not brief;

(iii) The employer failed to regularly inspect the workplace for readily identifiable hazards;

(iv) The employer failed to train and supervise employees regarding the particular hazard.

c. The actual or constructive knowledge of a supervisor who is aware of a violative condition or practice can usually be imputed to the employer for purposes of establishing knowledge. In cases where the employer contends that the supervisor's own conduct constituted an isolated event of employee misconduct, the CSHO shall attempt to determine whether the supervisor violated an established work rule, and the extent to which the supervisor was trained in the rule and supervised regarding compliance to prevent such conduct.

**III.** **General Duty Requirements**. T.C.A. Section 50-3-105(1) requires that “Each employer shall furnish to each of its employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or physical harm to its employees.”

**A. Evaluation of General Duty Requirements**. In general, Review Commission and court precedent have established that the following elements are necessary to prove a violation of the Section 50-3-105(1) (general duty clause):

**1.** The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;

**2.** The hazard was recognized;

**3.** The hazard was causing or was likely to cause death or serious physical harm; and

**4.** There was a feasible and useful method to correct the hazard.

A general duty citation must involve both the presence of a serious hazard and exposure of the cited employer's own employees.

**B. Elements of a General Duty Requirement Violation**.

**1. Definition of a Hazard**.

a. The hazard in a general duty citation is a workplace condition or practice to which employees are exposed, creating the potential for death or serious physical harm to employees.

b. These conditions or practices must be clearly stated in a citation so as to apprise employers of their obligations and must be ones the employer can reasonably be expected to prevent. The hazard must therefore be defined in terms of the presence of hazardous conditions or practices that present a particular danger to employees. Also, the hazard must be a condition or practice that can reasonably be abated by the employer.

**2. Do Not Cite the Lack of a Particular Abatement Method**.

a. General duty clause citations are not intended to allege that the violation is a failure to implement certain precautions, corrective actions, or other abatement measures but rather addresses the failure to prevent or remove a particular hazard. T.C.A. Section 50-3-105(1) therefore does not mandate a particular abatement measure but only requires an employer to render the workplace free of recognized hazards by any feasible and effective means the employer wishes to utilize.

b. In situations where a question arises regarding distinguishing between a dangerous workplace condition or practice and the lack of an abatement method, the Area Supervisor shall consult with the Section Manager, or TOSHA Administrator for assistance in correctly identifying the hazard.

**EXAMPLE 4-12**: Employees are conducting sanding operations that create sparks in the proximity of magnesium dust (workplace condition or practice) exposing them to the serious injury of burns from a fire (potential for physical harm). One proposed method of abatement may be engineering controls such as adequate ventilation. The "hazard" is sanding that creates sparks in the presence of magnesium that may result in a fire capable of seriously injuring employees, not the lack of adequate ventilation.

**EXAMPLE 4-13**: Employees are operating tools that generate sparks in the presence of an ignitable gas (workplace condition) exposing them to the danger

of an explosion (physical harm). The hazard is use of tools that create sparks in a volatile atmosphere that may cause an explosion capable of seriously injuring employees, not the lack of approved equipment.

**EXAMPLE 4-14**: In a workplace situation involving high- pressure machinery that vents gases next to a work area where the employer has not installed proper high-pressure equipment, has improperly installed the equipment that is in place, and does not have adequate work rules addressing the dangers of high pressure gas, there are three abatement measures the employer has failed to take. However, there is only one hazard (i.e., employee exposure to the venting of high-pressure gases into a work area that may cause serious burns from steam discharges).

**3. The Hazard is Not a Particular Accident/Incident.**

a. The occurrence of an accident/incident does not necessarily mean that the employer has violated the general duty clause, although the accident/incident may be evidence of a hazard. In some cases a general duty violation may be unrelated to the cause of the accident/incident. Although accident/incident facts may be relevant and shall be documented, the citation shall address the hazard in the workplace that existed prior to the accident/incident, not the particular facts that led to the occurrence of the accident/incident.

**EXAMPLE 4-15**: A fire occurred in a workplace where flammable materials were present. No one was injured by the fire but an employee, disregarding the clear instructions of his supervisor to use an available exit, jumped out of a window and broke a leg. The danger of fire due to the presence of flammable materials may be a recognized hazard causing or likely to cause death or serious physical harm, but the action of the employee may be an instance of unpreventable employee misconduct. The citation must address the underlying workplace fire hazard, not the accident/incident involving the employee.

**4. The Hazard Must be Reasonably Foreseeable**. The hazard for which a citation is issued must be reasonably foreseeable. All of the factors that could cause a hazard need not be present in the same place or at the same time in order to prove foreseeability of the hazard; e.g., an explosion need not be imminent.

**EXAMPLE 4-16**: If combustible gas and oxygen are present in sufficient quantities in a confined area to cause an explosion if ignited, but no ignition source is present or could be present, no general duty violation would exist. However, if the employer has not taken sufficient safety precautions to preclude the presence or use of ignition sources in the confined area, then a foreseeable hazard may exist.

*NOTE: It is necessary to establish the reasonable foreseeability of the workplace hazard, rather than the particular circumstances that led to an accident/incident.*

**EXAMPLE 4-17**: A titanium dust fire spreads from one room to another because an open can of gasoline was in the second room. An employee who usually worked in both rooms is burned in the second room as a result of the gasoline igniting. The presence of gasoline in the second room may be a rare occurrence. However, it is not necessary to demonstrate that a fire in both rooms could reasonably occur, but only that a fire hazard, in this case due to the presence of titanium dust, was reasonably foreseeable.

**5. The Hazard Must Affect the Cited Employer's Employees.**

a. The employees exposed to the general duty hazard must be the employees of the cited employer. An employer who may have created, contributed to, and/or controlled the hazard normally shall not be cited for a general duty violation if his own employees are not exposed to the hazard.

b. In complex situations, such as multi-employer worksites, where it may be difficult to identify the precise employment relationship between the employer to be cited and the exposed employees, the Area Supervisor shall consult with the Section Manager or TOSHA Administrator to determine the sufficiency of the evidence regarding the employment relationship.

c. The fact that an employer denies that exposed workers are his/her employees is not necessarily determinative of the employment relationship issue. Whether or not exposed persons are employees of an employer depends on several factors, the most important of which is who controls the manner in which the employees perform their assigned work.

The question of who pays employees in and of itself may not be the determining factor to establish a relationship.

**6. The Hazard Must Be Recognized**. Recognition of a hazard can be established on the basis of employer recognition, industry recognition, or "common-sense" recognition. The use of common sense as the basis for establishing recognition shall be limited to special circumstances. Recognition of the hazard must be supported by the following evidence and adequate documentation in the file:

a. **Employer Recognition.**

(i) A recognized hazard can be established by evidence of actual employer knowledge of a hazardous condition or practice. Evidence of employer recognition may consist of written or oral statements made by the employer or other management or supervisory personnel during or before the TOSHA inspection.

(ii) Employer awareness of a hazard may also be demonstrated by a review of company memorandums, safety work rules that specifically identify a hazard, operations manuals, standard operating procedures, and collective bargaining agreements. In addition, prior accidents/incidents, near misses known to the employer, injury and illness reports, or workers' compensation data, may also show employer knowledge of a hazard.

(iii) Employer awareness of a hazard may also be demonstrated by prior TOSHA, Federal OSHA or other OSHA State Plan State inspection history which involved the same hazard.

(iv) Employee complaints or grievances and safety committee reports to supervisory personnel may establish recognition of the hazard, but the evidence should show that the complaints were not merely infrequent, off-hand comments.

(v) An employer's own corrective actions may serve as the basis for establishing employer recognition of the hazard if the employer did not adequately continue or maintain the corrective action or if the corrective action did not afford effective protection to the employees.

*NOTE: CSHOs are to gather as many of these facts as possible to support establishing a general duty violation.*

b. **Industry Recognition**.

(i) A hazard is recognized if the employer's relevant industry is aware of its existence. Recognition by an industry other than the industry to which the employer belongs is generally insufficient to prove this element of a general duty violation. Although evidence of recognition by an employer's similar operations within an industry is preferred, evidence that the employer's overall industry recognizes the hazard may be sufficient. The Area Supervisor shall consult with the Section Manager on this issue. Industry recognition of a hazard can be established in several ways:

(1) Statements by safety or health experts who are familiar with the relevant conditions in industry (regardless of whether they work in the industry);

(2) Evidence of implementation of abatement methods to deal with the particular hazard by other members of the industry;

(3) Manufacturers' warnings on equipment or in literature that are relevant to the hazard;

(4) Statistical or empirical studies conducted by the employer's industry that demonstrate awareness of the hazard. Evidence such as studies conducted by the employee representatives, the union or other employees must also be considered if the employer or the industry has been made aware of them;

(5) Government and insurance industry studies, if the employer or the employer's industry is familiar with the studies and recognizes their validity;

(6) State and local laws or regulations that apply in the jurisdiction where the violation is alleged to have occurred and which currently are enforced against the industry in question. In such cases, however, corroborating evidence of recognition is recommended; and/or

(7) If the relevant industry participated in the committees drafting national consensus standards such as the American National Standards Institute (ANSI), the National Fire Protection Association (NFPA), and other private standard-setting organizations, this can constitute industry recognition. Otherwise, such private standards normally shall be used only as corroborating evidence of recognition. Preambles to these standards that discuss the hazards involved may show hazard recognition as much as, or more than, the actual standards. However, these private standards cannot be enforced as TOSHA standards, but they may be used to provide evidence of industry recognition, seriousness of the hazard or feasibility of abatement methods.

(ii) In cases where State and local government agencies have codes or regulations covering hazards not addressed by TOSHA standards, the Area Supervisor, upon consultation with the Section Manager, shall determine whether the hazard is to be cited under the general duty clause or referred to the appropriate local agency for enforcement.

**EXAMPLE 4-18**: A safety hazard on a personnel elevator in a factory is documented during an inspection. It is determined that the hazard may not be cited under the general duty clause, but there is a local code that addresses this hazard and a local agency actively enforces the code. The situation normally shall be referred to the local enforcement agency in lieu of citing Section 50-3-105(1).

(iii) References that may be used to supplement other evidence to help demonstrate industry recognition include the following:

(1) NIOSH criteria documents.

(2) EPA publications.

(3) National Cancer Institute and other agency publications.

(4) OSHA Hazard Alerts.

(5) OSHA Technical Manual.

c. **Common Sense Recognition**. If industry or employer recognition of the hazard cannot be established in accordance with (a) and (b), hazard recognition can still be established if a hazardous condition is so obvious that any reasonable person would have recognized it. This form of recognition should only be used in flagrant or obvious cases.

**EXAMPLE 4-19:** In a general industry situation, courts have held that any reasonable person would recognize that it is hazardous to use an unenclosed chute to dump bricks into an alleyway 26 feet below where unwarned employees worked. In construction, T.C.A. 50-3-105(1) could not be cited in this situation because §1926.252 or §1926.852 applies. In the context of a chemical processing plant, common sense recognition was established where hazardous substances were being vented into a work area.

**7. The Hazard Was Causing or Likely to Cause Death or Serious Physical Harm.**

a. This element of a general duty violation is virtually identical to the substantial probability element of a serious violation under T.C.A. Section 50-3-403. Serious physical harm is defined in Paragraph II.C.3. of this chapter.

b. This element of a general duty violation can be established by showing that:

(i) An actual death or serious injury resulted from the recognized hazard, whether immediately prior to the inspection or at other times and places; or

(ii) If an accident/incident occurred, the likely result would be death or serious physical harm.

**EXAMPLE 4-20**: An employee is standing at the edge of an unguarded floor 25 feet above the ground. If a fall occurred, death or serious physical harm (e.g., broken bones) is likely to result.

c. In the health context, establishing serious physical harm at the cited levels may be challenging if the potential for illness/harm requires the passage of a substantial period of time. In such cases, expert testimony is crucial to establish there is reasonable probability that long-term serious physical harm will occur from such illnesses or harm. It will generally be less difficult to establish this element for acute illnesses, since the immediacy of the effects will make the causal relationship clearer. In general, the following must be shown to establish that the hazard causes, or is likely to cause, death or serious physical harm when such illness or death will occur only after the passage of time:

(i) Regular and continuing employee exposure at the workplace to the toxic substance at the measured levels could reasonably occur;

(ii) An illness reasonably could result from such regular and continuing employee exposures; and

(iii) If illness does occur, its likely result is death or serious physical harm.

**8. The Hazard May be Corrected by a Feasible and Useful Method**.

a. To establish a general duty violation, the agency must also identify the existence of a measure(s) that is feasible, available, and likely to correct the hazard. Evidence regarding feasible abatement measures shall indicate that the recognized hazard, rather than a particular accident/incident, is preventable.

b. If the proposed abatement method would eliminate or significantly reduce the hazard beyond whatever measures the employer may be taking, a general duty citation may be issued. A citation will not be issued merely because the agency is aware of an abatement method different from that of the employer, if the proposed method would not reduce the hazard significantly more than the employer's method. In some cases, only a series of abatement methods will materially reduce a hazard and then all potential abatement methods shall be listed. For example, an abatement note shall be included on the violation worksheet such as “Among other methods, one feasible and acceptable means of abatement would be to ____.” (Fill in the blank with the specified abatement recommendation.)

c. Examples of such feasible and acceptable means of abatement include, but are not limited, to:

(i) The employer's own abatement method, which existed prior to the inspection but was not implemented;

(ii) The implementation of feasible abatement measures by the employer after the accident/incident or inspection;

(iii) The implementation of abatement measures by other employers/companies; and

(iv) Recommendations made by the manufacturer addressing safety measures for the hazardous equipment involved, as well as suggested abatement methods contained in trade journals, national consensus

standards and individual employer work rules. National consensus standards shall not solely be relied on to mandate specific abatement methods.

**EXAMPLE 4-21**: An ANSI standard addresses the hazard of exposure to hydrogen sulfide gas and refers to various abatement methods, such as the prevention of the buildup of materials that create the gas and the provision of ventilation. The ANSI standard may be used as general evidence of the existence of feasible abatement measures.

In this example, the citation shall state that the recognized hazard of exposure to hydrogen sulfide gas was present in the workplace and that a feasible and useful abatement method existed; e.g., preventing the buildup of gas by providing an adequate ventilation system. It would not be correct to base the citation on the employer's failure to prevent the buildup of materials that could create the gas and to provide a ventilation system as both of these are abatement methods, not recognized hazards.

d. Evidence provided by expert witnesses may be used to demonstrate feasibility of abatement methods. In addition, although it is not necessary to establish that an industry recognizes a particular abatement measure, such evidence may be used if available.

**C. Use of the General Duty Clause.**

**1.** The general duty clause shall be used only where there is no standard that applies to the particular hazard and in situations where a recognized hazard is created in whole or in part by conditions not covered by a standard. See §1910.5(f).

**EXAMPLE 4-22**: A hazard covered only partially by a standard would be construction employees exposed to a collapse hazard because of a failure to properly install reinforcing steel. Construction standards contain requirements for reinforcing steel in walls, piers, columns, and similar vertical structures, but do not contain requirements for steel placement in horizontal planes, e.g., a concrete floor. A failure to properly install reinforcing steel in a floor in accordance with industry standards and/or structural drawings could be cited under the general duty clause.

**EXAMPLE 4-23**: The powered industrial truck standard at §1910.178 does not address all potential hazards associated with forklift use. For instance, while that standard deals with the hazards associated with a forklift operator leaving his vehicle unattended or dismounting the vehicle and working in its vicinity, it does not contain requirements for the use of operator restraint systems. An employer's failure to address the hazard of a tipover (forklifts are particularly susceptible to tipovers) by requiring operators of powered industrial trucks equipped with restraint devices or seat belts to use those devices could be cited under the general duty clause. *See CPL 02-01-028, Compliance Assistance for the Powered Industrial Truck Operator Training Standards*, for additional guidance.

**2.** The general duty clause may also be applicable to some types of employment that are inherently dangerous (fire brigades, emergency rescue operations, confined space entry, etc.).

a. Employers involved in such occupations must take the necessary steps to eliminate or minimize employee exposure to all recognized hazards that are likely to cause death or serious physical harm. These steps include an

assessment of hazards that may be encountered, providing appropriate protective equipment, and any training, instruction, or necessary equipment.

b. An employer, who has failed to take such steps and allows its employees to be exposed to a hazard, may be cited under the general duty clause.

**D. Limitations of Use of the General Duty Clause**. T.C.A. Section 50-3-105(1) is to be used only within the guidelines given in this chapter.

**1.** The General Duty Clause Shall Not be Used When a Standard Applies to a Hazard. As discussed above, the general duty clause may not be cited if a TOSHA standard applies to the hazardous working condition. If there is a question as to whether a standard applies, the Area Supervisor shall consult with the Section Manager. The TOSHA Administrator will assist the Section Manager in determining the applicability of a standard prior to the issuance of a citation.

**EXAMPLE 4-24**: The general duty clause shall not be cited for electrical hazards as §1910.303(b) and §1926.403(b) require that electrical equipment is to be kept free from recognized hazards that are likely to cause death or serious physical harm to employees.

**2.** The general duty clause shall normally not be used to impose a stricter requirement than that required by the standard.

**EXAMPLE 4-25**: A standard provides for a permissible exposure limit (PEL) of 5 ppm. Even if data establish that a 3 ppm level is a recognized hazard, the general duty clause shall not be cited to require that the lower level be achieved. If the standard has only a time-weighted average permissible exposure level and the hazard involves exposure above a recognized ceiling level, the Area Supervisor shall consult with the Section Manager, who shall discuss any proposed citation with the TOSHA Administrator.

*NOTE: An exception to this rule may apply if it can be proven that "an employer knows a particular safety or heath standard is inadequate to protect his employees against the specific hazard it is intended to address." See, Int. Union UAW v. General Dynamics Land Systems Division, 815 F.2d 1570 (D.C. Cir. 1987). Such cases shall be subject to pre-citation review.*

**3.** The general duty clause shall normally not be used to require additional abatement methods not set forth in an existing standard. If a toxic substance standard covers engineering control requirements but not requirements for medical surveillance, the general duty clause shall not be cited to additionally require medical surveillance. Area Supervisors shall evaluate the circumstances of special situations in accordance with guidelines stated herein and consult with the Section Manager to determine whether a general duty citation can be issued in those special cases.

**4. Alternative Standards**. The following standards shall be considered carefully before issuing a general duty citation for a health hazard.

a. There are a number of general standards that shall be considered rather than the general duty clause in situations where the hazard is not covered by a particular standard. If a hazard not covered by a specific standard can be substantially corrected by compliance with a personal protective equipment (PPE) standard, the PPE standard shall be cited. In general industry, §1910.132(a) may be appropriate where exposure to a hazard may be prevented by the wearing of PPE.

b. For a health hazard, the particular toxic substance standard, such as asbestos and coke oven emissions, shall be cited where appropriate. If those particular standards do not apply, however, other standards may be applicable; e.g., the air contaminant levels contained in TOSHA Rule 0800-01-01-.07(2)(b) in general industry and in §1926.55 for construction.

c. Another general standard is §1910.134(a), which addresses the hazards of breathing harmful air contaminants not covered under TOSHA Rule 0800-01-01-.07(2)(b) or another specific standard, and which may be cited for failure to use feasible engineering controls or respirators.

d. Violations of §1910.141(g)(2) may be cited when employees are allowed to consume food or beverages in an area exposed to a toxic material, and §1910.132(a) where there is a potential for toxic materials to be absorbed through the skin.

**E. Classification of Violations Cited Under the General Duty Clause**. Only hazards presenting serious physical harm or death may be cited under the general duty clause (including willful and/or repeated violations that would otherwise qualify as serious violations). Other-than-serious citations shall not be issued for general duty clause violations.

**F. Procedures for Implementation of General Duty Clause Enforcement**. To ensure that citations of the general duty clause are defensible, the following procedures shall be followed:

**1. Gathering Evidence and Preparing the File.**

a. The evidence necessary to establish each element of a general duty violation shall be documented in the file. This includes all photographs, videotapes, sampling data, witness statements, and other documentary and physical evidence necessary to establish the violation. Additional documentation includes evidence of specific and/or general awareness of a hazard, why it was detectable and recognized, and any supporting statements or reference materials.

b. If copies of documents relied on to establish the various general duty elements cannot be obtained before issuing the citation, these documents shall be accurately cited and identified in the file so they can be obtained later if necessary.

c. If experts are necessary to establish any element(s) of a general duty violation, such experts and the TOSHA Administrator shall be consulted prior to the citation being issued and their opinions noted in the file.

**2. Pre-Citation Review**. The Area Supervisor shall review and approve all proposed general duty citations. These citations shall undergo additional pre-citation review as follows:

a. The Section Manager and TOSHA Administrator shall be consulted prior to the issuance of all general duty citations where complex issues or exceptions to the outlined procedures are involved; and

b. If a standard does not apply and all criteria for issuing a general duty citation are not met, yet the Area Supervisor determines that the hazard warrants some type of notification, a letter shall be sent to the employer and employee representative describing the hazard and suggesting corrective action.

**IV.** **Other-than-Serious Violations**. This type of violation shall be cited in situations where the accident/incident or illness that would most likely result from a hazardous condition would probably not cause death or serious physical harm, but would have a direct and immediate relationship to the safety and health of employees.

**V.** **Willful Violations**. A willful violation exists under the Act where an employer has demonstrated either an intentional disregard for the requirements of the Act or a plain indifference to employee safety and health. Area Supervisors are encouraged to consult with the Section Manager, TOSHA Administrator, and TOSHA attorney when developing willful citations. The following guidance and procedures apply whenever there is evidence that a willful violation may exist:

**A.** **Intentional Disregard Violations.** An employer commits an intentional and knowing violation if:

**1.** An employer was aware of the requirements of the Act or of an applicable standard or regulation and was also aware of a workplace condition or practice in violation of those requirements, but did not abate the hazard; or

**2.** An employer was not aware of the requirements of the Act or standards, but had knowledge of a comparable legal requirement (e.g., state or local law) and was also aware of a condition or practice in violation of that requirement.

*NOTE: Good faith efforts made by the employer to minimize or abate a hazard may sometimes preclude the issuance of a willful violation. In such cases, CSHOs should consult the Area Supervisor if a willful classification is under consideration.*

**3.** A willful citation also may be issued where an employer knows that specific steps must be taken to address a hazard, but substitutes its judgment for the requirements of the standard.

**EXAMPLE 4-26**: The employer was issued repeated citations addressing the same or similar conditions, but did not take corrective action.

**B.** **Plain Indifference Violations**.

**1.** An employer commits a violation with plain indifference to employee safety and health where:

a. Management officials were aware of a TOSHA requirement applicable to the employer's business but made little or no effort to communicate the requirement to lower level supervisors and employees.

b. Company officials were aware of a plainly obvious hazardous condition but made little or no effort to prevent violations from occurring.

**EXAMPLE 4-27:** The employer is aware of the existence of unguarded power presses that have caused near misses, lacerations and amputations in the past and does nothing to abate the hazard.

c. An employer was not aware of any legal requirement, but knows that a condition or practice in the workplace is a serious hazard to the safety or health of employees and makes little or no effort to determine the extent of the problem or to take the corrective action. Knowledge of a hazard may be gained from such means as insurance company reports, safety committee or other internal reports, the occurrence of illnesses or injuries, or complaints of employees or their representatives.

*NOTE: Voluntary employer self-audits that assess workplace safety and health conditions shall not normally be used as a basis of a willful violation. However, once an employer's self-audit identifies a hazardous condition, the employer must promptly take appropriate measures to correct a violative condition and provide interim employee protection. See TOSHA Directive 00-01 (CPL-TN 02) TOSHA's Policy on Voluntary Employer Safety and Health Self-Audits (December 15, 2000).*

d. Willfulness may also be established despite lack of knowledge of a legal requirement if circumstances show that the employer would have placed no importance on such knowledge.

**EXAMPLE 4-28**: An employer sends employees into a deep unprotected excavation containing a hazardous atmosphere without ever inspecting for potential hazards.

**2.** It is not necessary that the violation be committed with a bad purpose or malicious intent to be deemed "willful." It is sufficient that the violation was deliberate, voluntary or intentional as distinguished from inadvertent, accidental or ordinarily negligent.

**3.** CSHOs shall develop and record on the violation worksheet all evidence that indicates employer knowledge of the requirements of a standard, and any reasons for why it disregarded statutory or other legal obligations to protect employees against a hazardous condition. Willfulness may exist if an employer is informed by employees or employee representatives regarding an alleged hazardous condition and does not make a reasonable effort to verify or correct the hazard. Additional factors to consider in determining whether to characterize a violation as willful include:

a. The nature of the employer's business and the knowledge regarding safety and health matters that could reasonably be expected in the industry;

b. Any precautions taken by the employer to limit the hazardous conditions;

c. The employer's awareness of the Act and of its responsibility to provide safe and healthful working conditions; and

d. Whether similar violations and/or hazardous conditions have been brought to the attention of the employer through prior citations, accidents, warnings from TOSHA or officials from other government agencies or an employee safety committee regarding the requirements of a standard.

*NOTE: This includes prior citations or warnings from federal OSHA and other OSHA State Plan officials.*

**4.** Also, include facts showing that even if the employer was not consciously violating the Act, it was aware that the violative condition existed and made no reasonable effort to eliminate it.

**VI. Criminal/Willful Violations**. T.C.A. Section 50-3-503 provides that: "Any employer who willfully violates any standard adopted by regulation promulgated pursuant to Section 50-3-201, which violation causes death of any employee, commits a Class C misdemeanor."

**A. Area Supervisor Coordination**. The Area Supervisor, in coordination with the Section Manager, the TOSHA Administrator, and the TOSHA attorney shall carefully evaluate all willful cases involving employee deaths to determine whether they may involve criminal violations of Section

50-3-503 of the Act. Because the quality of the evidence available is of paramount importance in these investigations, there shall be early and close discussions between the CSHO, the Area Supervisor, the Section Manager, and the TOSHA Administrator in developing all evidence when there is a potential Section 50-3-503 violation.

**B. Criteria for Investigating Possible Criminal/Willful Violations** The following criteria shall be considered in investigating possible criminal/willful violations:

**1.** In order to establish a criminal/willful violation TOSHA must prove that:

a. The employer violated a TOSHA standard. A criminal/willful violation cannot be based on violation of T.C.A. Section 50-3-105(1).

b. The violation was willful in nature.

c. The violation of the standard caused the death of an employee. In order to prove that the violation caused the death of an employee, there must be evidence which clearly demonstrates that the violation of the standard was the direct cause of, or a contributing factor to, an employee's death.

**2.** If asked during an investigation, CSHOs should inform employers that any violation found to be willful that has caused or contributed to the death of an employee is evaluated for potential criminal referral to the TOSHA Attorney and District Attorney General.

**3.** Following the investigation, if the Area Supervisor, Section Manager and TOSHA Administrator decide to recommend criminal prosecution, a memorandum shall be forwarded promptly to the TOSHA Attorney. It shall include an explanation why they have determined a possible criminal/willful violation exists. In addition, if correction of the hazardous condition is at issue, this shall be noted in the transmittal memorandum, because in most cases prosecution of a criminal/willful case stays the resolution of the civil case and its abatement requirements.

**4.** The TOSHA Administrator or Assistant TOSHA Administrator shall normally issue a civil citation in accordance with current procedures even if the citation involves charges under consideration for criminal prosecution.

**C. Willful Violations Related to a Fatality.** Where a willful violation is related to a fatality and a decision is made not to recommend a criminal referral, the Area Supervisor shall ensure the case file contains documentation justifying that conclusion. The file documentation should indicate which elements of a potential criminal violation make the case unsuitable for referral.

**VII. Repeated Violations**. An employer may be cited for a repeated violation if that employer has been cited previously for the same or substantially similar condition or hazard and the citation has become a final order of the Review Commission. A citation becomes a final order when an employer does not contest the citation, or pursuant to court decision or settlement. The underlying citation which the repeated violation will be based on must have become a final order *before* the occurrence or observation of the second substantially similar violation.

Prior citations by federal OSHA or other State Plan States cannot be used as a basis for TOSHA repeated violations. Only violations that have become final orders of the Review Commission may be considered.

**A. Identical Standards**. Generally, similar workplace conditions or hazards can be demonstrated by showing that in both situations the identical standard was violated, but there are exceptions.

**EXAMPLE 4-29**: A citation was previously issued for a violation of §1910.132(a) for not requiring the use of safety-toe footwear for employees. A recent inspection of the same

establishment revealed a violation of §1910.132(a) for not requiring the use of head protection (hardhats). Although the same standard was involved, the hazardous conditions in each case are not substantially similar and therefore a repeated violation would not be appropriate.

**B.** **Different Standards**. In some circumstances, similar conditions or hazards can be demonstrated even when different standards are violated.

**EXAMPLE 4-30**: A citation was previously issued for a violation of §1910.28(d)(7) for not installing standard guardrails on a tubular welded frame scaffold platform. A recent inspection of the same employer reveals a violation of §1910.28(c)(14) for not installing guardrails on a tube and coupler scaffold platform. Although different standards are involved, the conditions and hazards (falls) present during both inspections were substantially similar, and therefore a repeated violation would be appropriate.

*NOTE: There is no requirement that the previous and current violations occur at the same workplace or under the same supervisor.*

**C.** **Obtaining Inspection History.** For purposes of determining whether a violation is repeated, the following criteria shall apply:

**1.** The CSHO shall obtain a history of citations previously issued to this employer at all of its identified establishments statewide, within the same two digit Standard Industrial Classification (SIC) or three digit North American Industry Classification System (NAICS) code.

**2.** If these violations have been previously cited within the time limitations (described in Paragraph VII.E. of this chapter) and have become final orders of the Review Commission, a repeated citation may be issued.

**3.** Citations from previous inspections upon which a proposed repeated citation will be based must have become a final order before the initiation of the second inspection.

**4.** Under special circumstances, citations may be issued for repeated violations without regard for the NAICS code.

**D.** **Time Limitations.**

**1.** Although there are no statutory limitations on the length of time that a prior citation was issued as a basis for a repeated violation, the following policy shall generally be followed.

A citation will be issued as a repeated violation if:

a. The citation is issued within 5 years of the final order date of the previous citation or within 5 years of the final abatement date, whichever is later; or

b. The previous citation was contested, within 3 years of the Review Commission's final order or the order of a court of appeal.

**2.** When a violation is found during an inspection and a repeated citation has previously been issued for a substantially similar condition, the violation may be classified as a second instance repeated violation with a corresponding increase in penalty.

**EXAMPLE 4-31**: An inspection is conducted in an establishment and a violation of §1910.217(c)(1)(i) is found. That citation is not contested by the employer and becomes a

final order on October 17, 2006. On December 8, 2008, a citation for repeated violation of the same standard was issued. The violation found during the current inspection may be treated as a second instance repeated.

**3.** In cases of multiple prior repeated citations, the Section Manager shall be consulted for guidance.

**E.** **Repeated v. Failure to Abate**. A failure to abate exists when a previously cited hazardous condition, practice or non-complying equipment has not been brought into compliance since the prior inspection (i.e., the violation is continuously present) and is discovered at a later inspection. If, however, the violation was corrected, but later reoccurs, the subsequent occurrence is a repeated violation.

**F.** **Area Supervisor Responsibilities.** After the CSHO makes a recommendation that a violation should be cited as repeated, the Area Supervisor shall:

**1.** Ensure that the violation meets the criteria outlined in the preceding subparagraphs of this section;

**2.** Ensure that the case file includes a copy of the citation for the prior violation, the violation worksheets describing the prior violation that serves as the basis for the repeated citation, and any other supporting evidence that describes the violation. If the prior violation citation is not available, the basis for the repeated citation shall, nevertheless, be adequately documented in the case file. The file shall also include all documents showing that the citation is a final order and on what date it became final, as follows: if the case was not contested, the certified mail card (final 20 calendar days from employer's receipt of the citation), signed Informal Settlement (final 20 calendar days from when both parties signed) or Formal Settlement Agreements (final 60 days after approval date));

**3.** OIS information shall not be used as the sole means to establish that a prior violation has been issued.

**4.** In circumstances when it is not clear that the violation meets the criteria outlined in this section, consult with the Section Manager before recommending a repeated citation; and

**5.** If a repeated citation is issued, ensure that the cited employer is fully informed of the previous violations serving as a basis for the repeated citation by notation in the Alleged Violation Description (AVD) portion of the citation, using the following or similar language:

> The (employer name) was previously cited for a violation of this occupational safety and health standard or its equivalent standard (name previously cited standard), which was contained in TOSHA inspection number_____, citation number_____, item number_____ and was affirmed as a final order on (date), with respect to a workplace located at_____.

**VIII.** **De Minimis Conditions**. De minimis conditions are those where an employer has implemented a measure different than one specified in a standard, that has no direct or immediate relationship to safety or health. Whenever de minimis conditions are found during an inspection, they shall be documented.

**A.** **Criteria**. The criteria for finding a de minimis condition are as follows:

**1.** An employer complies with the intent of the standard, yet deviates from its particular requirements in a manner that has no direct or immediate impact on employee safety or health. These deviations may involve, for example, distance specifications, construction

material requirements, use of incorrect color, minor variations from recordkeeping, testing, or inspection regulations.

**EXAMPLE 4-32**: §1910.27(b)(1)(ii) allows 12 inches as the maximum distance between ladder rungs. Where the rungs are 13 inches apart, the condition is de minimis.

**EXAMPLE 4-33:** §1910.217(e)(1)(ii) requires that mechanical power presses be inspected and tested at least weekly. If the machinery is seldom used, inspection and testing prior to each use is adequate to meet the intent of the standard.

**2.** An employer complies with a proposed TOSHA standard or amendment or a consensus standard rather than with the standard in effect at the time of the inspection and the employer's action clearly provides equal or greater employee protection.

**3.** An employer complies with a written interpretation issued by TOSHA, the OSHA National Office or an OSHA Regional Office.

**4.** An employer's workplace protections are "state of the art" and technically more enhanced than the requirements of the applicable standard and provides equivalent or more effective employee safety or health protection.

**B.** **Professional Judgment**. Professional judgment should be exercised in determining whether noncompliance with a standard constitutes a de minimis condition.

**C.** **Area Supervisor Responsibilities**. Area Supervisors shall ensure that the employer is verbally notified of the violation(s) and the CSHO notes it in the inspection case file.

**IX.** **Citing in the Alternative**. In rare cases, the same factual situation may present a possible violation of more than one standard.

**EXAMPLE 4-34**: The facts which support a violation of §1910.28(a)(1) may also support a violation of §1910.132(a), if no scaffolding is provided and the use of safety belts is not required by the employer.

Where it appears that more than one standard is applicable to a given factual situation and that compliance with any of the applicable standards would effectively eliminate the hazard, it is permissible to cite alternative standards using the words "in the alternative." A reference in the citation to each of the standards involved shall be accompanied by a separate AVD that clearly alleges all of the necessary elements of a violation of that standard. Only one penalty shall be proposed for the violative condition.

**X.** **Combining and Grouping Violations**.

**A.** **Combining**. Separate violations of a single standard, for example §1910.212(a)(3)(ii), having the same classification found during the inspection of an establishment or worksite generally shall be combined into one alleged citation item. Different options presented in the SAVEs of the same standard shall normally also be combined. Each instance of the violation shall be separately set out within that item of the citation.

*NOTE: Except for standards which deal with multiple hazards (e.g., Tables Z-1-A cited under Rule 0800-01-01-.07(2)(b)), the same standard may not normally be cited more than once on a single citation. However, the same standard may be cited on different citations based on separate classifications and facts on the same inspection.*

**B.** **Grouping**. When a source of a hazard is identified which involves interrelated violations of different standards, the violations may be grouped into a single violation. The following situations normally call for grouping violations:

1. **Grouping Related Violations**. If violations classified either as serious or other than serious are so closely related they may constitute as a single hazardous condition, such violations shall be grouped and the overall classification shall normally be based on the most serious item.

2. **Grouping Other-than-Serious Violation Where Grouping Results in a Serious Violation**. When two or more violations are found which, if considered individually, represent other than serious violations, but together create a substantial probability of death or serious physical harm, the violations shall be grouped as a serious violation.

3. **Where Grouping Results in High Gravity Other-than-Serious Violation**. Where the CSHO finds, during the course of the inspection, that a number of other-than-serious violations are present, the violations shall be considered in relation to each other to determine the overall gravity of possible injury resulting from an accident or incident involving the hazardous condition.

4. **Penalties for Grouped Violations**. If penalties are to be proposed for grouped violations, the penalty shall be written across from the first violation item appearing on the TOSHA-2.

**C. When Not to Group or Combine.**

1. **Multiple Inspections**. Violations discovered during multiple inspections of a single establishment or worksite may not be grouped. Where only one inspection form has been completed, an inspection at the same establishment or worksite shall be considered a single inspection even if it continues for a period of more than one day, or is discontinued with the intention of later resuming it.

2. **Separate Establishments of the Same Employer**. The employer shall be issued separate citations for each establishment or worksite where inspections are conducted, either simultaneously or at different times. If CSHOs conduct inspections at two establishments belonging to the same employer and instances of the same violation are discovered during each inspection, the violations shall not be grouped.

3. **General Duty Clause**. Because a general duty citation covers all aspects of a serious hazard where no standard exists, there shall be no grouping of separate general duty violations. This policy, however, does not prohibit grouping a general duty violation with a related violation of a specific standard.

4. **Egregious Violations**. Violations, which are proposed as instance-by-instance citations, shall not normally be combined or grouped. See *CPL-TN 02-00-080, Handling of Cases to be Proposed for Violation-by-Violation Penalties.*

**XI. Health Standard Violations**.

**A. Citation of Ventilation Standards**. In cases where a citation of a ventilation standard is appropriate, consideration shall be given to standards intended to control exposure to hazardous levels of air contaminants, prevent fire or explosions, or regulate operations that may involve confined spaces or specific hazardous conditions. In such cases, the following guidelines shall be observed:

1. **Health-Related Ventilation Standards**.

a. Where an over-exposure to an airborne contaminant is present, the appropriate air contaminant engineering control requirement shall be cited; e.g., Rule 0800-

01-01-.07(2)(b). Citations of this standard shall not be issued to require specific volumes of air to reduce such exposures.

b. Other requirements contained in health-related ventilation standards shall be evaluated without regard to the concentration of airborne contaminants. Where a specific standard has been violated and an actual or potential hazard has been documented, a citation shall be issued.

**2.** **Fire and Explosion-Related Ventilation Standards**. Although not normally considered health violations, the following guidelines shall be observed when citing fire and explosion related ventilation standards:

a. **Adequate Ventilation**. An operation is considered to have adequate ventilation when both of the following criteria are present:

(i) The requirement(s) of the specific standard has been met.

(ii) The concentration of flammable vapors is 25 percent or less of the lower explosive limit (LEL).

b. **Citation Policy.** If 25 percent of the LEL has been exceeded and:

(i) The standard's requirements have not been met, violations of the applicable ventilation standard normally shall be cited as serious.

(ii) If there is no applicable ventilation standard, T.C.A. Section 50-3-105(1) shall be cited in accordance with the guidelines in Section III of this chapter, General Duty Requirement.

**B.** **Violations of the Noise Standard.** Current enforcement policy regarding §1910.95(b)(1) allows employers to rely on personal protective equipment and a hearing conservation program, rather than engineering and/or administrative controls, when hearing protectors will effectively attenuate the noise to which employees are exposed to acceptable levels. (See Tables G-16 or G-16a of the standard).

**1.** Citations for violations of §1910.95(b)(1) shall be issued when technologically and economically feasible engineering and/or administrative controls have not been implemented; and

a. Employee exposure levels are so elevated that hearing protectors alone may not reliably reduce noise levels received to levels specified in Tables G-16 or G-16a of the standard. (e.g., Hearing protectors which offer the greatest attenuation may reliably be used to protect employees when their exposure levels border on 100 dba). See CPL 02-02-035, 29 CFR 1910.95(b)(1), Guidelines for Noise Enforcement; Appendix A, dated December 19, 1983; or

b. The costs of engineering and/or administrative controls are less than the cost of an effective hearing conservation program.

**2.** When an employer has an ongoing hearing conservation program and the results of audiometric testing indicate that existing controls and hearing protectors are adequately protecting employees, no additional controls may be necessary. In making this assessment, factors such as exposure levels present, number of employees tested, and duration of the testing program shall be considered.

**3.** When employee noise exposures are less than 100 dBA but the employer does not have an ongoing hearing conservation program, or results of audiometric testing indicate that the employer's existing program is inadequate, the CSHO shall consider whether:

a. Reliance on an effective hearing conservation program would be less costly than engineering and/or administrative controls.

b. An effective hearing conservation program can be established or improvements made in an existing program which could bring the employer into compliance with Tables G-16 or G-16a.

c. Engineering and/or administrative controls are both technically and economically feasible.

**4.** If noise workplace levels can be reduced to the levels specified in Tables G-16 or 16a by means of hearing protectors along with an effective hearing conservation program, a citation for any missing program elements shall be issued rather than for lack of engineering controls. If improvements in the hearing conservation program cannot be made or, if made, cannot reasonably be expected to reduce exposures, but feasible controls exist to address the hazard, then §1910.95(b)(1) shall be cited.

**5.** When hearing protection is required but not used and employee exposures exceed the limits of Table G-16, §1910.95(i)(2)(i) shall be cited and classified as serious (see (8), below) whether or not the employer has instituted a hearing conservation program. §1910.95(a) shall no longer be cited except in the case of the oil and gas drilling industry.

*NOTE: Citations of §1910.95(i)(2)(ii)(b) shall also be classified as serious.*

**6.** Where an employer has instituted a hearing conservation program and a violation of one or more elements (other than §1910.95(i)(2)(ii)(a) or (i)(2)(ii)(b)) is found, citations for the deficient elements of the noise standard shall be issued if exposures equal or exceed an 8-hour time-weighted average of 85 dB.

**7.** If an employer has not instituted a hearing conservation program and employee exposures equal or exceed an 8-hour time-weighted average of 85 dB, a citation for §1910.95(c) only shall be issued.

**8.** Violations of §1910.95(i)(2)(i) may be grouped with violations of §1910.95(b)(1) and classified as serious when employees are exposed to noise levels above the limits of Table G-l6 and:

a. Hearing protection is not utilized or is not adequate to prevent overexposures; or

b. There is evidence of hearing loss that could reasonably be considered:

(i) To be work-related, and

(ii) To have been preventable, if the employer had been in compliance with the cited provisions.

**9.** No citation shall be issued where, in the absence of feasible engineering or administrative controls, employees are exposed to elevated noise levels, but effective hearing protection is being provided and used, and the employer has implemented an effective hearing conservation program.

**XII. Violations of the Respiratory Protection Standard (§1910.134)**. If an inspection reveals the presence of potential respirator violations, *CPL 02-00-158, Inspection Procedures for the Respiratory Protection Standard, dated June 26, 2014*, shall be followed.

**XIII. Violations of Air Contaminant Standards TOSHA** Rule 0800-01-01-.07(2)(b)**.**

**A. Requirements under the standard**:

**1.** Table Z-1-A of Rule 0800-01-01-.07(2)(b) provide ceiling values, STELs, skin designations and 8-hour time – weighted averages applicable to employee exposure to air contaminants.

**2.** Table Z-1-A of Rule 0800-01-01-.07(2)(d) also provides that to achieve compliance with those exposure limits, administrative or engineering controls shall first be identified and implemented to the extent feasible. When such controls do not achieve full compliance, personal protective equipment shall be used. Whenever respirators are used, their use shall comply with §1910.134.

**3.** Section §1910.134(a) provides that when effective engineering controls are not feasible, or while they are being instituted, appropriate respirators shall be used.

**4.** There may be cases where workplace conditions require that employers provide engineering controls as well as administrative controls (including work practice controls) and personal protective equipment. Rule 0800-01-01-.07(2)(d) allows employers to implement feasible engineering controls and/or administrative and work practice controls in any combination, provided the selected abatement means eliminates the overexposure.

**5.** Where engineering and/or administrative controls are feasible but do not, or would not, reduce air contaminant levels below applicable ceiling values or threshold limit values, an employer must nevertheless institute such controls to reduce the exposure levels. In cases where the implementation of all feasible engineering and administrative controls fails to reduce the level of air contaminants below applicable levels, employers must additionally provide personal protective equipment to reduce exposures.

**B. Classification of Violations of Air Contaminant Standards**. Where employees are exposed to a toxic substance in excess of the PEL established by TOSHA standards (without regard to the use of respirator protection), a citation for exceeding the air contaminant standard shall be issued. The violation shall be classified as serious or other-than-serious on the criteria set forth in the Chemical Sampling Information web page and based on whether respirators are being used. Classification of these violations is dependent upon the determination that an illness is reasonably predictable at the measured exposure level.

**1. Classification Considerations**. Exposure to regulated substances shall be characterized as serious if exposures could cause impairment to the body as described in Paragraph II.C.3. of this chapter.

a. In general, substances having a single health code of 13 or less shall be considered as posing a serious health hazard at any level above the Permissible Exposure Limit (PEL). Substances in categories 6, 8 and 12, however, are not considered serious at levels where only mild, temporary effects would be expected to occur.

b. Substances causing irritation (i.e., categories 14 and 15) shall be considered other-than-serious up to levels at which "moderate" irritation could be expected.

c. For a substance having multiple health codes covering both serious and other-than-serious effects (e.g., cyclohexanol), a classification of other-than-serious is appropriate up to levels where serious health effect(s) could be expected to occur.

d. For a substance having an ACGIH Threshold Limit Value (TLV) or a NIOSH recommended value, but no TOSHA PEL, a citation for exposure in excess of the recommended value may be considered under T.C.A. Section 50-3-105(1) of the Act. Prior to citing a general duty violation under these circumstances, it is essential that CSHOs document that a hazardous exposure is occurring or has occurred at the workplace, not just that a recognized occupational exposure recommendation has been exceeded. See instructions in Section III of this chapter, General Duty Requirements.

e. If an employee is exposed to concentrations of a substance below the PEL, but in excess of a recommended value (e.g., ACGIH TLV or NIOSH recommended value), citations will not normally be issued. CSHOs shall advise employers that a reduction of the PEL has been recommended.

*NOTE: An exception to this may apply if it can be documented that an employer knows that a particular safety or health standard fails to protect his workers against the specific hazard it is intended to address.*

f. For a substance having an 8-hour PEL with no ceiling PEL but ACGIH or NIOSH has recommended a ceiling value, the case shall be referred to the Section Manager in accordance with Paragraph III.D.2. of this chapter. If no citation is issued, CSHO shall advise employers that a ceiling value is recommended.

**2. Additive and Synergistic Effects**.

a. Substances which have a known additive effect and, therefore, result in a greater probability/severity of risk when found in combination with each other shall be evaluated using the formula found in Rule 0800-01-01-.07(2)(b). Use of this formula requires that exposures have an additive effect on the same body organ or system.

b. If CSHOs suspect that synergistic effects are possible they shall consult with their supervisor, who shall then refer the question to the Section Manager. If a synergistic effect of the cited substances is determined to be present, violations shall be grouped to accurately reflect severity and/or penalty.

**XIV. Citing Improper Personal Hygiene Practices**. The following guidelines apply when citing personal hygiene violations:

**A. Ingestion Hazards**. A citation under §1910.141(g)(2) and (4) shall be issued where there is reasonable probability that, in areas where employees consume food or beverages (including drinking fountains), a significant quantity of a toxic material may be ingested and subsequently absorbed.

**1.** For citations under §1910.141(g)(2) and (4), wipe sampling results shall be taken to establish the potential for a serious hazard.

**2.** Where, for any substance, a serious hazard is determined to exist due to potential for ingestion or absorption for reasons other than the consumption of contaminated food or

drink (e.g., smoking materials contaminated with the toxic substance), a serious citation shall be considered under Section 50-3-105(1) of the Act.

**B.** **Absorption Hazards**. A citation for exposure to materials that may be absorbed through the skin or can cause a skin effect (e.g., dermatitis) shall be issued where appropriate personal protective clothing is necessary, but is not provided or worn. If a serious skin absorption or dermatitis hazard exists that cannot be eliminated with protective clothing, a general duty citation may be considered. Engineering or administrative (including work practice) controls may be required in these cases to prevent the hazard. See §1910.132(a).

**C.** **Wipe Sampling**. In general, wipe samples, not measurements for air concentrations, will be necessary to establish the presence of a toxic substance posing a potential absorption or ingestion hazard. (See TED 01-00-015, OSHA Technical Manual, for sampling procedures.)

**D.** **Citation Policy**. The following criteria should be considered prior to issuing a citation for ingestion or absorption hazards:

**1.** A health risks exist as demonstrated by one of the following:

a. A potential for an illness, such as dermatitis, and/or

b. The presence of a toxic substance that may be potentially ingested or absorbed through the skin. (See the Chemical Sampling Information web page.)

**2.** The potential for employee exposure by ingestion or absorption may be established by taking both qualitative and quantitative wipe samples. The substance must be present on surfaces that employees contact (such as lunch tables, water fountains, work areas etc.) or on other surfaces, which, if contaminated, present the potential for ingestion or absorption.

**3.** The sampling results must reveal that the substance has properties and exists in quantities that pose a serious hazard.

**XV.** **Biological Monitoring**. If an employer has been conducting biological monitoring, CSHOs shall evaluate the results of such testing. These results may assist in determining whether a significant quantity of the toxic substance is being ingested or absorbed through the skin.

# Chapter 5
# CASE FILE PREPARATION AND DOCUMENTATION

**I. Introduction.** These instructions are provided to assist CSHOs in determining the minimum level of written documentation necessary in preparation of an inspection case file. All necessary information relative to documentation of violations shall be obtained during the inspection, (including but not limited to notes, audio/videotapes, digital audio/video files, photographs, employer and employee interviews and employer maintained records). CSHOs shall develop detailed information for the case file to establish the specific elements of each violation.

When an inspection involves important or novel facts or presents potentially complex litigation issues, and consultation with the TOSHA Attorney is necessary, it shall be conducted at the earliest possible stage of the inspection.

**II. Inspection Conducted, Citations Being Issued.** All case files must include the following forms and documents.

**A. Inspection form** The CSHO shall obtain available information to complete the inspection form and other appropriate forms.

**B. Narrative form**. The narrative form shall list the following, if the information is not included on the inspection form:

**1.** Establishment Name;

**2.** Inspection Number;

**3.** Additional Citation Mailing Addresses;

**4.** Names and Addresses of all Organized Employee Groups;

**5.** Names, Addresses and Phone Numbers of Authorized Representatives of Employees;

**6.** Employer Representatives contacted and the extent of their participation in the inspection;

**7.** CSHO's evaluation of the Employer's Safety and Health Management System, and if applicable, a discussion of any penalty reduction for good faith;

**8.** A written narrative containing accurate and concise information about the employer and the worksite;

**9.** Date the closing conference(s) was held and description of any unusual circumstances encountered;

**10.** Any other relevant comments/information CSHOs believe may be helpful, based on his/her professional judgment;

**11.** Names, Addresses and Phone Numbers of other persons contacted during the inspection, such as the police, coroner, attorney, etc.;

**12.** Names and Job Titles of any individuals who accompanied the CSHO on the inspection;

**13.** Calculation of the DART rate (at least three full calendar years; CSHOs shall review current year);

**14.** Discussion clearly addressing all items on the Complaint or Referral;

**15.** Type of Legal Entity [Indicate whether the employer is a corporation, partnership, sole proprietorship, etc. (Do not use the word "owner.") If the employer named is a subsidiary of another firm, indicate that.]; and

**16.** Coverage Information.

**C. Violation worksheet**.

**1.** A separate violation worksheet should normally be completed for each alleged violation. Describe the observed hazardous conditions or practices, including all relevant facts, and all information pertaining to how and/or why a standard is violated. Specifically identify the hazard to which employees have been or could be exposed. Describe the type of injury or illness which the violated standard was designed to prevent in this situation, or note the name and exposure level of any contaminant or harmful physical agent to which employees are, have been, or could be potentially exposed. If employee exposure was not actually observed during the inspection, state the facts on which the determination was made (i.e., tools left inside an unprotected trench) that an employee has been or could have been exposed to a safety or health hazard.

**2.** The following information shall be documented:

a. Explanation of the hazard(s) or hazardous condition(s);

b. Identification of the machinery or equipment (such as equipment type, manufacturer, model number, serial number);

c. Specific location of the hazard and employee exposure to the hazard;

d. Injury or illness likely to result from exposure to the hazard;

e. Employee proximity to the hazard and specific measurements taken, (describe how measurements were taken, identify the measuring techniques and equipment used, identify those who were present and observed the measurements being made, include calibration dates of equipment used);

f. For contaminants and physical agents, any additional facts that clarify the nature of employee exposure. A representative number of Material Safety Data Sheets should be collected for hazardous chemicals that employees may potentially be exposed to;

g. Names, addresses, phone numbers, and job titles for exposed employees;

h. Approximate duration of time the hazard has existed and frequency of exposure to the hazard;

i. Employer knowledge;

j. Any and all facts which establish that the employer actually knew of the hazardous condition, or what reasonable steps the employer failed to take (including regular inspections of the worksite) that could have revealed the presence of the hazardous condition. The mere presence of the employer in the workplace is not sufficient evidence of knowledge. There must be evidence that demonstrates why the employer reasonably could have recognized the presence

of the hazardous condition. Avoid relying on conclusory statements such as "reasonable diligence" to establish employer knowledge. See Chapter 4, Paragraph II.C.4., Knowledge of the Hazardous Condition, for additional information.

(i) In order to establish that a violation may be potentially classified as willful, facts shall be documented to show either that the employer knew of the applicable legal requirements and intentionally violated them or that the employer showed plain indifference to employee safety or health (See Section V of Chapter 4, Willful Violations). For example, document facts that the employer knew that the condition existed and that the employer was required to take additional steps to abate the hazard. Such evidence could include prior TOSHA citations, previous warnings by a CSHO, insurance company or city/state inspector regarding the requirements of the standard(s), the employer's familiarity with the standard(s), contract specifications requiring compliance with applicable standards, or warnings by employees or employee safety representatives of the presence of a hazardous condition and what protections are required by TOSHA standards.

(ii) Also include facts showing that even if the employer was not consciously or intentionally violating the Act, the employer acted with such plain indifference for employee safety that had the employer known of the standard, it probably would not have complied anyway. This type of evidence would include instances where an employer was aware of an employee exposure to an obviously hazardous condition(s) and made no reasonable effort to eliminate it.

(iii) Any relevant comments made by the employer or employee during the walkaround or closing conference, including any employer comments regarding why it violated the standard, which may be characterized as admissions of the specific violations described; and

(iv) Include any other facts, which may assist in evaluating the situation or in reconstructing the total inspection picture in preparation for testimony in possible legal actions.

k. Appropriate and consistent abatement dates should be assigned and documented for abatement periods longer than 30 days. The abatement period shall be the shortest interval within which the employer can reasonably be expected to correct the violation. An abatement period should be indicated in the citation as a specific date, not a number of days. When abatement is witnessed by the CSHO during an inspection, the abatement period shall be listed on the citation as "Corrected During Inspection."

l. The establishment of the shortest practicable abatement date requires the exercise of professional judgment on the part of the CSHO. Abatement periods exceeding 30 days shall not normally be offered, particularly for simple safety violations. Situations may arise, however, especially for complex health or program violations, where abatement cannot be completed within 30 days (e.g., ventilation equipment needs to be installed, new parts or equipment need to be ordered, delivered and installed or a process hazard analysis needs to be performed as part of a PSM program). When an initial abatement date is granted that is in excess of 30 calendar days, the reason should be documented in the case file.

**3.** Records obtained during the course of the inspection which the CSHO determines are necessary to support the violations.

**4.** For violations classified as repeated, the file shall include a copy of the previous citation(s), the violation worksheet on which the repeat classification is based, photos used to support the previous citation(s), and documentation of the final order date of the original citation.

**III.** **Inspection Conducted But No Citations Issued**. For inspections that do not result in citations being issued, a lesser amount of documentation may be included in the case file. At a minimum, the case file shall include the inspection form, the narrative form, with a general narrative/statement that at the time of the inspection no conditions were observed in violation of any standard, and a complaint/referral response letter, if appropriate shall clearly address all of the item(s).

**IV.** **No Inspection**. For "No Inspections," the CSHO shall include in the case file an inspection form and a narrative form which indicates the reason why no inspection was conducted. If there was a denial of entry, the information necessary to obtain a warrant or an explanation of why a warrant is not being sought shall be included. The case file shall also include a complaint/referral response letter, if appropriate, which explains why an inspection was not conducted.

**V.** **Health Inspections**.

**A.** **Document Potential Exposure**. In addition to the documentation indicated above, CSHOs shall document all relevant information concerning potential exposure(s) to chemical substances or physical agents (including, as appropriate, collection and evaluation of applicable Material Safety Data Sheets), such as symptoms experienced by employees, duration and frequency of exposures to the hazard, employee interviews, sources of potential health hazards, types of engineering or administrative controls implemented by the employer, and personal protective equipment being provided by the employer and used by employees.

**B.** **Employer's Occupational Safety and Health System**. CSHOs shall request and evaluate information on the following aspects of the employer's occupational safety and health system as it relates to the scope of the inspection:

**1.** **Monitoring.** The employer's system for monitoring safety and health hazards in the establishment should include a program for self-inspection. CSHOs shall discuss the employer's maintenance schedules and inspection records. Additional information shall be obtained concerning activities such as sampling and calibration procedures, ventilation measurements, preventive maintenance procedures for engineering controls, and laboratory services. Compliance with the monitoring requirements of any applicable substance-specific health standards shall be determined.

**2.** **Medical.** CSHOs shall determine whether the employer provides the employees with pre-placement and periodic medical examinations. The medical examination protocol shall be requested to determine the extent of the medical examinations and, if applicable, compliance with the medical surveillance requirements of any applicable substance-specific health standards.

**3.** **Records Program**. CSHOs shall determine the extent of the employer's records program, such as whether records pertaining to employee exposure and medical records are being maintained in accordance with §1910.1020.

**4.** **Engineering Controls**. CSHOs shall identify any engineering controls present, including substitution, isolation, general dilution and local exhaust ventilation, and equipment modification.

5. **Work Practice and Administrative Controls**. CSHOs shall identify any control techniques, including personal hygiene, housekeeping practices, employee job rotation, employee training and education. Rotation of employees as an administrative control requires employer knowledge of the extent and duration of exposure.

*NOTE: Employee rotation is not permitted as a control under some standards.*

6. **Personal Protective Equipment.** An effective personal protective equipment program should exist in the workplace. A detailed evaluation of the program shall be documented to determine compliance with specific standards, such as, §§1910.95, 1910.134, and 1910.132.

7. **Regulated Areas**. CSHOs shall investigate compliance with the requirements for regulated areas as specified by certain standards. Regulated areas must be clearly identified and known to all appropriate employees. The regulated area designation must be maintained according to the prescribed criteria of the applicable standard.

8. **Emergency Action Plan.** CSHOs shall evaluate the employer's emergency action plan when such a plan is required by a specific standard. When standards provide that specific emergency procedures be developed where certain hazardous substances are handled, CSHO's evaluation shall determine if: potential emergency conditions are included in the written plan, emergency conditions are explained to employees and there is a training program for the protection of affected employees, including use and maintenance of personal protective equipment.

**VI. Affirmative Defenses**. An affirmative defense is a claim which, if established by the employer and found to exist by the CSHO, will excuse the employer from a citation that has otherwise been documented.

**A. Burden of Proof.** Although employers have the burden of proving any affirmative defenses at the time of a hearing, CSHOs must anticipate when an employer is likely to raise an argument supporting such a defense. CSHOs shall keep in mind all potential affirmative defenses and attempt to gather contrary evidence, particularly when an employer makes an assertion that would indicate raising a defense/excuse against the violation(s). CSHOs shall bring all documentation of hazards and facts related to possible affirmative defenses to the attention of the Area Supervisor.

**B. Explanations**. The following are explanations of common affirmative defenses.

1. **Unpreventable Employee or Supervisory Misconduct or "Isolated Event."**

a. To establish this defense in most jurisdictions, employers must show all the following elements:

(i) A work rule adequate to prevent the violation;

(ii) Effective communication of the rule to employees;

(iii) Methods for discovering violations of work rules; and

(iv) Effective enforcement of rules when violations are discovered.

b. CSHOs shall document whether these elements are present, including if the work rule at issue tracks the requirements of the standard addressing the hazardous condition.

**EXAMPLE 5-1**: An unguarded table saw is observed. The saw, however, has a guard which is reattached while the CSHO watches. Facts to be documented include:

(i) Who removed the guard and why?

(ii) Did the employer know that the guard had been removed?

(iii) How long or how often had the saw been used without the guard?

(iv) Were there any supervisors in the area while the saw was operated without a guard?

(v) Did the employer have a work rule that the saw only be operated with the guard on?

(vi) How was the work rule communicated to employees?

(vii) Did the employer monitor compliance with the rule?

(viii) How was the work rule enforced by the employer when it found noncompliance?

**2.** **Impossibility/Infeasibility of Compliance**. Compliance with the requirements of a standard is impossible or would prevent performance of required work and the employer took reasonable alternative steps to protect employees or there are no alternative means of employee protection available.

**EXAMPLE 5-2**: An unguarded table saw is observed. The employer states that a guard would interfere with the nature of the work. Facts to be documented include:

a. Would a guard make performance of the work impossible or merely more difficult?

b. Could a guard be used some of the time or for some of the operations?

c. Has the employer attempted to use a guard?

d. Has the employer considered any alternative means of avoiding or reducing the hazard?

**3.** **Greater Hazard**. Compliance with a standard would result in a greater hazard(s) to employees than would noncompliance and the employer took reasonable alternative protective measures, or there are no alternative means of employee protection. Additionally, an application for a variance would be inappropriate.

**EXAMPLE 5-3**: The employer indicates that a saw guard had been removed because it caused the operator to be struck in the face by particles thrown from the saw. Facts to be documented include:

a. Was the guard initially properly installed and used?

b. Would a different type of guard eliminate the problem?

c. How often was the operator struck by particles and what kind of injuries resulted?

d. Would personal protective equipment such as safety glasses or a face shield worn by the employee solve the problem?

e. Was the operator's work practice causing the problem and did the employer attempt to correct the problem?

f. Was a variance requested?

**VII. Interview Statements**.

**A. Generally.** Interview statements of employees or other individuals shall be obtained to adequately document a potential violation. Statements shall normally be in writing and the individual shall be encouraged to sign and date the statement. During management interviews, CSHOs are encouraged to take verbatim, contemporaneous notes whenever possible as these tend to be more credible than later general recollections. Statements should be taken on the TOSHA Witness Statement form number LB-0056.

**B. CSHOs shall obtain written statements when**:

**1.** There is an actual or potential controversy as to any material facts concerning a violation;

**2.** A conflict or difference among employee statements as to the facts arises;

**3.** There is a potential willful or repeated violation; and

**4.** In accident investigations, when attempting to determine if potential violations existed at the time of the accident.

**C. Language and Wording of Statement**. Interview statements shall normally be written in the first person and in the language of the individual when feasible. (Statements taken in a language other than English shall be subsequently translated.) The wording of the statement shall be understandable to the individual and reflect only the information that has been brought out in the interview. The individual shall initial any changes or corrections to the statement; otherwise, the statement shall not be modified, added to or altered in any way. The statement shall end with the wording: "I have read the above, or the statement has been read to me, and it is true to the best of my knowledge." Where appropriate, the statement shall also include the following: "I request that my statement be held confidential to the extent allowed by law." Only the individual interviewed may later waive the confidentiality of the statement. The individual shall sign and date the interview statement and the CSHO shall sign it as a witness.

**D. Refusal to Sign Statement**. If the individual refuses to sign the statement, the CSHO shall note such refusal on the statement. Statements shall be read to the individual and an attempt made to obtain an agreement. A note to this effect shall be documented in the case file. Recorded statements shall be transcribed whenever possible.

**E. Video and Audiotape Statements.** Interview statements may be videotaped or audio taped, with the consent of the person being interviewed. The statement shall be reduced to writing in egregious, fatality/catastrophe, willful, repeated, failure to abate, and other significant cases so that it may be signed. CSHOs are encouraged to produce the written statement for correction and signature as soon as possible, and identify the transcriber.

**F. Administrative Depositions**. When necessary to document or develop investigative facts, a management official or other individual may be administratively deposed.

*NOTE: See Chapter 3, Paragraph VII.I.4., Interviews of Employees, for additional guidance regarding interviews of employees.*

**VIII. Paperwork and Written Program Requirements.** In certain cases, violations of standards requiring employers to have a written program to address a hazard or make a written certification (e. g., hazard communication, personal protective equipment, permit required confined spaces and others) are considered paperwork deficiencies. However, in some circumstances, violations of such standards may have an adverse impact on employee safety and health. See *CPL 02-00-111, Citation Policy for Paperwork and Written Program Requirement Violations*.

**IX. Guidelines for Case File Documentation for Use with Videotapes and Audiotapes.** The use of videotaping as a method of documenting violations and of gathering evidence for inspection case files may be used. Methods of documentation, such as handwritten notes, audio taping, digital audio/video recording, and photographs, continue to be acceptable and are encouraged to be used whenever they add to the quality of the evidence. See *CPL 02-00-098, Guidelines for Case File Documentation for use with Videotapes and Audiotapes.*

**X. Case File Activity Diary Sheet.** All case files shall contain an activity diary sheet, which is designed to provide a ready record and summary of all actions relating to a case. It will be used to document important events or actions related to the case, especially those not noted elsewhere in the case file. Diary entries should be clear, concise and legible and should be dated in chronological order to reflect a timeline of the case development. Information provided should include, at a minimum, the date of the action or event, a brief description of the action or event and the initials of the person making the entry. When a case file is completed, the CSHO must ensure that it is properly organized.

**XI. Citations.** T.C.A. Section 50-3-307(a)(1) addresses the form and issuance of citations. Section 50-3-307(a)(1) provides: "If, upon an inspection or investigation, the commissioner believes that any employer is not in compliance with any standard or regulation promulgated by the commissioner pursuant to this chapter, the commissioner shall, with reasonable promptness and in no event later than six (6) months following the inspection, issue to the employer by certified mail, by delivery service with delivery receipt, or via hand delivery, a written citation that states the nature and location of the violation, including a reference to the provision of the chapter, the standard or regulation alleged to have been violated."

**A. Statute of Limitations**. The Act provides that citations shall be issued no later than six (6) months following the opening conference date of the inspection. However, where the actions or omissions of the employer concealed the existence of the violation, the six-month issuance limitation is tolled until such time that TOSHA learns or could have learned of the violation. The Section Manager and TOSHA Attorney shall be consulted in such cases.

**B. Issuing Citations.**

**1.** Citations shall be sent by certified mail. Hand delivery of citations to the employer or an appropriate agent of the employer, or use of a mail delivery service other than the United States Postal Service, may be used in addition to certified mail if it is believed that these methods would effectively give the employer notice of the citation. A signed receipt shall be obtained whenever possible. The circumstances of delivery shall be documented in the case file.

**2.** Citations shall generally be mailed to employee representatives at the same time as the citation is mailed to the employer. Citations shall also be mailed to any employee upon request and without the need to make a written request under the Tennessee Open Records Act (ORA). In the case of a fatality, the family of the victim shall be provided with a copy of the citations without charge upon request.

**C. Amending/Withdrawing Citations and Notification of Penalties.**

**1.** **Amendment Justification.** Amendments to, or withdrawal of, a citation shall be made when information is presented to the Area Supervisor and approved by the Section Manager, which indicates a need for such action and may include administrative or technical errors such as:

a. Citation of an incorrect standard;

b. Incorrect or incomplete description of the alleged violation;

c. Additional facts not available to the CSHO at the time of the inspection establish a valid affirmative defense;

d. Additional facts not available to the CSHO at the time of the inspection establish that there was no employee exposure to the hazard; or

e. Additional facts establish a need for modification of the abatement date or the penalty, or reclassification of citation items.

**2.** **When Amendment is Not Appropriate.** Amendments to, or withdrawal of, a citation shall not be made by the Area Supervisor for any of the following:

a. Timely Notice of Contest received;

b. The 20 calendar days for filing a Notice of Contest has expired and the citation has become a Final Order; or

c. Employee representatives were not given the opportunity to present their views (unless the revision involves only an administrative or technical error).

**D.** **Procedures for Amending or Withdrawing Citations.** The following procedures apply whenever amending or withdrawing citations.

*NOTE: The instructions contained in this section, with appropriate modifications, are also applicable to the amendment of the TOSHA-2B, Notification of Failure to Abate Alleged Violation.*

**1.** Withdrawal of, or modifications to, the citation and notification of penalty, shall normally be accomplished by means of Informal or Formal Settlement Agreements.

**2.** In exceptional circumstances, the Area Supervisor may initiate a change to a citation and notification of penalty without an informal conference. If proposed amendments to citation items (individual violations) change the original classification of the items, such as willful to repeated, the original items shall be withdrawn and the new, appropriate items will be issued. The amended Citation and Notification of Penalty Form (TOSHA-2) shall clearly indicate that the employer is obligated under the Act to post the amendment to the citation along with the original citation, until the amended violation has been corrected, or for three working days, whichever is longer.

**3.** The 20 calendar day contest period for the amended portions of the citation will begin on the day following the day of receipt of the amended Citation and Notification of Penalty.

**4.** The contest period is not extended for the unamended portions of the original citation.

**5.** When circumstances warrant, the Area Supervisor may recommend withdrawing a citation and notification of penalty in its entirety. Justification for the withdrawal must be noted in the case file. A notice withdrawing the Citation and Notification of Penalty shall be sent to the employer. The notice shall refer to the original citation and notification of

penalty, state that they are withdrawn and direct that the employer post the letter for three working days in the same location(s) where the original citation was posted. When applicable, a copy of the notice shall also be sent to the employee representative(s) and/or complainant.

## XII. Inspection Records.

### A. Generally.

**1.** Inspection records are any record made by a CSHO that concern, relate to, or are part of, any inspection, or are a part of the performance of any official duty.

**2.** All official forms and notes constituting the basic documentation of a case must be part of the case file. Original field notes, if retained by the CSHO, are part of the inspection record and shall be maintained in the file. Inspection records also include photographs (including digital photographs), negatives of photographs, digital audio/video files, videotapes, DVDs and audiotapes. Inspection records are the property of the State of Tennessee and not the property of the CSHO and are not to be retained or used for any private purpose.

**B. Release of Inspection Information.** The information obtained during inspections is confidential, but may be disclosable or non-disclosable based on criteria established in the Tennessee Open Records Act. Requests for release of inspection information shall be directed to the Manager of Standards and Procedures.

### C. Classified and Trade Secret Information.

**1.** Any classified or trade secret information and/or personal knowledge of such information by agency personnel shall be handled in accordance with TOSHA rules. Trade Secrets are matters that are not of public or general knowledge. A trade secret, as referenced in T.C.A. Section 50-3-504, includes information concerning or related to processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association. The collection of such information and the number of personnel with access to it shall be limited to the minimum necessary for the conduct of investigative activities. CSHOs shall specifically identify any classified and trade secret information in the case file. T.C.A. Section 50-3-504 provides for criminal penalties in the event of improper disclosure.

**2.** It is essential to the effective enforcement of the Act that CSHOs and all TOSHA personnel preserve the confidentiality of all information and investigations which might reveal a trade secret. When the employer identifies an operation or condition as a trade secret, it shall be treated as such (unless, after following proper procedures, including consulting with the TOSHA Attorney, the agency determines that the matter is not a trade secret). Information obtained in such areas, including all negatives, photographs, videotapes and documentation forms shall be labeled:

**"ADMINISTRATIVELY CONTROLLED
RESTRICTED TRADE INFORMATION"**

**3.** Under T.C.A. Section 50-3-504, all information reported to or obtained by CSHOs in connection with any inspection or other activity which contains or may reveal a trade secret shall be kept confidential. Such information shall not be disclosed except to other TOSHA officials concerned with the enforcement of the Act or, when relevant, in any proceeding under the Act.

**4.** Trade secret materials shall not be labeled as “Top Secret,” “Secret,” or “Confidential,” nor shall these security classification designations be used in conjunction with other words, unless the trade secrets are also classified by an agency of the U. S. Government in the interest of national security.

**5.** If the employer objects to the taking of photographs and/or videotapes because trade secrets would or may be disclosed, CSHOs should advise employers of the protection against such disclosure afforded by T.C.A. Section 50-3-504 and Rule 0800-01-04-.10. If the employer still objects, CSHOs shall contact the Area Supervisor or TOSHA Administrator’s office for guidance.

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# Chapter 6
# PENALTIES AND DEBT COLLECTION

**I. General Penalty Policy**. The penalty structure in Part 4 of the TOSH Act is designed primarily to provide an incentive for preventing or correcting violations voluntarily, not only to the cited employer, but to other employers. While penalties are not designed as punishment for violations, the Legislature has made clear its intent that penalty amounts should be sufficient to serve as an effective deterrent to violations.

Proposed penalties, therefore, serve the public policy purpose intended under the Act; and criteria approved for such penalties by the Commissioner are based on effectuating this purpose.

The penalty structure described in this chapter is part of TOSHA's general enforcement policy and shall normally be applied as set forth below. If, in a specific case, the TOSHA Administrator determines that it is warranted to depart from the general policy in order to achieve the appropriate deterrent effect, the extent of the departure and the reasons for doing so shall be fully documented in the case file.

**II. Civil Penalties**.

**A. Statutory Authority for Civil Penalties**. Part 4 of the TOSH Act provides the Commissioner with the statutory authority to propose civil penalties for violations of the Act. Civil penalties advance the purposes of the Act by encouraging compliance and deterring violations. Proposed penalties are the penalty amounts TOSHA issues with citation(s).

**1.** T.C.A. Section 50-3-405(b) provides that any employer who willfully or repeatedly violates the Act may be assessed a civil penalty of not more than $70,000 for each violation.

**2.** T.C.A. Section 50-3-403 provides that any employer who has received a citation for an alleged violation of the Act which is determined to be of a serious nature shall be assessed a civil penalty of up to $7,000 for each violation.

**3.** T.C.A. Section 50-3-405(a) provides that, when the violation is specifically determined not to be of a serious nature, a proposed civil penalty of up to $7,000 may be assessed for each violation.

**4.** T.C.A. Section 50-3-404(a) provides that any employer who fails to correct a violation for which a citation has been issued, may be assessed a civil penalty of not more than $7,000 for each day during which such failure or violation continues.

**5.** T.C.A. Section 50-3-406 provides that, when a violation of a posting requirement is cited, a civil penalty of up to $7,000 shall be assessed for each violation.

**B. Appropriation Act Restrictions**. In providing partial funding for TOSHA, the U.S. Congress has placed restrictions on enforcement activities regarding two categories of employers: small farming operations and small employers in low-hazard industries. The Appropriations Act contains limits for TOSH Act activities on a year-by-year basis.

*NOTE: See CPL-TN 02-00-051,* Enforcement Exemptions and Limitations under the Appropriations Act, *issued March 8, 1999, for additional information. Appendix A of that directive contains the list of low-hazard industries, which is updated annually.*

**C. Minimum Penalties**. The following policies apply:

**1.** The proposed penalty for any willful violation shall not be less than $5,000. This minimum penalty applies to all willful violations, whether serious or other-than-serious.

**2.** When the proposed penalty for a serious violation (citation item) would amount to less than $100, a $100 penalty shall be proposed for that violation.

**3.** When the proposed penalty for an other-than-serious violation (citation item), or a regulatory violation other than a posting violation, would amount to less than $100, no penalty shall be proposed for that violation.

**4.** When the proposed penalty for a posting violation (citation item) would amount to less than $100, a $100 penalty shall be proposed for that violation.

**D.** **Maximum Penalties**. The civil penalty amounts included in Part 4 of the TOSH Act are generally maximum amounts before any permissible reductions are taken.
Table 6-1 below summarizes the maximum amounts for proposed civil penalties:

**Table 6-1: Maximum Amounts for Civil Penalties**

| Type of Violation | Penalty Maximum |
|---|---|
| Serious | $7,000 per violation |
| Other-Than-Serious | $7,000 per violation |
| Willful or Repeated | $70,000 per violation |
| Posting Requirements | $7,000 per violation |
| Failure to Abate (FTA) | $7,000 per day unabated beyond the abatement date [generally limited to 30 days maximum] |

**III.** **Penalty Factors**. T.C.A. Section 50-3-402(b) provides that penalties shall be assessed giving due consideration to four factors:

- The gravity of the violation;
- Size of the employer's business;
- The good faith of the employer; and
- The employer's history of previous violations.

**A.** **Gravity of Violation**. The gravity of the violation is the primary consideration in determining penalty amounts. It shall be the basis for calculating the basic penalty for serious and other-than-serious violations. To determine the gravity of a violation, the following two assessments shall be made:

- The severity of the injury or illness which could result from the alleged violation.
- The probability that an injury or illness could occur as a result of the alleged violation.

**1.** **Severity Assessment**. The classification of an alleged violation as serious or other-than-serious is based on the severity of the potential injury or illness and is the first step. The

following categories shall be considered in assessing the severity of potential injuries or illnesses:

**Table 6-2: Severity Assessment**

| Category | Injury/Illness | Severity |
|---|---|---|
| I | Non-serious violations | 0 |
| II | Injuries/illnesses not resulting in hospitalization or temporary, reversible illnesses requiring minor supportive treatment | 1-3 |
| III | Injury/illness resulting in hospitalization or temporary, reversible illnesses with a variable but limited period of disability | 4-6 |
| IV | Injuries involving permanent disability or chronic, irreversible illness or death | 7-10 |

*NOTE: Categories II, III, and IV apply to serious violations. The penalty for non-serious violations shall be calculated using zero (0) as the severity factor.*

**2.** **Probability Assessment - Safety**. The probability that an injury or illness will result from a hazard has no role in determining the classification of a violation, but probability does affect the amount of the penalty to be proposed. The probability shall be estimated by considering five probability factors to which an appropriate numerical value shall be assigned in accordance with the relative contribution of each as follows:

**Table 6-3: Probability Assessment - Safety**

| | | |
|---|---|---|
| **Number of workers exposed** | | |
| | Each worker up to ten (10) | 1-10 |
| **Frequency of exposure** | | |
| | Any exposure up to once a week | 1-3 |
| | More than once a week up to a daily exposure | 4-6 |
| | Continuous daily exposure | 7-10 |
| **Employee proximity** | | |
| | Fringe of danger zone | 1-3 |
| | Near danger zone | 4-6 |
| | At the point of danger | 7-10 |
| **Working conditions including environmental and other factors (e.g., speed of operations, lighting, temperature, weather conditions, noise, housekeeping, etc.) which may influence the likelihood of an injury-producing accident** | | |
| | Low stress/good conditions | 1-3 |
| | Medium stress/fair conditions | 4-6 |
| | High stress/poor conditions | 7-10 |
| **Other Factors (See Note Below)** | | 1-10 |

*NOTE: Other factors which may affect significantly the probability of an injury-producing accident:*

- *If there are mitigating circumstances such as specific safety instructions, effective training program, existence of a comprehensive safety and health program, evidence of correction underway, warning signs, mandated use of protective gear, or mandatory controls providing some, though less than full protection, assign a low number of points to lower the probability.*

- *If there are additional contributing factors such as inappropriate safety instructions, inadequate training, poor or nonexistent safety and health program, faulty equipment, etc., assign an appropriately high number of points.*

a. The following decisions shall be adequately documented and approved by the Area Supervisor and Section Manager.

b. If, in the opinion of the CSHO, any of the above factors do not significantly influence the probability of an injury-causing accident, that factor shall not be entered into the probability calculation.

c. If, on the other hand, use of a factor would tend to dilute the penalty excessively, that factor shall not be entered into the penalty calculation. For example, in a particularly dangerous trenching situation, when only one or two employees are exposed, it may not be appropriate to average in factor (1), number of employees exposed.

d. To determine overall probability, the factors used must be averaged. Total the points assigned for each factor and divide by the number of factors used. Any fractions shall be rounded off (.1 to .4 to lower whole number; .5 to .9 to next higher whole number). The resulting number is the "probability quotient."

e. When strict adherence to the probability assessment procedures would result in an unreasonably high probability/severity quotient the CSHO may use professional judgment to adjust the probability quotient accordingly.

**3.** **Probability Assessment -- Health**. To determine the probability that an illness could result from an overexposure to a health hazard, the CSHO shall consider the number of workers exposed, the duration of exposure, the use of personal protective equipment, and the results of medical testing as follows:

**Table 6-4: Probability Assessment - Health**

| | | |
|---|---|---|
| **Number of workers exposed** | | |
| | Each worker up to ten (10) | 1-10 |
| **Duration of exposure** | | |
| | One (1) to eight (8) hours per week | 1-3 |
| | Over eight (8) hours per week but not continuous daily exposure | 4-8 |
| | Continuous daily exposure | 9-10 |
| **Use of appropriate personal protective equipment** | | |
| | Personal protective equipment utilized by all exposed employees, and a good program is in effect | 1-3 |
| | Personal protective equipment utilized by some of the exposed employees but with minor deficiencies in the program | 4-6 |
| | Personal protective equipment not utilized by any of the exposed employees | 7-10 |
| **Evaluation of the medical surveillance program: (If there is no applicable surveillance program, this category shall not be considered.)** | | |
| | The medical surveillance program effectively protects the employee | 1-3 |
| | The medical surveillance program partially protects the employee | 4-6 |
| | No medical surveillance program is in effect, or the medical program does not effectively protect the employee | 7-10 |
| Other Factors (See Note Below) | | 1-10 |

*NOTE: Other factors which may significantly affect the degree of probability of an illness:*

- *If there are mitigating circumstances, such as specific health instructions, an effective training program, existence of a comprehensive safety and health program, evidence of correction underway, warning signs or labels or special procedures, mandated use of protective gear, or mandatory controls providing some, though less than full protection, assign a low number of points to lower the probability.*

- *Similarly, assign an appropriately higher point count if there are additional contributing circumstances, such as inappropriate health instructions, inadequate training, a poor or nonexistent health program.*

  a. The following decisions shall be adequately documented, approved by the Area Supervisor and Section Manager.

  b. If, in the opinion of the CSHO, any of the above factors do not significantly influence the probability of an illness-producing accident, that factor shall not be considered in the probability calculation.

  c. If, on the other hand, use of a factor would tend to dilute the penalty excessively, that factor shall not be entered into the penalty calculation. For example, in a confined space where there is insufficient oxygen to support life, even when only one or two employees are exposed, it would not be appropriate to average in factor (1) number of workers exposed.

  d. To determine overall probability, the factors used must be averaged. Total the points assigned for each factor and divide by the number of factors used. Any fractions shall be rounded off (.1 to .4 to lower whole number; .5 to .9 to next higher whole number). The resulting number is called the "probability quotient."

e. When strict adherence to the probability assessment procedures would result in an unreasonably high probability/severity quotient the CSHO may, in consultation with the Area Supervisor and Section Manager, use professional judgment to adjust the probability quotient accordingly.

**4. Gravity-Based Penalty (GBP).** The GBP is the unadjusted penalty and is calculated in accordance with the following procedures:

a. The GBP for each violation is determined by averaging the severity factor and the probability quotient. The sum is divided by two and results in the probability/severity (P/S) quotient. Any fractions shall be rounded as previously described.

b. P/S quotients may be assigned in some cases without using the probability factors given in this chapter when these factors cannot appropriately be used. The Area Supervisor and Section Manager will be consulted.

c. The P/S quotient is then used to determine the gravity-based penalty by consulting the penalty table. The penalty is found in the column marked GBP opposite the numerical P/S quotient which has been assigned to the specific violation.

d. Table 6-5: Penalty Table - Serious Violations shall be used for serious violations and Table 6-6: Penalty Table - Other Than Serious Violations for other than serious violations.

**Table 6-5: Penalty Table - Serious Violations**

| P/S Quotient | GBP | Percent Reduction | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | 10 | 20 | 30 | 40 | 50 | 60 | 70 | 80 | 90 |
| 1 | 1,000 | 900 | 800 | 700 | 600 | 500 | 400 | 300 | 200 | 100 |
| 2 | 1,500 | 1,350 | 1,200 | 1,050 | 900 | 750 | 600 | 450 | 300 | 150 |
| 3 | 2,000 | 1,800 | 1,600 | 1,400 | 1,200 | 1,000 | 800 | 600 | 400 | 200 |
| 4 | 2,500 | 2,250 | 2,000 | 1,750 | 1,500 | 1,250 | 1,000 | 750 | 500 | 250 |
| 5 | 3,000 | 2,700 | 2,400 | 2,100 | 1,800 | 1,500 | 1,200 | 900 | 600 | 300 |
| 6 | 3,500 | 3,150 | 2,800 | 2,450 | 2,100 | 1,750 | 1,400 | 1,050 | 700 | 350 |
| 7 | 4,000 | 3,600 | 3,200 | 2,800 | 2,400 | 2,000 | 1,600 | 1,200 | 800 | 400 |
| 8 | 5,000 | 4,500 | 4,000 | 4,000 | 4,000 | 4,000 | 4,000 | 4,000 | 4,000 | 4,000 |
| 9 | 6,000 | 5,400 | 5,400 | 5,400 | 5,400 | 5,400 | 5,400 | 5,400 | 5,400 | 5,400 |
| 10 | 7,000 | 7,000 | 7,000 | 7,000 | 7,000 | 7,000 | 7,000 | 7,000 | 7,000 | 7,000 |

**Table 6-6: Penalty Table - Other Than Serious Violations**

| P/S Quotient | GBP | Percent Reduction | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | 10 | 20 | 30 | 40 | 50 | 60 | 70 | 80 | 90 |
| 1 | 100 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2 | 250 | 225 | 200 | 175 | 150 | 125 | 100 | 0 | 0 | 0 |
| 3 | 500 | 450 | 400 | 350 | 300 | 250 | 200 | 150 | 100 | 0 |
| 4 | 750 | 675 | 600 | 525 | 450 | 375 | 300 | 225 | 150 | 0 |
| 5 | 1,000 | 900 | 800 | 700 | 600 | 500 | 400 | 300 | 200 | 100 |

**5. Gravity Calculations for Combined or Grouped Violations**. The guidelines for calculating penalties given in this chapter generally apply to combined and grouped violations except as indicated in the following sections.

a. The severity and probability factors for combined violations shall be based on the instance with the highest P/S quotient.

b. For grouped violations the following special guidelines shall be adhered to:

(i) **Severity Factor.** There are two considerations to be kept in mind in calculating the severity of grouped violations:

(1) The severity assigned to the grouped violation shall be no less than the severity of the most serious reasonably predictable injury or illness that could result from the violation of any single item.

(2) If a more serious injury or illness is reasonably predictable from the grouped items than from any single violation item, the more serious injury or illness shall serve as the basis for the calculation of the severity factor of the grouped violation.

(ii) **Probability Factors.** There are three considerations to be kept in mind for calculating the probability of grouped violations:

(1) The probability assigned to the grouped violation shall be no less than the probability of the item which is most likely to result in an injury or illness.

(2) If the overall probability of injury or illness is greater with the grouped violation than with any single violation item, the greater probability of injury or illness shall serve as the basis for calculation of the probability assessment of the grouped violations.

(3) Some individual probability factors may be increased by grouping and others may not. The increased values shall be used in the probability calculation if, in the professional judgment of the CSHO a more appropriate probability assessment will result. The Area Supervisor will be consulted. For example, the number of employees exposed may be increased while the proximity factor may not.

(iii) **Gravity-based Penalty.** A single P/S quotient for the combined or grouped violation will result from the foregoing considerations. That result shall be the basis for selecting an appropriate gravity-based penalty for the violation item according to the guidelines. The penalty shall be entered in the penalty column of the TOSHA-2 across from the first item of the violation.

c. Combined and grouped violations shall normally be considered as one violation for penalty purposes, and in such cases the guidelines for calculating penalties given in this chapter shall apply.

d. In egregious cases; including willful, repeated, and high gravity serious citations and FTA, an additional factor of up to the number of violation instances may be applied to the gravity-based penalty calculated in accordance with Chapter 6.III.A.5.c. or the regulatory penalty assigned in accordance with 6.III.B., 6.VI., 6.VII., 6.VIII., and 6.IX., as described in the following subsections. Penalties calculated with this additional factor shall not be proposed without the concurrence of the Commissioner of Labor and Workforce Development.

**B. Penalty Adjustment Factors**.

**1. General**. The gravity-based penalty may be reduced as much as ninety (90) percent depending upon the employer's "good faith," "size of business," and "history of previous violations."

| |
|---|
| Up to sixty (60) percent reduction will be permitted for size, |
| Up to thirty (30) percent for good faith, and |
| Up to ten (10) percent for history. |

a. Since these factors are based on the general character of a business and its safety and health performance, the factors shall generally be calculated only once for each employer. This shall be done after the classification and probability ratings have been determined for each violation and the general character of the employer's performance will be apparent.

b. Limits to the penalty reductions for good faith, size and history of previous violations in the case of certain high gravity, serious violations may necessitate lower reductions for such violations in some instances. See Table 6-8 Maximum Penalty Reduction - High Gravity Serious.

c. The rate of penalty reduction for size of business, employer's good faith and employer's history of previous violations shall be calculated on the basis of the criteria described in the following paragraphs.

**2. Size.** A maximum penalty reduction of sixty (60) percent is permitted for small businesses. "Size of business" shall be measured on the basis of the maximum number of employees controlled by an employer at all workplaces nationwide at any one time during the previous twelve (12) months. Information on the total number of an employer's employees can generally be obtained at the inspected worksite. However, on occasion it may be necessary to obtain or confirm the information from the employer's headquarters. Table 6-7 below summarizes the rates of reduction to be applied for size.

Table 6-7: Size Adjustment

| No. of Employees | Percent Reduction |
|---|---|
| 1 - 25 | 60 |
| 26 to 100 | 40 |
| 101 to 250 | 20 |
| 251 or More | None |

**3.** **Good Faith Reduction.** A maximum penalty reduction of 30% is permitted in recognition of an employer's effort to implement an effective safety and health management system in the workplace. The following apply to reductions for good faith:

a. **Reduction Not Permitted.**

(i) No reduction shall be given for serious violations with a P/S Quotient of 8, 9 or 10.

(ii) No reduction shall be given if a willful violation is found. Additionally, where a willful violation has been documented, no reduction for good faith can be applied to any of the violations found during the same inspection.

(iii) No reduction shall be given for repeated violations. If a repeated violation is found, no reduction for good faith can be applied to any of the violations found during the same inspection.

(iv) No reduction shall be given if a FTA violation is found during an inspection. No good faith reduction shall be given for any violation in the inspection in which the FTA was found.

(v) No reduction shall be given to employers being cited under abatement verification for any rule 0800-01-04-.23 violations.

(vi) No reduction shall be given if the employer has no safety and health management system.

b. **Thirty Percent Reduction**. A 30 percent reduction for "good faith" normally requires a written safety and health management system. In exceptional cases, CSHOs may recommend a full 30 percent reduction for employers with 1-25 employees who have implemented an effective safety and health management system, but has not reduced it to writing.

To qualify for this reduction, the employer's safety and health management system must provide for:

(i) Appropriate management commitment and employee involvement;

(ii) Worksite analysis for the purpose of hazard identification;

(iii) Hazard prevention and control measures;

(iv) Safety and health training; and

(v) Where young persons (i.e., less than 18 years old) are employed, the CSHO's evaluation must consider whether the employer's safety and

health management system appropriately addresses the particular needs of such employees, relative to the types of work they perform and the potential hazards to which they may be exposed.

(vi) Where persons who speak limited or no English are employed, the CSHO's evaluation must consider whether the employer's safety and health management system appropriately addresses the particular needs of such employees, relative to the types of work they perform and the potential hazards to which they may be exposed.

*NOTE: One example of an effective safety and health management system is given in Safety and Health Program Management Guidelines; Issuance of Voluntary Guidelines (*Federal Register*, January 16, 1989 (54 FR 3904)).*

c. **Twenty Percent Reduction.** A 20 percent reduction for good faith shall normally be given if the employer has a documented and effective safety and health management system, with only incidental deficiencies.

d. **Ten Percent Reduction.** A 10 percent reduction for good faith shall normally be given if the employer has implemented some of the elements of an effective safety and health management system.

e. **RESERVED**

f. **Allowable Percentages**. Only these percentages (10%, 20%, 30% or 40%) may be used to reduce penalties due to the employer's good faith.

**4. History Reduction.**

a. **Maximum Reduction.** A reduction of 10 percent shall be given to employers who have not been cited by TOSHA for any serious, willful, or repeated violations in the prior three years.

b. **Time Limitation and Final Order**. . Only citations that have become a final order within the three years immediately before the opening conference date shall be considered. The three-year history shall be calculated from the opening conference date of the current inspection.

c. **Reduction Not Permitted.**

(i) For a repeated violation, or

(ii) To employers being cited for FTA violations, or

(iii) To employers being cited for abatement verification for any rule 0800-01-04-.23 violations.

**5. Total.** The total reduction will normally be the sum of the reductions for each of the adjustment factors. In no case, however, shall the total reduction exceed ninety (90) percent. For serious violations of high gravity the combined rate of penalty reduction for size, good faith, and history of previous violations shall be limited. Where the Probability/Severity (P/S) quotient for a specific high-gravity, serious violation is as follows, the maximum penalty reduction for all adjustment factors combined shall be lowered as indicated in table 6-8:

Table 6-8: Maximum Penalty Reduction - High Gravity Serious

| P/S Quotient | Maximum Penalty Reduction |
|---|---|
| 8 | 20% |
| 9 | 10% |
| 10 | 0% |

**IV. Imminent Danger Situations.** Instructions and procedures for handling allegations of imminent danger situations are contained in Chapter 3. Penalties shall be assessed in accordance with the following:

**A. Classification.** An imminent danger situation will normally involve a serious, willful, or repeated violation.

**B. Proposed Penalties**. Penalties shall be proposed in cases where citations are issued in imminent danger situations even though, after being informed by the CSHO, the employer immediately eliminates the imminence of the danger and initiates steps to abate the hazard. The procedures given in this chapter for calculating and assessing proposed penalties shall be applied in the case of imminent danger situations, as appropriate.

**V. Effect on Penalties If Employer Immediately Corrects or Initiates Significant Steps To Take Corrective Action.** Appropriate penalties will be proposed with respect to an alleged violation even though, after being informed of such alleged violation by the CSHO, the employer immediately corrects or initiates significant steps to correct the hazard. These actions shall be favorably considered when figuring the penalty adjustment factor for good faith credit.

**VI. Failure to Abate (FTA).** T.C.A. §50-3-404 provides criteria for assessing civil penalties for FTA a violation. A penalty of not more than seven thousand dollars ($7,000) may be assessed for each day the violation continues past the final abatement date.

**A. Application.** A Notification of Failure to Abate Alleged Violation (TOSHA-2B) shall be issued in cases where violations have not been corrected as required.

**1.** FTA penalties shall be applied when an employer has not corrected a violation which was cited previously when the previous citation became a final order.

**2.** A good faith but unsuccessful effort to abate the violation shall be taken into consideration when determining the appropriate penalty amount as indicated in III.B.3 of this chapter.

**B. No Employer Contest.** If a timely notice of contest has not been filed, the citation and proposed penalties shall be deemed a final order upon the expiration of the contest period. Penalties for FTA shall be applied where abatement has not been accomplished.

**C. Employer Contests Alleged Violation(s)**. If an employer contests one or more of the alleged violations, the period for abatement does not begin to run, as to those items contested, until the day following the entry of the final order by the Review Commission affirming the citation.

**1.** If the employer contests only the amount of the proposed penalty, the employer must correct the alleged violation within the prescribed abatement period.

**2.** If an employer contests an abatement date in good faith, a Failure to Abate Notice shall not be issued for the item contested until a final order affirming a date is entered, the new abatement period, if any, has been completed, and the employer has still failed to abate.

**D. Calculation of Additional Penalties.** A gravity-based penalty for unabated violations is to be calculated for FTA serious or non-serious violations on the basis of the facts noted upon

reinspection. This recalculated gravity-based penalty, however, shall not be less than that proposed for the item when originally cited, except as provided in VI.F. of this chapter.

**1.** In those instances where no penalty was initially proposed, an appropriate penalty shall be determined after consulting with the Area Supervisor. In no case shall the gravity based penalty be less than one thousand dollars ($1,000).

**2.** The adjustment factor for size shall be applied based upon the circumstances noted during the reinspection.

**3.** The daily proposed penalty shall be multiplied by the number of calendar days that the violation continued unabated. The number of days unabated will be counted from the day following the abatement date specified in the citation and final order. It will include all calendar days between that date and the date of reinspection, excluding the date of reinspection. Normally the total proposed penalty for FTA a particular violation shall not exceed thirty (30) times the amount of the daily proposed penalty, i.e., thirty (30) days in FTA condition.

**4.** In unusual circumstances, such as where the gravity of the violation is especially high or the employer has willfully failed to abate the violation, higher penalties may be proposed. In such situations the proposed penalty and factors involved shall be approved by the TOSHA Administrator.

**E. Partial Abatement.**

**1.** When a citation has been partially abated, the Area Supervisor may authorize a reduction of 25 to 75 percent to the amount of the proposed penalty calculated as outlined above.

**2.** When a violation consists of a number of instances and the follow-up inspection reveals that only some instances of the violation have been corrected, the additional daily proposed penalty shall take into consideration the extent of the abatement efforts.

**F. Good Faith Effort to Abate.** When the CSHO believes that the employer has made good faith efforts to correct the violation and has good reason to believe that it was fully abated, the TOSHA Administrator may reduce or eliminate the daily proposed penalty that would otherwise be justified.

**VII. Repeated Violations.** T.C.A. §50-3-405(b) provides that, for a repeated violation of the Act, an employer may be assessed a civil penalty of not more than seventy thousand dollars ($70,000) for each violation. (See Chapter 4.VII.D. concerning time limitations for repeated violations).

**A. Gravity-Based Penalty Factors.** Each violation shall be classified as serious or non-serious. A gravity-based penalty shall then be calculated for repeated violations based on facts noted during the current inspection. The appropriate adjustment factors for size based upon the current inspection shall be applied.

**B. Penalty Increase Factors**. The amount of the increased penalty to be assessed for a repeated violation shall be determined by the size of the employer.

**1. Smaller Employers**. For employers with two hundred fifty (250) or fewer employees, the gravity-based penalty shall be doubled for the first repeated violation and multiplied by five (5) if the violation has been cited twice before. If the TOSHA Administrator determines that it is appropriate to achieve the necessary deterrent effect, the gravity-based penalty may be multiplied by ten (10).

**2.** **Larger Employers.** For employers with more than two hundred fifty (250) employees, the gravity-based penalty shall be multiplied by five (5) for the first repeated violation and multiplied by ten (10) if the violation has been cited twice before.

**C.** **Non-serious, No Initial Penalty.** For a repeated non-serious violation that otherwise would have no initial penalty, a penalty of two hundred dollars ($200) shall be assessed for the first repeated violation, five hundred dollars ($500) if the violation has been cited twice before, and one thousand dollars ($1,000) for a third repetition.

**D.** **Regulatory Violations.** For repeated instances of regulatory violations (see C.8.), the initial penalty (of current inspection) shall be doubled for the first repeated violation and multiplied by five (5) if the violation has been cited twice before. If the TOSHA Administrator determines that it is appropriate to achieve the necessary deterrent effect, the initial penalty may be multiplied by ten (10).

**VIII.** **Willful Violations.** T.C.A. §50-3-405(b) provides that, for a willful violation of the Act, an employer may be assessed a civil penalty of not more than seventy thousand dollars ($70,000) for each violation.

**A.** **Gravity and Penalty Factors**. Each violation shall be classified as serious or non-serious. After determining the gravity of the violation, a gravity-based penalty shall be determined based on the facts noted during the inspection. The adjustment factors for size and history may be applied.

**B.** **Serious Violations.** For willful serious violations, the adjusted gravity-based penalty shall be multiplied by ten (10).

**1.** In no case shall the proposed penalty be less than twenty five thousand dollars ($25,000) except for small employers with ten (10) or fewer employees. In such case the minimum proposed penalty shall not be less than five thousand dollars ($5,000).

**2.** The TOSHA Administrator may assess a higher penalty (up to the statutory maximum of seventy thousand dollars ($70,000)) or a lower penalty than that calculated in accordance with the previous paragraph, upon consideration of such factors as the degree of willfulness involved in the violation and the achievement of an appropriate deterrent effect. The reasons for such action shall be documented in the case file.

**C.** **Non-serious Violations.** For willful non-serious violations, the adjusted gravity-based penalty shall be multiplied by ten (10). A minimum penalty of five thousand dollars ($5,000) shall be assessed.

**D.** **No Gravity-Based Penalty.** In those instances where a gravity-based penalty does not result from the calculation based on current facts for willful non-serious violations, a minimum penalty of five thousand dollars ($5,000) shall be assessed.

**IX.** **Penalty and Citation Policy for Regulatory Requirements. T.C.A.** Section 50-3-406 provides that any employer who violates any of the posting requirements shall be assessed a civil penalty of up to $7,000 for each violation (this includes recordkeeping violations). The following policy and procedure document must also be consulted for an in-depth review of these policies: *CPL 02-00-111, Citation Policy for Paperwork and Written Program Requirement Violations, issued November 27, 1995*. Gravity-based penalties for regulatory violations, including posting requirements, shall be reduced for size, history and good faith.

**A.** **Posting Requirements Under Rule 0800-01-04-.03.** Penalties for violation of posting requirements shall be proposed as follows:

**1.** **Failure to Post the TOSHA Notice (Poster).** A citation for failure to post the TOSHA Notice is warranted if:

a. The pattern of violative conditions for a particular establishment demonstrates a consistent disregard for the employer's responsibilities under the Act, and

b. Interviews show that employees are unaware of their rights under the Act; or

c. The employer has been previously cited or advised by TOSHA of the posting requirement.

If the criteria above are met and the employer has not displayed (posted) the notice furnished by the Tennessee Occupational Safety and Health Administration as prescribed in rule 0800-01-04-.03(1), an other-than-serious citation shall normally be issued. The gravity-based penalty for this alleged violation shall be $1,000.

**2. Failure to Post a Citation - Rule 0800-01-04-.17.** If an employer received a citation that was not posted as prescribed in Rule 0800-01-04-.17, an other-than-serious citation shall normally be issued. The gravity-based penalty shall be $3,000. For information regarding the *OSHA-300A* form, see CPL 02-00-135, Recordkeeping Policies and Procedures Manual.

**B. Advance Notice of Inspection – Rule 0800-01-04-.07.** When an employer has received advance notice of an inspection and fails to notify the authorized employee representative as required by rule 0800-01-04-07(2), an other-than-serious citation shall be issued. The violation shall have a gravity-based penalty of $2,000.

**C. Abatement Verification Regulation Violations – Rule 0800-01-04-.23.**

**1. General.**

a. The penalty provisions of the TOSH Act apply to all citations issued under this regulation. Only the reduction factor for size shall apply when assessing penalties.

b. No "Good Faith" or "History" reduction shall be given to employers when proposing penalties for any abatement verification rule 0800-01-04-.23 violations. Only the reduction factor for "Size" shall apply.

c. See Chapter 7, *Post-Citation Inspection Procedures and Abatement Verification*, for detailed guidance.

**2. Penalty for Failing to Certify Abatement.**

a. A penalty for failing to submit abatement certification documents, rule 0800-01-04-.23(4), shall be $1,000, reduced only for size.

b. A penalty for failure to submit abatement verification documents will not exceed the penalty for the entire original citation.

**3. Penalty for Failing to Notify and Tagging.** Penalties for not notifying employees and tagging movable equipment rule 0800-01-04-.23 [paragraphs (8)(a), (8)(b), (8)(d), (10)(a), (10)(b), (10)(c), (10)(e) and (10)(f)] will follow the same penalty structure (gravity-based penalty of $3,000) as for Failure to Post a Citation

**D. Injury and Illness Records and Reporting under Rule 0800-01-03.**

**1.** Rule 0800-01-03 violations are always other-than-serious. Multiple recordkeeping violations of the same specific rule will be listed as multiple instances on the violation worksheet. All recordkeeping violations will be grouped and assessed a gravity based penalty of $1,000.

**2.** Repeated and Willful penalty policies in paragraphs VII. and VIII., respectively, of this Chapter, may be applied to recordkeeping violations.

**X. Failure to Provide Access to Medical and Exposure Records – §1910.1020. Proposed Penalties.** If an employer is cited for failing to provide access to records as required under §1910.1020 for inspection and copying by any employee, former employee, or authorized representative of employees, a gravity-based penalty of $1,000 shall normally be proposed for each record (i.e., either medical record or exposure record, on an individual employee basis). A maximum gravity-based penalty of $7,000 may be proposed for such violations. See *CPL 02-02-072, Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records.*

**EXAMPLE 6-1**: If the evidence demonstrates that an authorized employee representative requests both exposure and medical records for three employees and the request was denied by the employer, a citation would be issued for six instances (i.e., one medical record and one exposure record (total two) for each of three employees) of a violation of §1910.1020, with a gravity-based penalty of $6,000.

**XI. Criminal Penalties.**

**A.** T.C.A. §§50-3-501 through 50-3-503 provide for criminal penalties in the following cases:

**1.** Willful violations causing death. (T.C.A. §50-3-503)

**2.** Giving unauthorized advance notice. (T.C.A. §50-3-501)

**3.** Giving false information (T.C.A. §50-3-502)

**B.** Criminal penalties are imposed by the courts after trials and not by the Commissioner of Labor and Workforce Development through the Administrator, Division of Occupational Safety and Health, or the Tennessee Occupational Safety and Health Review Commission.

**XII. Handling Monies Received from Employers**.

**A. Responsibility of the TOSHA Administrator**. Pursuant to its statutory authority, it is TOSHA policy to collect all TOSHA penalties owed to the State of Tennessee. The TOSHA Administrator is responsible to assure the policy contained in the TOSHA Payments Manual is followed. Additionally the TOSHA Administrator or designee will:

**1.** Inform employers of TOSHA's debt collection procedures;

**2.** Collect assessed penalties from employers;

**3.** Report penalty amounts collected and those due;

**4.** Calculate interest and other charges on overdue penalty amounts;

**5.** Refer cases with uncollected penalties greater than 180 days past due to the Tennessee Attorney General's Office of Collection;

**6.** Transfer collected monies in accordance with the payments manual; and

**7.** Review bankruptcy documents received by the Division.

**B. Debt Collection Procedures - Policy. T.C.A. Section 50-3-107** provides for the assessment of interest, administrative charges, and additional costs for nonpayment of debts arising under the TOSHA program. Penalties assessed by TOSHA are considered as debts. It is TOSHA policy to exercise the authority provided under the Act to assess additional charges on delinquent debts. It is also TOSHA policy to forbear collection of penalties until the employer has exhausted its right to challenge them administratively, as well as in all legal forums. The date when penalties become due and payable depends on whether or not the employer contests.

**1. Uncontested Penalties**. When citations and/or proposed penalties are uncontested, the penalties are due and payable 30 calendar days following the employer's receipt of the Citation and Notification of Penalty or, in the case of Informal Settlement Agreements, 30 calendar days following the employer's receipt of the Amended Citation and Notification of Penalty.

**Contested Penalties.** When citations and/or proposed penalties are contested, the date penalties are due and payable will depend upon whether the case is resolved by a settlement agreement, Review Commission decision, or a court judgment. See Chapter 15, Section XIII., Citation Final Order Dates, for additional information.).

## XIII. Violation-by-Violation (Egregious) Penalty Policy

**A. Penalty Procedure.** Each instance of noncompliance shall be considered a separate violation with individual proposed penalties for each violation. This procedure is known as the egregious or violation-by-violation penalty procedure.

**B. Case Handling.** Such cases shall be handled in accordance with CPL 02-00-080, *Handling of Cases to be Proposed for Violation-By-Violation Penalties.*

**C. Calculation of Penalties**. Penalties calculated using the violation-by-violation policy shall not be proposed without the approval of the TOSHA Administrator.

# Chapter 7
# POST-CITATION PROCEDURES AND ABATEMENT VERIFICATION

I. **Contesting Citations, Notifications of Penalty or Abatement Dates**. CSHOs shall advise the employer that the citation, the penalty and/or the abatement date may be contested in cases where the employer does not agree to the citation, penalty or abatement date or any combination of these.

**A. Notice of Contest.** CSHOs shall inform employers that if they intend to contest, the Area Supervisor must be notified in writing and such notification must be received no later than the 20th calendar day after receipt of the citation and notification of penalty, otherwise the citation becomes a final order. The agency has no authority to modify the contest period. Employers may also be apprised that their notice of contest can be sent electronically via email to the Area Supervisor within the 20 calendar day period. It shall be emphasized that oral notices of contest do not satisfy the requirement to give written notification.

*NOTE: Upon receipt of all electronic notices of contest, the Area Supervisor shall forward copies of the email notice to the Section Manager. Contest emails are not to be electronically forwarded to the Commission or TOSHA Attorney. Area Offices are encouraged to establish procedures to ensure ready access to email accounts designated to receive notices of contest to ensure the timely transmission of copies to the Section Manager. TOSHA's acceptance of notices of contest via email shall not be interpreted to mean that the agency has consented to, or accepted, the electronic service of documents in other matters where the acceptance is not specifically requested.*

1. An employer's Notice of Intent to Contest must clearly state what is specifically being contested. It must identify which item(s) of the citation, penalty, the abatement date, or any combination of these is being objected to. CSHOs shall ask the employer to read the TOSHA Closing Conference Guide pamphlet for additional details.

   a. If the employer only requests a later abatement date and there are valid grounds to consider the request, the Area Supervisor should be contacted. The TOSHA Administrator or Assistant TOSHA Administrator may issue an amended citation changing an abatement date prior to the expiration of the 20 calendar day period.

   b. If the employer contests only the penalty or some of the citation items, all uncontested items must still be abated by the dates indicated on the citation and the corresponding penalties paid within 30 days of notification.

2. CSHOs shall inform the employer that the Act provides that employees or their authorized representative(s) have the right to contest in writing any or all of the abatement dates set for a violation if they believe the date(s) to be unreasonable.

**B. Contest Process**. The CSHO shall explain to the employer that when a Notice of Intent to Contest is properly filed (i.e., received in the Area Office described in the note to A.1. of this chapter), the Area Supervisor is required to forward the notice to the Section Manager who will forward the case to the TOSHA Attorney.

TOSHA will normally cease all case related investigatory activities once an employer has filed a notice of contest. Any action relating to a contested case must first have the concurrence of the TOSHA Attorney.

II. **Informal Conferences**.

**A. General.**

1. Pursuant to Rule 0800-01-04-.20, the employer, any affected employee, or the employee representative may request an informal conference for the purpose of discussing any issues raised by an inspection, citation, notice of proposed penalty, or notice of intention to contest.

2. The informal conference will be conducted within the 20 calendar day contest period. The conference or any request for such a conference shall not operate as a stay of the 20 calendar day contest period.

3. If the employer's intent to contest is not clear, the Area Supervisor will contact the employer for clarification.

4. Informal conferences may be held by any means practical, but meeting in person is preferred.

**B. Assistance of Counsel.** In the event that an employer is bringing its attorney to an informal conference, the Area Supervisor through the Section Manager may contact the TOSHA Attorney's Office and ask for the assistance of counsel.

**C. Opportunity to Participate.**

1. If an informal conference is requested by the employer, an affected employee or employee representative shall be afforded the opportunity to participate. If the conference is requested by an employee or an employee representative, the employer shall be afforded an opportunity to participate.

2. If any party objects to the attendance of another party or the Area Supervisor believes that a joint informal conference would not be productive, separate informal conferences may be held.

3. During the conduct of a joint informal conference, separate or private discussions will be permitted if either party so requests.

**D. Notice of Informal Conferences**. The Area Supervisor shall notify the Section Manager of the date, time and location of the informal conference. In addition, the Case File Diary Sheet should indicate the date of the informal conference. An informal conference request memo shall be included in the case file.

**E. Posting Requirement.**

1. The Area Supervisor will ask the employer at the beginning of the informal conference whether the "Notice To Employees of Informal Conference" form that was included in the citation package indicating the date, time, and location of the conference has been posted as required.

2. If the employer has not posted the form, the Area Supervisor may postpone the informal conference until such action is taken.

**F. Conduct of the Informal Conference**. The informal conference will be conducted in accordance with the following guidelines:

1. **Conference Subjects.**

a. Purpose of the informal conference;

b. Rights of participants;

c. Contest rights and time constraints;

d. Limitations, if any;

e. Potential for settlements of citations; and

f. Other relevant information (e.g., if no employee or employee representative has responded, whether the employer has posted the notification form regarding the informal conference, etc.).

2. **Subjects Not to be Addressed**.

a. No opinions regarding the legal merits of an employer's case shall be expressed during the informal conference.

b. There should be no discussion with employers or employee representatives concerning the potential for referral of fatality inspections to the District Attorney General for criminal prosecution under the Act.

**3. Closing Remarks.**

a. At the conclusion of the conference, all main issues and potential courses of action will be summarized and documented.

b. A copy of the summary, together with any other relevant notes of the discussion made by the Area Supervisor, will be placed in the case file.

III. **Petition for Modification of Abatement Date (PMA).** An employer may file a petition for modification of abatement date when it has made a good faith effort to comply with abatement requirements, but such abatement has not been completed due to circumstances beyond its control. See Rule 0800-01-04-.15(7). If the employer requests additional abatement time after the 20 calendar day contest period has passed, the following procedures for PMAs are to be observed:

**A.** **Filing**. A PMA must be filed in writing with the Area Supervisor no later than the close of the next working day following the date on which abatement was originally required.

1. If a PMA is submitted orally, the employer shall be informed that TOSHA cannot accept an oral PMA and that a written petition must be mailed by the end of the next working day after the abatement date. If there is not sufficient time to file a written petition, the employer shall be informed of the requirements below for late filing of the petition.

2. A late petition may be accepted only if accompanied by the employer's statement of exceptional circumstances explaining the delay.

**B.** **Where Filing Requirements Are Not Met**. If the employer's written PMA does not meet all the requirements of Rule 0800-01-04-.15(7)(b)1. through 5., the employer shall be contacted within 10 working days and notified of the missing elements. A reasonable amount of time for the employer to respond shall be specified during this contact.

1. If no response is received or if the information returned is still insufficient, a second attempt (by telephone or in writing) shall be made. The employer shall be informed that if it fails to respond in a timely or adequate manner, the PMA will not be granted.

2. If the employer responds satisfactorily by telephone and the Area Supervisor determines that the requirements for a PMA have been met, that finding shall be documented in the case file.

3. Although TOSHA policy is to handle PMAs as expeditiously as possible, there may be cases where the Area Supervisor's decision may be delayed because of deficiencies in the PMA, the need to conduct a monitoring inspection and/or a request for involvement by the Section Manager.

**C.** **Approval of PMA**. After the expiration of 20 calendar days following the posting of a PMA in the workplace, the Area Supervisor shall agree with or object to the request within 10 working days. In the absence of a timely objection, the PMA shall be deemed granted even if not explicitly approved. The following action shall be taken:

1. If the PMA requests an abatement date that is two years or less from the issuance date of the citation, the Area Supervisor has the authority to approve or object to the petition.

2. Any PMA requesting an abatement date that is more than two years from the issuance date of the citation requires the approval of the TOSHA Administrator.

3. If the PMA is approved, the Area Supervisor shall notify the employer and the employee representatives by letter.

4. The Section Manager or TOSHA Administrator (as appropriate) after consultation with the TOSHA Attorney, shall object to a PMA where the evidence supports non-approval (e.g., employer has taken no meaningful abatement action at all or has otherwise exhibited bad faith). In such cases, all relevant documentation shall be sent to the Review Commission in accordance with Rule 0800-01-04-.15(7)(d). Both the employer and the employee representatives shall be notified of this action by letter, with return receipt requested.

   a. Letters notifying the employer or employee representative of the objection shall be mailed on the same date that the agency objection to the PMA is sent to the Review Commission.

   b. When appropriate, after consultation with the TOSHA Attorney, a failure to abate notification may be issued in conjunction with the objection to the PMA.

**D.** **Objection to PMA**. Affected employees or their representatives may file a written objection to an employer's PMA with the Area Supervisor within 20 calendar days of the date of posting of the PMA by the employer or its service upon an authorized employee representative.

1. Failure to file such a written objection with the 20 calendar day period constitutes a waiver of any further right to object to the PMA.

2. If an employee or an employee representative objects to the extension of the abatement date, all relevant documentation shall be sent to the Review Commission.

   a. Confirmation of this action shall be mailed (return receipt requested) to the objecting party as soon as it is accomplished.

   b. Notification of the employee objection shall be mailed (return receipt requested) to the employer on the same day that the case file is forwarded to the Commission.

IV. **TOSHA's Abatement Verification Rule, 0800-01-04-.23.**

## A. Important Terms and Concepts.

1. **Abatement.**

   a. Abatement means action by an employer to comply with a cited standard or regulation or to eliminate a recognized hazard identified by TOSHA during an inspection.

   b. For each inspection TOSHA shall open an employer-specific case file. The case file remains open throughout the inspection process and is not closed until the Agency is satisfied that abatement has occurred. If abatement was not completed, annotate the circumstances or reasons in the case file and enter the proper code in the OIS.

   c. Employers are required to verify in writing that they have abated cited conditions, in accordance with Rule 0800-01-04-.23.

2. **Abatement Verification**. Abatement verification includes abatement certification, documents, plans, and progress reports.

3. **Abatement Certification**. Employers must certify that abatement is complete for each cited violation. The written certification must include: the employer's name and address; the inspection number; the citation and item numbers; a statement that the information submitted is accurate; signature of the employer or employer's authorized representative; the date and method of abatement for each cited violation; and a statement that affected employees and their representatives have been informed of the abatement.

4. **Abatement Documents**. Documentation submitted must establish that abatement has been completed, and include evidence such as the purchase or repair of equipment, photographic or video evidence of abatement or other written records verifying correction of the violative condition.

5. **Affected Employee**. Affected employee means those employees who are exposed to the hazards(s) identified as violations(s) in a citation.

6. **Final Order Dates**.

   a. **Uncontested Citation Item**. For an uncontested citation item, the final order date is the day following the twentieth calendar day after the employer's receipt of the citation.

   b. **Contested Citation Item**. For a contested citation item, the final order date is as follows:

      (i) **Citation/Notice of Penalty Resolved by Formal Settlement Agreement (FSA)**. The Citation/Notice of Penalty becomes final 60 days after docketing of the TOSHRC's Order approving the parties' stipulation and settlement agreement.

      (ii) **Commission Decision Review by the Chancery Court**. The Chancery Court's decision becomes final after 60 days unless that decision is appealed to the Tennessee Court of Appeals.

(iii) The date on which an appeals court issues a decision affirming the violation in a case in which a final order of Review Commission has been stayed.

c. **Citation/Notice of Penalty Resolved by Informal Settlement Agreement (ISA)**. Because there is no contest of the citation, an ISA typically becomes final, with penalties due and payable, thirty (30) days after receipt of the Amended Citation and Notification of Proposed Penalty. (An ISA is effective upon signature by both the TOSHA Supervisor/Manager and the employer representative as long as the contest period has not expired).

**7. Abatement Dates.**

a. **Uncontested Citations**. For uncontested citations, the abatement date is the later of the following dates:

- The abatement date identified in the citation;
- The extended date established as a result of an employer's filing for a Petition for Modification of Abatement (PMA);
- The abatement date has been extended due to an amended citation; or
- The date established by an informal settlement agreement.

b. **Contested Citations**. For contested citations for which the Review Commission has issued a final order, the abatement date is the later of the following dates:

- The date identified in the final order for abatement;
- Where there has been a contest of a violation or abatement date (not penalty), the date computed by adding the period allowed in the citation for abatement to the final order date; or
- The date established by a formal settlement agreement.

c. **Contested Penalty Only**. Where an employer has contested only the proposed penalty, the abatement period continues to run unaffected by the contest. The abatement period is subject to the time periods set forth above.

8. **Movable Equipment**.

a. Movable equipment means a hand-held or non-hand-held machine or device, powered or non-powered, that is used to do work and is moved within or between worksites.

b. Hand-held equipment is equipment that is hand-held when operated and can generally be picked up and operated with one or two hands, such as a hand grinder, skill saw, portable electric drill, nail gun, etc.

**9. Worksite.**

a. For the purpose of enforcing the Abatement Verification regulation, the worksite is the physical location specified within the "Alleged Violation Description" of the citation.

b. If no location is specified, the worksite shall be the inspection site where the cited violation occurred.

**B. Written Certification**. The Abatement Verification Rule 0800-01-04-.23, requires those employers who have received a citation(s) for violation(s) of the Act to certify in writing that they have abated the hazardous condition for which they were cited and to inform affected employees of their abatement actions.

**C. Verification Procedures**. The verification procedures to be followed by an employer depend on the nature of the violation(s) identified and the employer's abatement actions. The abatement verification regulation establishes requirements for the following:

1. Abatement Certification
2. Abatement Documentation
3. Abatement Plans
4. Progress Reports
5. Tagging for Movable Equipment

**D. Supplemental Procedures**. Where necessary, TOSHA supplements these procedures with follow-up inspections and onsite monitoring inspections. For additional information see Section XII of this chapter, OnSite Visits: Procedures for Abatement Verification and Monitoring.

**E. Requirements**. Except for the application of warning tags or citations on movable equipment (Rule 0800-01-04-.23(10)), the abatement verification regulation does not impose any requirements on the employer until a citation item has become a final order. For movable hand-held equipment, the warning tag or citation must be attached immediately after the employer receives the citation. For other movable equipment, the warning tag or citation must be attached prior to moving the equipment within or between worksites.

## V. Abatement Certification.

**A. Minimum Level**. Abatement certification is the minimum level of abatement verification and is required for all violations once they become final orders. An exception exists where the CSHO observed abatement during the onsite portion of the inspection and the violation is listed on the citation as "Corrected During Inspection (CDI)." See Paragraph VI.D. of this chapter, CSHO Observed Abatement.

**B. Certification Requirements**. The employer's written certification that abatement is complete must include the following information for each cited violation:

1. The date and method of abatement;
2. A statement that affected employees and their representatives have been informed of the abatement;
3. The employer's name and address;
4. The inspection number to which the submission relates;

5. The citation and item numbers to which the submission relates;

6. A statement that the information submitted is accurate; and

7. The signature of the employer or the employer's authorized representative.

8. A non-mandatory example of an abatement certification letter is available in Appendix A of the Abatement Verification Regulation (Rule 0800-01-04-.23).

**C. Certification Timeframe**.

1. All citation items which have become final orders, regardless of their characterizations, require written abatement certification within 10 calendar days of the abatement date.

2. A PMA received and processed in accordance with the guidance of the FOM will suspend the 10-day time period for receipt of the abatement certification for the item for which the PMA is requested.

   a. Thus, no citation will be issued for failure to submit the certification within 10 days of the abatement date.

   b. If the PMA is denied, the 10-day time period for submission to TOSHA begins on the day the employer receives notice of the denial.

VI. **Abatement Documentation**. More extensive documentation of abatement is required for the most serious violations. When a violation requires abatement documentation, in addition to certifying abatement, the employer must submit documents demonstrating that abatement is complete.

**A. Required Abatement Documentation**. Pursuant to Rule 0800-01-04-.23, documentation of abatement is required for the following:

1. Willful violations;

2. Repeat violations; and

3. Serious violations where TOSHA determines that such documentation is necessary as indicated on the citation. For further information see Paragraph VI.C. of this chapter, Abatement Documentation for Serious Violations.

**B. Adequacy of Abatement Documentation**.

1. Abatement documentation must be accurate and describe or portray the abated condition adequately. It may be submitted in electronic form, if approved by the Area Supervisor.

2. The abatement regulation does not mandate a particular type of documentary evidence for any specific cited conditions.

3. The adequacy of the abatement documentation submitted by the employer will be assessed by TOSHA using the information available in the citation and the Agency's knowledge of the employer's workplace and history.

4. Examples of documents that demonstrate that abatement is complete include, but are not limited to:

   a. Photographic or video evidence of abatement;

b. Evidence of the purchase or repair of equipment;

c. Evidence of actions taken to abate the hazard;

d. Bills from repair services;

e. Reports or evaluations by safety and health professionals describing the abatement of the hazard or a report of analytical testing;

f. Documentation from the manufacturer that the article repaired is within the manufacturer's specifications;

g. Records of training completed by employees if the citation is related to inadequate employee training; and

h. A copy of program documents if the citation was related to a missing or inadequate program, such as a deficiency in the employer's respirator or hazard communication program.

5. Abatement documentation (photos, employer programs, etc.) shall be retained in the case file.

**C. Abatement Documentation for Serious Violations**.

**1. High Gravity Serious Violations.**

a. TOSHA policy is generally that all high gravity serious violations (P/S Quotient 7, 8, 9 or 10) will require abatement documentation.

b. Where, in the opinion of the Area Supervisor and with the Section Manager approval, abatement documentation is not required for a high gravity serious violation, the reasons for this must be set forth in the case file.

2. **Moderate or Low Gravity Serious Violations.** Moderate or low gravity serious violations should not normally require abatement documentation, except that the Area Supervisor will require evidence of abatement for moderate and low gravity serious violations under the following circumstances:

a. If the establishment has been issued a citation for a willful violation or a failure-to-abate notice for any standard which has become a final order in the previous three years; or

b. If the employer has any history of a violation that resulted in a fatality or an OSHA-300 log entry indicating serious physical harm to an employee in the past three years. The standard being cited must be similar to the standard cited in connection with the fatality or serious injury or illness.

**D. CSHO Observed Abatement**.

1. Pursuant to Rule 0800-01-04-.23(4)(b) employers are not required to certify abatement within 24 hours for violations which they promptly abate during the onsite portion of the inspection, and observed by the CSHO.

a. Area Supervisors may use their discretion in extending the "24 hour" time limit to document abated conditions during the inspection.

b. Observed abatement will be documented on the Violations Summary Form (violation worksheet and/or violation worksheet(IH)), for each violation and must include the date and method of abatement.

2. If the observed abatement is for a violation that would normally require abatement documentation by the employer, the documentation in the case file must also indicate that abatement is complete. Where suitable, the CSHO may use photographs or video evidence. For additional information regarding adequacy of abatement documentation, see Paragraph VI.B. of this chapter, Adequacy of Abatement Documentation.

3. Notations stating "Corrected during inspection" or "Employer has abated all hazards" shall not be made on the citation in cases where there is evidence of a continuing violative practice by an employer (i.e., failure to provide fall protection is a recurring condition based on citation history or other indications suggesting widespread violations of the same or similar standards at other establishments or construction worksites).

## VII. Monitoring Information for Abatement Periods Greater than 90 Days.

**A. Abatement Periods Greater than 90 Days**. For abatement periods greater than 90 calendar days, the regulation allows the Area Supervisor flexibility in either requiring or not requiring monitoring information.

1. The requirement for abatement plans and progress reports must be specifically associated to the citation item to which they relate.

2. Progress reports may not be required unless abatement plans are specifically required.

3. Note that Paragraphs (6) and (7) of Rule 0800-01-04-.23 have limits: the Area Supervisor is not allowed to require an abatement plan for abatement periods less than 91 days or for citations characterized as other-than-serious.

4. The regulation places an obligation on employers, where necessary, to identify how employees are to be protected from exposure to the violative condition during the abatement period. One way of ensuring that interim protection is included in the abatement plan is to note this requirement on the citation. See Rule 0800-01-04-.23, Non-Mandatory Appendix B, for a sample of an Abatement Plan and Progress Report.

**B. Abatement Plans.**

1. The Area Supervisor may require an employer to submit an abatement plan for each qualifying cited violation.

   a. The requirement for an abatement plan must be indicated in the citation.

   b. The citation may also call for the abatement plan to include interim measures.

2. Within 25 calendar days from the final order date, the employer must submit an abatement plan for each violation that identifies the violation and the steps to be taken to achieve abatement. The abatement plan must include a schedule for completing the abatement and, where necessary, the methods for protecting employees from exposure to the hazardous conditions in the interim until the abatement is complete (Rule 0800-01-04-.23(6)(b)).

3. In cases where the employer can not prepare an abatement plan within the allotted time, a PMA must be submitted by the employer to amend the abatement date.

**C. Progress Reports.**

1. An employer that is required to submit an abatement plan may also be required to submit periodic progress reports for each cited violation. In such cases, the citation must indicate:

   a. That periodic progress reports are required and the citation items for which they are required;

   b. The date on which an initial progress report must be submitted, which may be no sooner than 30 calendar days after the due date of an abatement plan;

   c. Whether additional progress reports are required; and

   d. The date(s) on which additional progress reports must be submitted.

2. For each violation, the progress report must identify in a single sentence if possible, the action taken to achieve abatement and the date the action was taken. There is nothing in this policy or the regulation prohibiting progress reports as a result of settlement agreements.

**D. Special Requirements for Long-Term Abatement.**

1. Long-term abatement is abatement which will be completed more than one year from the citation issuance date.

2. The Area Supervisor must require the employer to submit an abatement plan for every violation with an abatement date in excess of one year.

3. Progress reports are mandatory and must be required at a minimum every six months. More frequent reporting may be required at the discretion of the Area Supervisor.

## VIII. Employer Failure to Submit Required Abatement Certification.

**A. Actions Preceding Citation for Failure to Certify Abatement.**

1. If abatement certification, or any required documentation, is not received within 13 calendar days after the abatement date and the contest period has past (the regulation requires filing within 10 calendar days after the abatement date; and another 3 calendar days is added for mailing). The Area Supervisor will assure the following procedures are followed:

   a. Remind the employer by telephone of the requirement to submit the material and tell the employer that a citation will be issued if the required documents are not received within 7 calendar days after the telephone call.

   b. During the conversation with the employer, determine why it has not complied and document all communication efforts in the case file. Discuss TOSHA's PMA policy and explain that a late petition to modify the abatement date can be accepted only if accompanied by the employer’s statement of exceptional circumstances explaining the delay.

   c. Issue a follow-up letter to the employer the same day as the telephone call.

   d. The employer may be allowed to respond via fax or email where appropriate.

2. If the certification and/or documentation are not received within the next 7 calendar days, a single other-than-serious citation will be issued.

3. Normally citations for failure to submit abatement certification for violations of Rule 0800-01-04-.23 shall not be issued until the above procedures have been followed and the employer has been provided additional opportunity to comply. These pre-citation procedures also apply when abatement plans or progress reports are not received within 13 days of the due date.

**B. Citation for Failure to Certify.**

1. Citations for failure to submit abatement verification (certification, documentation, abatement plans or progress reports) can be issued without formal follow-up activities by following the procedures identified in the following paragraphs.

2. A single other-than-serious citation will be issued combining all the individual instances where the employer has not submitted abatement certification and/or abatement documentation.

   a. This “other than serious” citation will be issued under the same inspection number which contained the original violations cited.

   b. The abatement date for this citation shall be set 30 days from the date of issuance.

3. For those situations where the abatement date falls within the 20 day informal conference time period, and an informal conference request is likely, enforcement activities should be delayed for these citations until it is known if the citation's characterization or abatement period is to be modified.

4. For those rare instances where the reminder letter is returned to the Area Office by the Post Office as undeliverable, telephone contact efforts fail, and all other reasonable efforts have been exhausted, the Area Supervisor, with the approval of the Section Manager, has the discretion to stop further efforts to locate the employer and document in the case file the reason for no abatement certification.

**C. Certification Omissions**.

1. An initial minor or non-substantive omission in an abatement certification (e.g., lack of a definitive statement stating that the information being submitted is accurate) should be considered a de minimis condition of the regulation.

2. If there are minor deficiencies, such as omitting the inspection number, signature or date, the employer should be contacted by telephone to verify that the documents received were the ones they intended to submit. If so, the date stamp of the Area Office can serve as the date on the document.

3. A certification with an omitted signature should be returned to the employer to be signed. A signed certificate received by telephone facsimile (FAX) would be acceptable.

**D. Penalty Assessment for Failure to Certify.** The penalty provisions of the TOSH Act apply to all citations issued under this regulation. See Chapter 6, *Penalties and Debt Collection*, for additional information.

IX. **Tagging for Movable Equipment**.

**A. Tag-Related Citations**. Tag-related citations must be observed by CSHOs prior to the issuance of a citation for failure to initially tag cited movable equipment.

1. See Rule 0800-01-04-.23, Non-mandatory Appendix C, for a sample warning tag. TOSHA must be able to prove the employer's initial failure to tag the movable equipment upon receipt of the citation.

2. Where there is insufficient evidence to support a violation of the employer's initial failure to tag or post the citation on the cited movable equipment, a citation may be issued for failure to maintain the tag or copy of the citation using Rule 0800-01-04-.23(10)(f).

**B. Equipment Which is Moved**. Tags are intended to provide an interim form of protection to employees through notification for those who may not know of the citation or the hazardous condition.

1. For non hand-held equipment, CSHOs should make every effort to be as detailed as possible when documenting the initial location where the violation occurred. This documentation is critical to the enforcement of the tagging requirement (Rule 0800-01-04-.23(10)) because the tagging provision is triggered upon *movement of* the equipment.

2. For hand-held equipment, employers must attach a warning tag or copy of the citation *immediately* after the employer's receipt of the citation. The attachment of the tag is not dependent on any *subsequent* movement of the equipment.

## X. Failure to Notify Employees by Posting Abatement Documents.

**A. Evidence**. CSHOs shall investigate and document an employer's failure to notify employees by posting abatement documents or a summary of the abatement document(s) submitted to TOSHA.

**B. Location of Posting**. Where an employer claims that posting at the location where the violation occurred would ineffectively inform employees (Rule 0800-01-04-.23(8)(b)) the employer may post the document or a summary of the document in a location where it will be readily observable by affected employees and their representatives. Employers may also communicate by other means with affected employees and their representatives regarding abatement activities.

**C. Other Communication**. The CSHO must determine not only whether the documents or summaries were appropriately posted, but also whether, as an alternative, other communication methods, such as meetings or employee publications, were used.

## XI. Abatement Verification for Special Enforcement Situations.

**A. Construction Activity Considerations**.

1. Construction activities pose situations requiring special consideration.

   a. Construction site closure or hazard removal due to completing of the structure or project will only be accepted as abatement without certification where the area office CSHO verifies the site closure/completion and where closure/completion effectively abates the condition cited.

   b. In all other circumstances, the employer must certify to TOSHA that the hazards have been abated by the submission of an abatement certification. In rare cases the verification may have to cease and the abatement action closed through cessation of work or verification with the general contractor of the site to verify abatement.

2. Equipment-related and all program-related (e.g., crane inspection, hazard communication, respirator, training, competent person, qualified persons, etc.) violations *should* require employer certification of abatement regardless of construction site closure.

3. Where the violation specified in a citation is the employer's general practice of failing to comply with a requirement (e.g., the employer routinely fails to provide fall protection at its worksites), closure/completion of the individual worksite will not be accepted as abatement.

4. For situations where the main office of the employer being cited is physically located in another Area Office jurisdiction, the Area Supervisor having the jurisdiction over the work site will proceed as if the employer's main office were in the Area Supervisor's own jurisdiction.

5. Where a follow-up inspection to verify abatement is deemed necessary, the affected Area Office(s) will determine the most efficient and mutually beneficial approach to conducting the inspection.

**B. Follow-Up Policy for Employer Failure to Verify Abatement under Rule 0800-01-04-.23.** Follow-up or monitoring inspections would not normally be conducted when evidence of abatement is provided by the employer or employee representatives.

*NOTE: For further information on extended abatement periods, see Section VII, Monitoring Information for Abatement Periods Greater than 90 Days, and Section XIII, Monitoring Inspections, both of this chapter.*

1. Where the employer has not submitted the required abatement certification or documentation within the time permitted by the regulation, the Area Supervisor has discretion to conduct a follow-up inspection.

2. Submission of inadequate documents may also be the basis for a follow-up inspection.

3. This inspection should not generally occur before the end of the original 20 day contest period except in unusual circumstances.

*NOTE: Typically a follow up inspection will be conducted within 90 calendar days of the abatement due date.*

## XII. Follow Up Inspection Procedures for Abatement Verification.

**A. Follow-Up Inspections**. The primary purpose of a follow-up inspection is to determine if the previously cited violations have been corrected.

**B. Follow-Up Procedures for Willful, Repeat, Fatality with Related Serious Violations and all Chemical and Noise Exposure Violations.**

1. A follow-up inspection will normally be conducted even if abatement of the cited violations has been verified in the following cases:

   a. Inspections that results in violations classified as willful or repeat.

   b. Fatality/catastrophe inspections that contain serious violations related to the event.

c. All health inspections with chemical and noise exposures that result in citations.

2. The primary purpose of follow-up inspections is to assess both whether the cited violation(s) were abated and whether the employer is committing similar violations.

3. If there is a compelling reason not to conduct a follow-up inspection, the reason must be documented in the file.

*NOTE: Typically a follow up inspection will be conducted within 90 calendar days of the abatement due date.*

**C. Initial Follow-Up**.

1. The initial follow-up is the first follow-up inspection after issuance of the citation.

2. If a violation is found not to have been abated, the CSHO shall inform the employer that the employer is subject to a Notification of Failure to Abate Alleged Violation and proposed additional daily penalties while such failure or violation continues.

3. Failure to comply with enforceable interim abatement dates involving multi-step abatement shall be subject to a Notification of Failure to Abate Alleged Violation.

4. Where the employer has implemented some controls, but the control measures were inadequate during follow-up monitoring, and other technology was available which would have brought the process into compliance, a Notification of Failure to Abate Alleged Violation normally shall be issued. If the employer has exhibited good faith, a late PMA for extenuating circumstances may be considered.

5. Where an apparent failure to abate by means of engineering controls is found to be due to technical infeasibility, no failure to abate notice shall be issued; however, if proper administrative controls, work practices or personal protective equipment are not utilized, a Notification of Failure to Abate Alleged Violation shall be issued.

**D. Second Follow-Up**.

1. Any subsequent follow-up after the initial follow-up inspection dealing with the same violations is considered a second follow-up.

   a. After the Notification of Failure to Abate Alleged Violation has been issued, the Area Supervisor shall allow a reasonable time for abatement of the violation before conducting a second follow-up. The employer must ensure that employees are adequately protected by other means until the violations are corrected.

   b. If the employer contests the proposed additional daily penalties, a follow-up inspection shall still be scheduled to ensure correction of the original violation.

2. If a second follow-up inspection reveals the employer still has not corrected the original violations, a second Notification of Failure to Abate Alleged Violation with additional daily penalties shall be issued if the Area Supervisor, after consultation with the Section Manager, TOSHA Administrator and TOSHA Attorney, believes it to be appropriate.

3. If a Notification of Failure to Abate Alleged Violation and additional daily penalties are not to be proposed because of an employer's flagrant disregard of a citation or an item on a citation, the Area Supervisor shall immediately contact the TOSHA Administrator, in writing, detailing the circumstances so the matter can be referred to the TOSHA Attorney for action.

**E.** **TOSH Act Section 50-3-401(a)(1)**. There may be times during the initial, or subsequent, follow-up when, because of an employer's flagrant disregard of a citation or other factors, it will be apparent that traditional enforcement actions would be inappropriate or ineffective. In such cases, a summary enforcement action shall be initiated under T.C.A. Section 50-3-401(a)(1). The Area Supervisor shall notify the TOSHA Administrator, in writing, of all the particular circumstances of the case for referral to the TOSHA Attorney.

**F.** **Follow-Up Inspection Reports**.

1. The follow up inspection file will contain the inspection narrative, violation worksheets for any additional violations identified during the follow up inspection, copies of violation worksheets from the original inspection that result in repeat citations. A memorandum for record identifying the original inspection by activity number as well as the follow up inspection by activity number shall be created and a copy placed in both the original file as well as the follow up inspection file. The applicable identification and description sections of the violation worksheet shall be used for documenting correction of willful, repeated, and serious violations and failure to correct items during follow-up inspections.

2. If Serious, Willful, or Repeat violation items were appropriately grouped in the violation worksheet in the original case file, they may be grouped on the follow-up violation worksheet; otherwise, individual violation worksheet forms shall be used for each item. The correction of other-than-serious violations may be documented in the narrative portion of the case file.

3. **Documentation of Hazard Abatement by Employer.**

   a. The hazard abatement observed by the CSHO shall be specifically described in the violation worksheet/1B(IH) form, including any applicable dimensions, materials, specifications, personal protective equipment, engineering controls, measurements or readings, or other conditions.

   b. Brief terms such as "corrected" or "in compliance" will not be accepted as proper documentation for violations having been corrected.

   c. When appropriate, this written description shall be supplemented by a photograph and/or a videotape to illustrate correction circumstances. Only the item description and identification blocks need be completed on the follow-up violation worksheet with an occasional inclusion of an applicable employer statement concerning correction under the employer knowledge section, if appropriate.

**4.** **Sampling.**

   a. CSHOs conducting a follow-up inspection to determine abatement of violations of air contaminant or noise standards, shall decide whether sampling is necessary and if so, what kind (i.e., spot sampling, short-term sampling, or full-shift sampling).

b. If there is reasonable probability that a Notification of Failure to Abate Alleged Violation will be issued, full-shift sampling is required to verify exposure limits based on an 8-hour time-weighted average.

5. **Narrative**. The CSHO must include in the narrative the findings pursuant to the inspection, along with recommendations for action. In order to make a valid recommendation, it is important to have all the pertinent factors available in an organized manner.

6. **Failure to Abate**. In the event that any item has not been abated, complete documentation shall be included on a violation worksheet.

XIII. **Monitoring Inspections**.

**A.** **General**. Monitoring inspections are conducted to ensure that hazards are being corrected and employees are being protected, whenever a long period of time is needed for an establishment to come into compliance. Such inspections may be scheduled, among other reasons, as a result of:

- Abatement dates in excess of one year.
- A petition for modification of abatement date (PMA).
- Corporate Wide Settlement Agreement.
- To ensure that terms of a permanent variance are being carried out.
- At the request of an employer requesting technical assistance granted by the Area Supervisor.

**B.** **Conduct of Monitoring Inspection** (PMAs and Long-Term Abatement). Monitoring inspections shall be conducted in the same manner as follow-up inspections. An inspection shall be classified as a monitoring inspection when a safety/health inspection is conducted for one or more of the following purposes:

- Determine the progress an employer is making toward final correction.
- Ensure that the target dates of a multi-step abatement plan are being met.
- Ensure that an employer's petition for the modification of abatement dates is made in good faith and that the employer has attempted to implement necessary controls as expeditiously as possible.
- Ensure that the employees are being properly protected until final controls are implemented.
- Ensure that the terms of a permanent variance are being carried out.
- Provide abatement assistance for items under citation.

**C.** **Abatement Dates in Excess of One Year**.

1. Monitoring visits shall be scheduled to check on progress made whenever abatement dates extend beyond one year from the issuance date of the citation.

2. These inspections shall be conducted approximately every six months, counted from the citation date, until final abatement has been achieved for all cited violations.

a. If the case has been contested, the final order date shall be used as a starting point, instead of the citation date.

b. A settlement agreement may specify an alternative monitoring schedule.

3. If the employer is submitting satisfactory quarterly progress reports and the Area Supervisor agrees after careful review, that these reports reflect adequate progress on implementation of control measures and adequate interim protection for employees, a monitoring inspection may be conducted every twelve months.

4. Such inspections shall have priority equal to that of serious formal complaints. The seriousness of the hazards requiring abatement shall determine the priority among monitoring inspections.

**D. Monitoring Abatement Efforts.**

1. The Area Supervisor shall take the steps necessary to ensure that the employer is making a good faith attempt to bring about abatement as expeditiously as possible.

2. Where engineering controls have been cited or required for abatement, a monitoring inspection shall be scheduled to evaluate the employer's abatement efforts. Failure to conduct a monitoring inspection shall be fully explained in the case file.

3. Where no engineering controls have been cited but more time is needed for other reasons not requiring assistance from TOSHA, such as delays in receiving equipment, a monitoring visit need not normally be scheduled.

4. Monitoring inspections shall be scheduled as soon as possible after the initial contact with the employer and shall not be delayed until actual receipt of the PMA.

5. CSHOs shall decide during the monitoring inspection whether sampling is necessary and, if so, to what extent (i.e., spot sampling, short-term sampling, or full-shift sampling).

6. CSHOs shall include pertinent findings in the narrative along with recommendations for action. To reach a valid conclusion when recommending action, it is important to have all the relevant factors available in an organized manner. The factors to be considered may include, but are not limited to the following:

a. Progress reports or other indications of the employer's good faith, demonstrating effective use of technical expertise and/or management skills, accuracy of information reported by the employer, and timeliness of progress reports.

b. The employer's assessment of the hazards by means of surveys performed by in-house personnel, consultants, and/or the employer's insurance agency.

c. Other documentation collected by Area Office personnel including verification of progress reports, success and/or failure of abatement efforts, and assessment of current exposure levels of employees.

d. Employer and employee interviews.

e. Specific reasons for requesting additional time including specific plans for controlling exposure and specific calendar dates.

f. Personal protective equipment.

g. Medical programs.

h. Emergency action plans.

**E. Monitoring Corporate-Wide Settlement Agreements**. Corporate-wide Settlement Agreements (CSA) extend abatement requirements to all covered locations of the company. These agreements may require baseline, periodic and follow-up monitoring.

XIV. **Notification of Failure to Abate**.

**A. Violation.** Notification of Failure to Abate an Alleged Violation (TOSHA-2B) shall be issued in cases where violations have not been corrected as required, as verified by an onsite inspection or follow-up inspection.

**B. Penalties**. Failure to abate penalties shall be applied when an employer has not corrected a previously cited violation which had become a final order.

**C. Calculation of Additional Penalties**.

1. A Gravity Based Penalty (GBP) for unabated violations is to be calculated for failure to abate a serious or other-than-serious violation on the basis of the facts noted upon re-inspection.

2. Detailed information on calculating failure to abate (FTA) penalties is included in Chapter 6, Penalties and Debt Collection.

**XV. Case File Management.**

**A. Closing of Case File Without Abatement Certification**. The closing of a case file without abatement certification(s) must be justified through a statement in the case file by the Area Supervisor or Section Manager, addressing the reason for accepting each uncertified violation as an abated citation.

**B. Review of Employer-Submitted Abatement.** Area Supervisors shall review employer-submitted abatement verification materials as soon as possible but no later than 30 days after receipt. If the review will be delayed, notify the employer that the material will be reviewed by a certain date, and that the case will be closed if appropriate, after that time.

**C. Retention of Abatement Documentation**. Abatement documentation (photos, employer programs, etc.) shall be retained in the case file in accordance with current TOSHA policy.

XVI. **Abatement Services Available to Employers**. Employers requesting abatement assistance shall be informed that TOSHA is willing to work with them even after citations have been issued.

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# Chapter 8
# SETTLEMENTS

**I.** **Settlement of Cases by Area Supervisors**. Area Supervisors are granted settlement authority and shall follow these instructions when negotiating settlement agreements.

**A.** **General**.

**1.** Except for egregious cases, or cases that affect other jurisdictions, Area Supervisors may enter into Informal Settlement Agreements with employers prior to the employer filing a written notice of contest.

*NOTE: After the employer has filed a written notice of contest, the TOSHA Administrator may proceed toward a Formal Settlement Agreement with the concurrence and participation of the TOSHA Attorney.*

**2.** Area Supervisors may amend abatement dates, reclassify violations (e.g., willful to serious, serious to other-than-serious), and modify or withdraw a penalty, a citation, or a citation item, where evidence establishes during the informal conference that the changes are justified.

**3.** Area Supervisors may actively negotiate the amount of proposed penalties, depending on the circumstances of the case and the particular improvements in employee safety and health that can be obtained.

**4.** Employers shall be informed that they are required by Rule 0800-01-04-.17 to post copies of all amendments or changes to citations resulting from informal conferences. Employee representatives must also be provided with copies of any agreements.

**5.** Cases or issues relating to potential monetary settlements shall be handled in accordance with established agency procedures.

**6.** In cases where a penalty reduction of greater than 25% is proposed, and in all willful, failure to abate and fatality related citations, the section manager shall be consulted.

**7.** In all cases an informal conference memo prepared by the Area Supervisor will be included in the case file.

**B.** **Pre-Contest Settlement (Informal Settlement Agreement)**. Pre-contest settlement discussions will generally occur during or immediately following the informal conference and prior to the expiration of the 20 calendar day contest period.

**1.** In the event that an employer is bringing an attorney to an informal conference, Area Supervisors are encouraged to contact the TOSHA Attorney and ask for the assistance of counsel.

**2.** If a settlement is reached during the informal conference, an Informal Settlement Agreement (ISA) shall be prepared and the employer will be asked to sign it. It will be effective upon signature of both the employer and the Area Supervisor (who shall sign last), provided the contest period has not expired. Both parties will date the documents on the day of actual signature.

**3.** If the employer is not present to sign the ISA, the Area Supervisor shall send the agreement to the employer for signature. After signing, the employer must return the

agreement to the Area Supervisor by hand delivery, electronic mail, or via facsimile within the 20 day contest period.

a. In every case, Area Supervisors will notify the employer that the citation will become final and unreviewable at the end of the contest period, unless the employer signs the proposed agreement or files a written notice of contest.

b. If an employer wishes to make any changes to the text of the agreement, the Area Supervisor, in consultation with the Section Manager, must agree to and authorize the proposed changes prior to the expiration of the contest period.

(i) If the changes proposed by the employer are acceptable to the Area Supervisor, the exact language written into the agreement shall be mutually agreed upon. Employers shall be instructed to incorporate the agreed-upon language into the agreement, sign it, and return to the Area Office by hand delivery, electronic mail, or via facsimile.

(ii) Annotations incorporating the exact language of any changes authorized shall be made to the retained copy of the agreement and signed and dated by the Area Supervisor.

c. Upon receipt of the ISA signed by the employer, the Area Supervisor will ensure, prior to his/her signature, that any modifications to the agreement are consistent with the notations made in the case file.

(i) In these cases, the citation record will then be updated in OIS in accordance with current procedures.

(ii) If an employer's changes substantially alter the original terms, the agreement signed by the employer will be treated as a notice of contest and handled accordingly. The employer will be informed of this as soon as possible.

d. A reasonable time will be allowed for return of the agreement from the employer.

(i) If an agreement is not received within the 20 day contest period, the Area Supervisor will presume the employer did not sign the agreement, and the citation will be treated as a final order. The Area Supervisor shall make every effort to contact the employer prior to the 20th day.

(ii) The employer will be required to certify that the informal settlement agreement was signed prior to the expiration of the contest period.

**C. Procedures for Preparing the Informal Settlement Agreement.** The ISA shall be prepared and processed in accordance with current TOSHA policies and practices. For guidance in determining final dates of settlement and Review Commission orders, see Chapter 15, Section XII, *Citation Final Order Dates*.

**D. Post-Contest Settlement (Formal Settlement Agreement).**

**1.** Following the filing of a notice of contest, the Area Supervisor shall (unless other procedures have been agreed upon) document in the Informal Conference Memo that an informal conference was conducted.

**2.** Following contestment, if a settlement is later requested by the employer, the TOSHA Attorney will communicate the proposed terms to the TOSHA Administrator for review.

**E.** **Corporate-Wide Settlement Agreement.** Corporate-wide Settlement Agreements (CSAs) may be entered into under special circumstances to obtain formal recognition by the employer of cited hazards and formal acceptance of the obligation to seek out and abate those hazards throughout all workplaces under its control.

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# Chapter 9
# COMPLAINT AND REFERRAL PROCESSING

## I. Safety and Health Complaints and Referrals.

### A. Definitions.

1. **Complaint.** Notice of an alleged safety or health hazard (over which TOSHA has jurisdiction), or a violation of the Act.

   a. **Formal Complaint.** Complaint made by a current employee or a representative of employees that meets all of the following requirements:

      (i) Asserts that an imminent danger, a violation of the Act, or a violation of a TOSHA standard exposes employees to a potential physical or health hazard in the workplace;

      (ii) Is reduced to writing or submitted on a TOSHA-7 form; and

      (iii) Is signed by at least one current employee or employee representative of the employer against whom the complaint has been alleged.

   b. **Non-formal Complaint.** Any complaint alleging safety or health violations that does not meet all of the requirements of a formal complaint identified above and does not come from one of the sources identified under the definition of Referral, below.

2. **Inspection.** An onsite examination of an employer's worksite conducted by a TOSHA compliance officer, initiated as the result of a complaint or referral, and meeting at least one of the criteria identified in the section on Criteria Warranting an Inspection, below.

3. **Inquiry.** A process conducted in response to a complaint or a referral that does not meet one of the identified inspection criteria as listed in Section C. It does not involve an onsite inspection of the workplace, but rather the employer is notified of the alleged hazard(s) or violation(s) by telephone, fax, email, or by letter if necessary. The employer is then requested to provide a response, and TOSHA will notify the complainant of that response via appropriate means.

4. **Electronic Complaint.** A complaint submitted via OSHA or TOSHA's public websites. All complaints submitted via either OSHA or TOSHA's public website are considered non-formal.

5. **Permanently Disabling Injury or Illness.** An injury or illness that has resulted in permanent disability or an illness that is chronic or irreversible. Permanently disabling injuries or illnesses include, but are not limited to amputation, blindness, a standard threshold shift in hearing, lead or mercury poisoning, paralysis or third-degree burns.

6. **Referral.** An allegation of a potential workplace hazard or violation received from one of the sources listed below:

   a. **CSHO referral** – information based on the direct observation of a CSHO. (On the TOSHA-90, code 14A – *A. CSHO (Within Office)*.)

b. **Safety and health agency referral** – from sources including, but not limited to: NIOSH, other state programs, consultation, and state or local health departments, as well as safety and/or health professionals in other Federal or State agencies. (As appropriate, code 14A – *B. Federal OSHA; C. State OSH; F. Consultation; G. State/Local Government; or I. Other*.)

c. **T.C.A. Section 50-3-409 complaint referral** – made by a whistleblower investigator when an employee alleges that he or she was retaliated against for complaining about safety or health conditions in the workplace, refusing to do an allegedly imminently dangerous task, or engaging in other activities related to occupational safety or health (Code 14A – *D. Discrimination*.)

d. **Other government agency referral** – made by other Federal, State, or local government agencies or their employees, including local police and fire departments. (As appropriate, code 14A – *E. Other Federal Agency, or G. State/Local Government.*)

e. **Media report** – either news items reported in the media or information reported directly to TOSHA by a media source. (Code 14A – *H. Media*.)

f. **Employer report** - of accidents other than fatalities and catastrophes. (Code 14A – *I. Other*.)

7. **Representative of Employees.** Any of the following:

a. An authorized representative of the employee bargaining unit, such as a certified or recognized labor organization.

b. An attorney acting for an employee.

c. Any other person acting in a bona fide representative capacity, including, but not limited to, members of the clergy, social workers, spouses and other family members, and government officials or nonprofit groups and organizations acting upon specific complaints and injuries from individuals who are employees.

*NOTE: The representative capacity of the person filing complaints on behalf of another should be ascertained unless it is already clear. In general, the affected employee should have requested, or at least approved, the filing of the complaint on his or her behalf.*

**B. Classifying as a Complaint or a Referral.** Whether the information received is classified as a complaint or a referral, an inspection of a workplace is normally warranted if at least one of the conditions in the section *Criteria Warranting an Inspection* is met.

**C. Criteria Warranting an Inspection**. An inspection is normally warranted if at least one of the conditions below is met (but see also Paragraph I.D. of this chapter, *Scheduling an Inspection of an Employer in an Exempt Industry*):

1. A valid formal complaint is submitted. Specifically, the complaint must be reduced to writing or submitted on a TOSHA-7 form, be signed by a current employee or representative of current employees, and state the reason for the inspection request with reasonable particularity. Additionally, there must be reasonable grounds to believe either that a violation of the Act or TOSHA standard that exposes employees to physical harm exists, or that an imminent danger of death or serious injury exists, as provided in Section 50-3-304 of the Act.

2. The information received in a signed, written complaint from a current employee or employee representative that alleges a recordkeeping deficiency that indicates the existence of a potentially serious safety or health violation.

3. The information alleges that a permanently disabling injury or illness has occurred as a result of the complained of hazard(s), and there is reason to believe that the hazard or related hazards still exist.

4. The information alleges that an imminent danger situation exists.

5. The information concerns an establishment and an alleged hazard covered by a local, regional, or national emphasis program, or the Site-Specific Targeting Plan.

6. The employer fails to provide an adequate response to an inquiry, or the individual who provided the original information provides further evidence that the employer's response is false or does not adequately address the hazard(s). The evidence must be descriptive of current, on-going or recurring hazardous conditions.

7. The establishment that is the subject of the information has a history of egregious, willful, failure-to-abate, or repeated citations within TOSHA's jurisdiction during the past three years, or is an establishment or related establishment in the Severe Violator Enforcement Program. However, if the employer has previously submitted adequate documentation for these violations demonstrating that they were corrected and that programs have been implemented to prevent a recurrence of hazards, the Area Supervisor will normally determine that an inspection is not necessary.

8. A whistleblower investigator requests that an inspection be conducted in response to an employee's allegation that the employee was discriminated against for complaining about safety or health conditions in the workplace, refusing to perform an allegedly dangerous job or task, or engaging in other activities related to occupational safety or health.

9. If an inspection is scheduled or has begun at an establishment and a complaint or referral that would normally be handled via inquiry is received, that complaint or referral may, at the Area Supervisor's discretion, be incorporated into the scheduled or ongoing inspection. The complainant must receive a written response addressing the complaint items.

10. If the information gives reasonable grounds to believe that an employee under 18 years of age is exposed to a serious violation of a safety or health standard or a serious hazard, an onsite inspection will be initiated if the information relates to construction, manufacturing, agriculture, or other industries as determined by the Area Supervisor. Limitations placed on TOSHA's activities in agriculture by Appropriations Act provisions will be observed. See CPL-TN 02-00-051, *Enforcement Exemptions and Limitations under the Appropriations Act*

    *NOTE: The information does not need to allege that a child labor law has been violated.*

**D. Scheduling an Inspection of an Employer in an Exempt Industry.** In order to schedule an inspection of an employer in an exempt industry classification as specified by Appropriations Act provisions:

*NOTE: See CPL-TN 02-00-051, Enforcement Exemptions and Limitations under the Appropriations Act.*

1. *T*he information must come directly from a current employee; OR

2. It must be determined and documented in the case file that the information came from a representative of the current employee (see Paragraph I.A.9. of this chapter, *Representative of Employees*), with the employee's knowledge of the representative's intended action.

**E. Electronic Complaints Received via the OSHA or TOSHA Public Website**.

Electronic complaints submitted via the OSHA public website are automatically forwarded via email to a designated Area Office in the appropriate state. That Office then forwards the electronic complaints to TOSHA. Enter a UPA for all complaint information received. In order to facilitate the tracking of electronic complaints, enter the electronic complaint number in the field provided for that purpose in OIS.

1. Information received electronically from a current employee is considered a non-formal complaint until that individual provides a signed copy of the information. However, if a current employee has provided their name on the electronic complaint and checked the box "*This constitutes my electronic signature*" the complaint will be considered signed and processed accordingly. The employee can send or fax a signed copy of the information, request that a TOSHA-7 form be sent, or sign the information in person at the Area Office. Normally a complainant has five working days to formalize an electronic complaint. The Area Office Supervisor must actively follow up on information received electronically in order to provide the employee with the opportunity to formalize the complaint.

2. All complaint-related material received electronically should be printed and date stamped with the date the material was submitted and received. When these dates are not the same, the Area Supervisor will determine the appropriate date for the incoming material.

3. Electronic complaints received via the TOSHA public website will be processed in a manner similar to complaints received via the OSHA public website.

**F. Information Received by Telephone.**

1. While speaking with the caller, TOSHA personnel will attempt to obtain the following information:

   a. Whether the caller is a current employee or an employee representative.

   b. The exact nature of the alleged hazard(s) and the basis of the caller's knowledge. The individual receiving the information must determine, to the extent possible, whether the information received describes an apparent violation of TOSHA standards or the TOSH Act.

2. As appropriate, TOSHA will provide the caller with the following information:

a. Describe the complaint process, and if appropriate, the concepts of "inquiry" and "inspection," as well as the relative advantages of each.

b. If the caller is a current employee or a representative of employees, explain the distinction between a formal complaint and a non-formal complaint, and the rights and protections that accompany filing a formal complaint. These rights and protections include:

(i) The right to request an onsite inspection.

(ii) Notification in writing if an inspection is deemed unnecessary because there are no reasonable grounds to believe that a violation or danger exists.

(iii) The right to obtain review of a decision not to inspect by submitting a request for review in writing.

3. If appropriate, inform the complainant of rights to confidentiality in accordance with Section 50-3-304 of the Act and ask whether the complainant wishes to exercise this right. When confidentiality is requested, the identity of the complainant is protected regardless of the formality of the complaint. If the caller does not wish to, or cannot formalize a complaint, the Area Supervisor will offer to process the complaint as an inquiry and obtain the information required to do so which will include:

a. The exact nature of the alleged hazard(s) as specified in paragraph I.F.1.b of this chapter.

b. The employer's name, address, email address, telephone and fax numbers, as well as the name of a contact person at the worksite.

c. The name address, telephone number, and email address of any union and/or employee representative at the worksite.

**G. Procedures for Handling Complaints Filed in Multiple Area Offices**.

1. When an Area Office determines that multiple offices within the State have received the same complaint it should be referred to the Section Manager for disposition.

2. If the Section Manager determines that the complaint involves employers outside TOSHA's jurisdiction, the complaint will be referred to the OSHA Area Director.

**H. Procedures for an Inspection**.

1. Upon receipt of a complaint or referral, the Area Supervisor will evaluate all available information to determine whether there are reasonable grounds to believe that a violation or hazard exists.

a. If necessary, reasonable attempts will be made to contact the individual who provided the information in order to obtain additional details or to clarify issues raised in the complaint or referral. See the Complaint Questionnaire beginning on page 9-11.

b. The Area Supervisor, in consultation with the Section Manager, may determine not to inspect a facility if he/she has a substantial reason to believe that the condition complained of is being or has been abated.

2. Despite the existence of a complaint, if the Area Supervisor, in consultation with the Section Manager, believes there is no reasonable grounds that a violation or hazard exists, no inspection or inquiry will be conducted.

a. Where a formal complaint has been submitted, the complainant will be notified in writing of TOSHA's intent not to conduct an inspection, the reasoning behind the determination, and the right to have the determination reviewed under rule 0800-01-04-.13. The justification for not inspecting will be noted in the case file.

b. In the event of a non-formal complaint or referral, if possible, the individual providing the information will be notified by appropriate means of TOSHA's intent not to conduct an inquiry or inspection. The justification for not inspecting or conducting an inquiry will be noted in the case file.

3. If the information contained in the complaint or referral meets at least one of the inspection criteria listed in Paragraph I.C. of this chapter, *Criteria Warranting an Inspection*, and there are reasonable grounds to believe that a violation or hazard exists, the Area Office is authorized to conduct an inspection.

a. If appropriate, the Area Office will inform the individual providing the information that an inspection will be scheduled and that he or she will be advised of the results.

b. After the inspection, the Area Office will send the individual a letter addressing each information item, with reference to the citation(s) or a sufficiently detailed explanation for why a citation was not issued.

4. If an inspection is warranted, it will be initiated as soon as resources permit. Inspections resulting from formal complaints of serious hazards will normally be initiated within fifteen working days of formalizing.

**I. Procedures for an Inquiry.**

1. If the complaint or referral does not meet the criteria for initiating an onsite inspection, an inquiry will be conducted. TOSHA will promptly contact the employer to provide notification of the complaint or referral and its allegation(s), and fax or email a confirming letter.

2. If a non-formal complaint is submitted by a current employee or a representative of current employees that does not meet any of the inspection criteria, the complainant may be given five working days to make the complaint formal.

a. The complainant may come into the Area Office and sign the complaint, or mail, email, or fax a signed complaint letter to TOSHA. Additionally, a TOSHA-7 form can be mailed or faxed to the complainant, if appropriate.

b. If the complaint is not made formal after five working days, after making a reasonable attempt to inform the complainant of the decision, TOSHA will proceed with the inquiry process.

3. The employer will be advised of what information is needed to answer the inquiry and encouraged to respond by fax or email. Employers are encouraged to do the following:

   a. Immediately investigate and determine whether the complaint or referral information is valid and make any necessary corrections or modifications.

   b. Advise the Area Supervisor either in writing or via email within five working days of the results of the investigation into the alleged complaint or referral information. At the discretion of the Area Supervisor, the response time may be longer or shorter than five working days, depending on the circumstances. Additionally, although the employer is requested to respond within the above time frame, the employer may not be able to complete abatement action during that time, but is encouraged to do so.

   c. Provide the Area Supervisor with supporting documentation of the findings, including any applicable measurements or monitoring results, and photographs and/or videos that the employer believes would be helpful, as well as a description of any corrective action the employer has taken or is in the process of taking.

   d. Post a copy of the letter from TOSHA where it is readily accessible for review by all employees.

   e. Return a copy of the signed Certificate of Posting to the Area Office.

   f. If there is a recognized employee union or safety and health committee in the facility, provide the appropriate representative(s) with a copy of TOSHA's letter and the employer's response.

4. As soon as possible after contacting the employer, a notification letter will be emailed to the employer, faxed to the employer, or mailed where no fax is available. Sample letters to complainants and employers are provided in *IRT-TN 01-00-003 Citation and Form Letter Processing on the Personal Computer*. If e-mail is an acceptable means of responding, this should be indicated in the notification letter and the proper email address should be provided.

5. If no employer response or an inadequate employer response is received after the allotted five working days, additional contact with the employer may be made before an inspection is scheduled. If the employer provides no response or an inadequate response, or if TOSHA determines from other information that the condition has not been or is not being corrected, an inspection will be scheduled.

6. The complainant will be advised of the employer's response, as well as the complainant's rights to dispute that response, and if the alleged hazard persists, of the right to request an inspection. When TOSHA receives an adequate response from the employer and the complainant does not dispute or object to the response, an onsite inspection normally will not be conducted.

7. If the complainant is a current employee or a representative of current employees and wishes to dispute the employer's response, the disagreement must be submitted in writing and signed, thereby making the complaint formal.

   a. If the employee disagreement takes the form of a written and signed formal complaint, see Paragraph I.H. of this chapter, *Procedures for an Inspection*.

b. If the employee disagreement does not take the form of a written and signed formal complaint, some discretion is allowed in situations where the information does not justify an onsite inspection. In such situations, the complainant will be notified of TOSHA's intent not to conduct an inspection and the reasoning behind the determination. This decision should be thoroughly documented in the case file.

8. If a signed complaint is received after the complaint inquiry process has begun, the Area Supervisor will determine whether the alleged hazard is likely to exist based on the employer's response and by contacting the complainant. The complainant will be informed that the inquiry has begun and that the complainant retains the right to request an onsite inspection if he/she disputes the results and believes the hazard still exists.

9. The complaint must not be closed until TOSHA verifies that the hazard has been abated.

10. The justification for not conducting an inquiry will be noted in the case file.

**J. Complainant Protection**.

1. **Identity of the Complainant**. Upon request of the complainant, his or her identity will be withheld from the employer in accordance with Section 50-3-304 of the Act. No information will be given to the employer that would allow the employer to identify the complainant.

2. **Whistleblower Protection.**

a. Section 50-3-409 of the Act provides protection for employees who believe that they have been the subject of an adverse employment action in retaliation for engaging in activities related to workplace safety or health. Any employee who believes that he or she has been discharged or otherwise retaliated against by any person as a result of engaging in such activities may file a whistleblower complaint. The complaint must be filed within thirty days of the discharge or other retaliation.

b. Complainants should always be advised of their Section 50-3-409 rights and protections upon initial contact with TOSHA and whenever appropriate in subsequent communications.

***K.*** **Recording in OIS**. Information about complaint inspections or inquiries must be recorded in OIS following current instructions given in the OIS enforcement manual.

## II. Whistleblower Complaints.

**A.** TOSHA enforces the whistleblower or anti-retaliation provisions of the TOSH Act. Federal OSHA enforces sixteen other federal statutes. A desk reference summarizing these statutes can be found in the Whistleblower Investigations Manual on OSHA's Web site. These statutes generally provide that employers may not discharge or otherwise retaliate against an employee because the employee has reported an alleged violation related to the statute to an employer or a government agency, or otherwise exercised any rights provided to employees by the various statutes.

**B.** When a retaliation complaint is made under any of the sixteen federal whistleblower statutes enforced by OSHA other than the TOSH or OSH Act, the complainant should be referred promptly to the Federal OSHA Area Director because the requirements for filing complaints under those statutes vary from those of the TOSH or OSH Act. They should also be advised that there are statutory deadlines for filing these complaints.

**C.** In the context of a TOSHA enforcement action or a consultation activity, the complainant will be advised of the protection against retaliation afforded by Section 50-3-409 of the Act. A complaint of this nature may be in any form, including an oral complaint made to a CSHO. Thus, if a person alleges that he or she has suffered an adverse action because of activity protected under Section 50-3-409, CSHOs will record that person's identifying information and the date and time of this initial contact and forward the information to the Administrator or Assistant Administrator.

## III. Complainant Questionnaire

## Complaint Questionnaire

Obtain information from the caller by asking the following questions, where relevant.

**For All Complaints:**

1. What is the specific safety or health hazard?

2. Has the hazardous condition been brought to the employer's attention? If so, when? How?

3. How are employees exposed to this hazard? Describe the unsafe or unhealthful working conditions; identify the location.

4. What work is done in the unsafe/unhealthful area? Identify, as well as possible, the type and condition of equipment in use, the materials (e.g., chemicals) being used, the process/operation involved, and the kinds of work being done near the hazardous area. Have there been any recent chemical spills, releases, or accidents?

5. With what frequency are employees doing the task that leads to the exposure? Continuously? Every day? Every week? Rarely? For how long at one time? How long has the condition existed (so far as can be determined)? Has it been brought to the employer's attention? Have any attempts been made to correct the condition, and, if so, who took these actions? What were the results?

6. How many shifts are there? What time do they start? On which shift does the hazardous condition exist?

7. What personal protective equipment (e.g., hearing protection, gloves or respirators) is required by the employer relevant to the alleged exposure? Is it used by employees? Include all PPE and describe it as specifically as possible. Include the manufacturer's name and any identifying numbers.

8. How many people work in the establishment? How many are exposed to the hazardous conditions? How near do they get to the hazard?

9. Is there an employee representative or a union in the establishment? Include the name, address, and telephone number of the union and/or the employee representative(s).

**For Health Hazards**

10. Has the employer administered any tests to determine employee exposure levels to the hazardous conditions or substance? Describe these tests. Can the employees get the results (as required by the standard)? What were the results?

11. What engineering controls are in place in the area(s) in which the exposed employees work? For instance, are there any fans or acoustical insulation in the area which may reduce exposure to the hazard?

12. What administrative or work practice controls has the employer put in place?

13. Do any employees have any symptoms that may have been caused by exposure to hazardous substances? Have any employees ever been treated by a physician for a work-related disease or condition? What was it?

14. Have there been any “near-miss” incidents?

15. Are respirators worn to protect against health hazards? If so, what kind? What exposures are they protecting against?

16. If the complaint is related to noise, what, if any, hearing protection is provided to and worn by the employees?

17. Do employees receive audiograms on a regular basis?

**For Safety Hazards:**

18. Under what adverse or hazardous conditions are employees required to work? This should include conditions contributing to stress and "other" probability factors.

19. Have any employees been injured as a result of this hazardous condition? Have there been any "near-miss" incidents?

# Chapter 10
# INDUSTRY SECTORS

## I. Agriculture.

A. **Introduction**. Special situations arising in the agriculture industry, which is regulated under 29 CFR Part 1928 and the General Duty Clause, are discussed in this section. Part 1928 covers "agricultural operations," which include, but are not limited to, egg farms, poultry farms, livestock grain and feed lot operations, dairy farms, horse farms, hog farms, fish farms, and fur-bearing animal farms. TOSHA has very few standards that are applicable to this industry. Part 1928 sets forth a few standards in full and lists particular Part 1910 standards which apply to agricultural operations. Part 1910 standards not listed do not apply. The General Duty Clause may be used to address hazards not covered by these standards.

B. **Definitions.**

1. **Agricultural Operations**. This term is not defined in 29 CFR Part 1928. Generally, agricultural operations would include any activities involved in the growing and harvesting of crops, plants, vines, fruit trees, nut trees, ornamental plants, egg production, the raising of livestock (including poultry and fish), as well as livestock products. The Occupational Safety and Health Review Commission has ruled that activities integrally related to these core "agricultural operations" are also included within that term. *Darragh Company*, 9 BNA OSHC 1205, (Nos. 77-2555, 77-3074, and 77-3075, 1980) (delivery of feed to chicken farmer by integrator of poultry products is agricultural operation); *Marion Stevens dba Chapman & Stephens Company*, 5 BNA OSHC 1395 (No.13535, 1977) (removal of pipe to maintain irrigation system in citrus grove is agricultural operation). Post-harvest activities not on a farm, such as receiving, cleaning, sorting, sizing, weighing, inspecting, stacking, packaging and shipping produce, are not "agricultural operations." *J. C. Watson Company*, 22 BNA OSHC 1235 (Nos. 05-0175 and 05-0176, 2008) (employer's onion packing shed was not an agricultural operation); J.C. Watson Company v. Solis, DC Cir. 08-1230 (April 17, 2009).

2. **Agricultural Employee**. T.C.A. Section 50-3-104(7) states that the Act does not apply to "Any employee engaged in agriculture who is employed on a farm, each of the employees of which is related to the employer as spouse, child, parent, grandparent or grandchild."

3. **Farming Operation**. This term is used in OSHA's Appropriations Act, and has been defined in CPL-TN 02-00-051, *Enforcement Exemptions and Limitations under the Appropriations Act*, dated March 8, 1999, to mean any operation involved in the growing or harvesting of crops, the raising of livestock or poultry, or related activities conducted by a farmer on sites such as farms, ranches, orchards, dairy farms or similar farming operations.

   These are employers engaged in businesses that have a two digit Standard Industrial Classification (SIC) of 01 and three digit North American Industry Classification System (NAICS) of 111 (Agricultural Production - Crops); SIC 02 and NAICS 112 (Agricultural Production - Livestock and Animal Specialties); four digit SIC 0711 and six digit NAICS 115112 (Soil Preparation Services); SIC 0721 and NAICS 115112 (Crop Planting, Cultivating, and Protecting); SIC 0722 and NAICS 115113 (Crop Harvesting, Primarily by Machine); SIC 0761 and NAICS 115115 (Farm Labor Contractors and Crew Leaders); and SIC 0762 and NAICS 115116 (Farm Management Services).

4. **Post-Harvesting Processing.** This is a term that is used in CPL-TN 02-00-051, *Enforcement Exemptions and Limitations under the Appropriations Act*, in discussing

enforcement guidance for small farming operations. Generally, post-harvest processing can be thought of as changing the character of the product (canning, making cider or sauces, etc.) or a higher degree of packaging versus field sorting in a shed for size.

C. **Appropriations Act Exemptions for Farming Operations**.

1. **Exempt Farming Operations. T**OSHA is limited by provisions in its Appropriations Act as to which employers it may inspect. Some of the Appropriations Act exemptions and limitations apply to small farming operations. Specifically, TOSHA shall not inspect farming operations that have 10 or fewer employees and have had no temporary labor camp (TLC) activity within the prior 12 months.

2. **Non-Exempt Farming Operations.** A farming operation with 10 or fewer employees that maintains a temporary labor camp or has maintained a temporary labor camp within the last twelve months is not exempt from inspection.

3. **Enforcement Guidance for Small Farming Operations**. OSHA's Appropriations Act exempts qualifying small farming operations from enforcement or administration of all rules, regulations, standards or orders under the Occupational Safety and Health Act, including rules affecting consultation and technical assistance or education and training services.

   Table 10-1, below, provides an at-a-glance reference to TOSHA activities under its funding legislation.

**Table 10-1: OSHA's Appropriation Act Exemptions for Farming Operations**

| TOSHA Activity | Farming operations with 10 or fewer employees (EEs) and no TLC activity within 12 months. | Farming operations with more than 10 EEs or a farming operation with an active TLC within 12 months. |
|---|---|---|
| Programmed Safety Inspections | Not Permitted | Permitted |
| Programmed Health Inspections | Not Permitted | Permitted |
| Employee Complaint | Not Permitted | Permitted |
| Fatality and/or two or more Hospitalizations | Not Permitted | Permitted |
| Imminent Danger | Not Permitted | Permitted |
| 11(c) (whistleblower investigation) | Not Permitted | Permitted |
| Consultation & Technical Assistance | Not Permitted | Permitted |
| Education & Training | Not Permitted | Permitted |
| Conduct Surveys & Studies | Not Permitted | Permitted |

*NOTE: See CPL-TN 02-00-051, Enforcement Exemptions and Limitations under the Appropriations Act, March 8, 1999, for additional information.*

D. **Standards Applicable to Agriculture**. TOSHA has very few standards that apply to employers engaged in agricultural operations. Activities that take place after harvesting are considered general industry operations and are covered by TOSHA's general industry standards.

1. **Agricultural Standards (Part 1928)**.

a. Roll-over Protective Structures (ROPS) for Tractors (§§1928.51, 1928.52, and 1928.53).

b. Guarding of Moving Machinery Parts of Farm Field Equipment, Farmstead Equipment, and Cotton Gins (§1928.57).

c. Field Sanitation (§1928.110)

2. **General Industry Standards (Part 1910).**

a. Temporary Labor Camps (§1910.142). See Chapter 12, Section II, *Temporary Labor Camps*.

b. Storage and Handling of Anhydrous Ammonia (§1910.111(a) and (b)).

c. Logging Operations (§1910.266).

d. Specifications for Accident Prevention Signs and Tags – Slow-Moving Vehicle Emblem (§1910.145(d)(10)).

e. Hazard Communication (§1910.1200).

f. Cadmium (§1910.1027).

g. Retention of Department of Transportation Markings, Placards and Labels (§1910.1201).

h. Except to the extent specified above, the standards contained in subparts B through T and subpart Z of Part 1910 of Title 29 do not apply to agricultural operations.

3. **General Duty Clause.** As in any situation where no standard is applicable, Section 50-3-105(1) of the TOSH Act may be used; all the elements for a general duty citation must be met. See Chapter 4, Section III, *General Duty Clause.*

E. **Pesticides.**

1. **Coverage**.

a. Pursuant to the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), the Environmental Protection Agency (EPA) has jurisdiction over employee protection relating to pesticides (which also includes herbicides, fungicides and rodenticides). The EPA Worker Protection Standard (WPS) protects employees on farms, forests, nurseries, and greenhouses from occupational exposure to agricultural pesticides. The WPS includes provisions for personal protective equipment, labeling, employee notification, safety training, safety posters,

decontamination supplies, emergency assistance, and restricted field entry. See 40 CFR Part 170, Worker Protection Standard.

b. The regulation covers two types of employees:

- **Pesticide Handlers**. Those who mix, load, or apply agricultural pesticides; clean or repair pesticide application equipment; or assist with the application of pesticides in any way.

- **Agricultural Workers.** Those who perform tasks related to the cultivation and harvesting of plants on farms or in greenhouses, nurseries, or forests – such as carrying nursery stock, repotting plants, or watering – related to the production of agricultural plants on an agricultural establishment.

c. For all pesticide use, including uses not covered by 40 CFR Part 170, it is a violation of FIFRA to use a registered pesticide in a manner inconsistent with its labeling. Thus, TOSHA has no authority to issue any citations related to pesticide exposures. In the event that a CSHO should encounter any cases of pesticide exposure or the lack of an appropriate pesticide label on containers, a referral shall be made to the local EPA office or to state agencies administering pesticide laws.

d. EPA also has jurisdiction in non-agriculture situations where pesticides are being applied by pest control companies. This would include, but not be limited to, applications in and around factories, warehouses, office buildings, and personal residences. TOSHA may not cite its Hazard Communication standard in such situations.

2. **TOSHA's Hazard Communication Standard and Right To Know Law.** Although TOSHA will not cite employers covered under EPA's WPS with regard to hazard communication requirements for pesticides, agricultural employers otherwise covered by TOSHA are still responsible for having a hazard communication program for all hazardous chemicals that are not considered pesticides.

F. **Field Sanitation and Temporary Labor Camps.**

1. **TOSHA** has enforcement authority for the Field Sanitation standard, including the issuing of citations. The provisions of the Field Sanitation standard are also applicable to reforestation activities involving "hand-labor operations" as defined by the standard.

2. **Temporary Labor Camp (TLC) Standard. TOSHA has** enforcement authority for the TLC standard as well as the authority to evaluate temporary and permanent variances. The Commissioner of Labor and Workforce Development has the authority to grant variances.

## II. Construction [Reserved].

## III. Maritime [Reserved].

# Chapter 11
# IMMINENT DANGER, FATALITY, CATASTROPHE, AND EMERGENCY RESPONSE

## I. Imminent Danger Situations

### A. General.

**1. Definition of Imminent Danger.** Imminent danger is defined as any condition(s) or practice(s) in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures.

**2. Conditions of Imminent Danger**. The following conditions must be present in order for a hazard to be considered an imminent danger:

a. Death or serious harm must be threatened; AND

b. It must be reasonably likely that a serious accident could occur immediately OR, if not immediately, then before abatement would otherwise be implemented.

*NOTE: For a health hazard, exposure to the toxic substance or other hazard must cause harm to such a degree as to shorten life or be immediately dangerous to life and health (IDLH) or cause substantial reduction in physical or mental efficiency or health, even though the resulting harm may not manifest itself immediately.*

### B. Pre-Inspection Procedures.

**1. Imminent Danger Report Received.**

a. After the Area Supervisor receives a report of imminent danger, he or she will evaluate the inspection requirements and assign a CSHO to conduct the inspection.

b. Every effort will be made to conduct the imminent danger inspection on the same day that the report is received. In any case, the inspection will be conducted no later than the day after the report is received.

c. When an immediate inspection cannot be made, the Area Supervisor will contact the employer immediately, obtain as many pertinent details as possible about the situation, and attempt to have any employee(s) affected by the imminent danger voluntarily removed, if necessary.

(i) A record of what steps, if any, the employer intends to take in order to eliminate the danger will be included in the case file.

(ii) This notification is considered an advance notice of inspection to be handled in accordance with the advance notice procedures described below.

**2. Advance Notice**.

a. T.C.A. Section 50-3-306(b) authorizes advance notice of an inspection “when the giving of such notice is essential to the effectiveness of such inspection.” in

order to encourage employers to eliminate dangerous conditions as quickly as possible.

b. Where an immediate inspection cannot be made after the Area Office is alerted to an imminent danger condition and advance notice will speed the elimination of the hazard, the CSHO, at the direction of the Area Supervisor, will give notice of an impending inspection to the employer.

c. Where advance notice of an inspection is given to an employer, it shall also be given to the authorized employee representative, if present. If the inspection is in response to a formal complaint, the complainant will be informed of the inspection unless this will cause a delay in speeding the elimination of the hazard.

**C. Imminent Danger Inspection Procedures**. All alleged imminent danger situations brought to the attention of or discovered by CSHOs while conducting any inspection will be inspected immediately. Additional inspection activity will take place only after the imminent danger condition has been resolved.

**1. Scope of Inspection**. CSHOs may consider expanding the scope of an imminent danger inspection based on additional hazards discovered or brought to their attention during the inspection.

**2. Procedures for Inspection.**

a. Every imminent danger inspection will be conducted as expeditiously as possible.

b. CSHOs will offer the employer and employee representatives the opportunity to participate in the worksite inspection, unless the immediacy of the hazard makes it impractical to delay the inspection in order to afford time to reach the area of the alleged imminent danger.

c. As soon as reasonably practicable after discovery of existing conditions or practices constituting an imminent danger, the employer shall be informed of such hazards. The employer shall be asked to notify affected employees and to remove them from exposure to the imminent danger hazard. The employer should be encouraged to voluntarily take appropriate abatement measures to promptly eliminate the danger.

**D. Elimination of the Imminent Danger.**

**1. Voluntary Elimination of the Imminent Danger.**

a. **How to Voluntarily Eliminate a Hazard.**

(i) Voluntary elimination of the hazard has been accomplished when the employer:

(1) Immediately removes affected employees from the danger area;

(2) Immediately removes or abates the hazardous condition; and

(3) Gives satisfactory assurance that the dangerous condition will remain abated before permitting employees to work in the area.

(ii) Satisfactory assurance can be evidenced by:

(1) After removing the affected employees, immediate corrective action is initiated, designed to bring the dangerous condition, practice, means or method of operation, or process into compliance, which, when completed, would permanently eliminate the dangerous condition; or

(2) A good faith representation by the employer that permanent corrective action will be taken as soon as possible, and that affected employees will not be permitted to work in the area of the imminent danger until the condition is permanently corrected; or

(3) A good faith representation by the employer that permanent corrective action will be instituted as soon as possible. Where personal protective equipment can eliminate the imminent danger, such equipment will be issued and its use strictly enforced until the condition is permanently corrected.

*NOTE: Through onsite observations, CSHOs shall ensure that any/all representations from the employer that an imminent danger has been abated are accurate.*

b. **Where a Hazard is Voluntarily Eliminated**. If an employer voluntarily and completely eliminates the imminent danger without unreasonable delay:

(i) No imminent danger legal proceeding shall be instituted;

(ii) Neither the TOSHA-8, Notice of an Alleged Imminent Danger, nor the TOSHA-8A Emergency Stop Order need to be completed;

(iii) An appropriate citation(s) and notice(s) of penalty will be proposed for issuance with an appropriate notation on the violation worksheet to document corrective actions; and

(iv) CSHOs will inform the affected employees or their authorized representative(s) that, although an imminent danger had existed, danger has been eliminated. They will also be informed of any steps taken by the employer to eliminate the hazardous condition.

**2. Refusal to Eliminate an Imminent Danger**.

a. If the employer does not or cannot voluntarily eliminate the hazard or remove affected employees from the exposure and the danger is immediate, CSHOs will immediately consult with the Area Supervisor or designee and obtain permission to post a TOSHA-8 and/or TOSHA-8A.

b. The Area Supervisor will then contact the Section Manager and determine whether to consult with the TOSHA Administrator and TOSHA Attorney to obtain a Temporary Restraining Order (TRO).

c. The employer will be advised that the Act gives the Commissioner the authority to seek injunctive relief to restrain any condition or practice that poses an imminent danger to employees.

*NOTE: TOSHA has no authority to order the closing of a worksite or to order affected employees to leave the area of the imminent danger or the workplace unless a TOSHA-8A Emergency Stop Order is posted.*

d. CSHOs will notify affected employees and the employee representative that a TOSHA-8 and/or TOSHA-8A has been posted and will advise them of the discrimination protections under the TOSH Act. Employees will be advised that they have the right to refuse to perform work in the area where the imminent danger exists.

e. The Area Supervisor and the Section Manager, in consultation with TOSHA Administrator and the TOSHA Attorney, will assess the situation and, if warranted, make arrangements for the expedited initiation of court action, or instruct the CSHO to remove the TOSHA-8 and/or the TOSHA-8A.

**3. When Harm Will Occur Before Abatement is Required.**

a. If CSHOs have clear evidence that harm will occur before abatement is required (i.e., before a final order of the Tennessee Occupational Safety and Health Review Commission in a contested case or before a TRO can be obtained), they will confer with the Area Supervisor to determine a course of action.

*NOTE: In some cases, the evidence may not support the finding of an imminent danger at the time of the physical inspection, but rather after further evaluation of the case file or presence of additional evidence.*

b. As appropriate, an Imminent Danger Notice or Emergency Stop Order may be posted at the time citations are delivered or even after the notice of contest is filed.

## II. Fatality and Catastrophe Investigations.

### A. Definitions.

**1. Fatality.** An employee death resulting from a work-related incident or exposure; in general, from an accident or an illness caused by or related to a workplace hazard.

**2. Catastrophe**. The hospitalization of three or more employees resulting from a work-related incident or exposure; in general, from an accident or an illness caused by a workplace hazard.

**3. Hospitalization**. Being admitted as an inpatient to a hospital or equivalent medical facility for examination, observation or treatment.

**4. Incident Requiring a Coordinated Response**. An incident involving multiple fatalities, extensive injuries, massive toxic exposures, extensive property damage, or one that presents potential employee injury and generates widespread media interest.

### B. Initial Report.

**1.** The TOSHA Notification Form is a pre-inspection form that must be completed for all fatalities or catastrophes unless knowledge of the event occurs during the course of an

inspection at the establishment involved. The purpose of the TOSHA Notification Form is to provide TOSHA with enough information to determine whether or not to investigate the event. It is also used as a research tool by TOSHA and other agencies.

**2.** If, after the initial report, the Area Office becomes aware of information that affects the decision to investigate, the TOSHA Notification Form should be updated. If the additional information does not affect the decision to investigate, or the investigation has been initiated or completed, the TOSHA Notification Form need not be updated. After updating the TOSHA Notification Form, it should be resubmitted to the Central Office.

**3.** See additional details on completing the TOSHA Notification Form in Paragraph II.I. of this chapter, *Recording and Tracking for Fatality/Catastrophe Inspections*.

**C. Investigation Procedures**.

**1.** All fatalities and catastrophes will be thoroughly investigated in an attempt to determine the cause of the event, whether a violation of TOSHA safety and health standards, regulations, or the general duty clause occurred, and any effect the violation had on the incident. Each Section Manager will establish a procedure to ensure that each fatality or catastrophe is thoroughly investigated and processed in accordance with established policy.

**2.** The investigation should be initiated as soon as possible after receiving an initial report of the incident, ideally within one working day, by an appropriately trained and experienced compliance officer assigned by the Area Supervisor. The Area Supervisor determines the scope of the fatality/catastrophe investigation. All investigations must be completed in an expeditious manner.

**3.** Inspections following fatalities or catastrophes should include video recording as a method of documentation and gathering evidence when appropriate. The use of photography is also encouraged in documenting and evidence gathering.

**4.** As in all inspections, under no circumstances should TOSHA personnel conducting fatality/catastrophe investigations be unprotected against a hazard encountered during the course of an investigation. TOSHA personnel must use appropriate personal protective equipment and take all necessary precautions to avoid and/or prevent occupational exposure to potential hazards that may be encountered.

**D. Interview Procedures.**

**1. Identify and Interview Persons.**

a. Identify and interview all persons with firsthand knowledge of the incident, including first responders, police officers, medical responders, and management, as early as possible in the investigation. The sooner a witness is interviewed, the more accurate and candid the witness statement may be.

b. If an employee representative is actively involved in the inspection, he or she can serve as a valuable resource by assisting in identifying employees who might have information relevant to the investigation.

c. Conduct employee interviews privately, outside the presence of the employer. Employees are not required to inform their employer that they provided a statement to TOSHA.

d. When interviewing:

(i) Properly document the contact information of all parties because follow-up interviews with a witness are sometimes necessary.

(ii) When appropriate, reduce interviews to writing and have the witness sign the document. Transcribe video- and audio-taped interviews and have the witness sign the transcription.

(iii) Read the statement to the witness and attempt to obtain agreement. Note any witnesses' refusal to sign or initial his/her statement.

(iv) Ask the interviewee to initial any changes or corrections made to his/her statement.

(v) Advise interviewee of TOSHA discrimination protections.

e. See Chapter 3, *Inspection Procedures*, for additional information on conducting interviews.

**2. Informer's Privilege.**

a. The informer's privilege allows the government to withhold the identity of individuals who provide information about the violation of laws, including TOSHA rules and regulations. The identity of witnesses will remain confidential to the extent possible. However, inform each witness that disclosure of his/her identity may be necessary in connection with enforcement or court actions.

b. The informer's privilege also protects the contents of statements to the extent that disclosure would reveal the witness' identity. When the contents of a statement will not disclose the identity of the informant (i.e., statements that do not reveal the witness' job title, work area, job duties, or other information that would tend to reveal the individual's identity), the privilege does not apply and such statements may be released.

c. Inform witnesses in a tactful and nonthreatening manner that making a false statement to a CSHO during the course of an investigation could be a criminal offense. Making a false statement, upon conviction, is a Class C misdemeanor.

**E. Investigation Documentation**. Document all fatality and catastrophe investigations thoroughly.

**1. Personal Data – Victim**. Potential items to be documented include: Name; Address; Email address; Telephone; Age; Sex; Nationality; Job Title; Date of Employment; Time in Position; Job being done at the time of the incident; Training for job being performed at time of the incident; Employee deceased/injured; Nature of injury – fracture, amputation, etc.; and prognosis of injured employee.

**2. Incident Data**. Potential items to be documented include: How and why did the incident occur; the physical layout of the worksite; sketches/drawings; measurements; video/audio/photos to identify sources, and whether the accident was work-related.

**3. Equipment or Process Involved**. Potential items to be documented include: Equipment type; Manufacturer; Model; Manufacturer's instructions; Kind of process; Condition; Misuse; Maintenance program; Equipment inspection (logs, reports); Warning devices (detectors); Tasks performed; How often equipment is used; Energy sources and disconnecting means identified; and Supervision or instruction provided to employees involved in the accident.

**4.** **Witness Statements**. Potential witnesses include: the Public; Fellow employees; Management; Emergency responders (e.g., police department, fire department); and Medical personnel (e.g., medical examiner).

**5.** **Safety and Health Program**. Potential questions include: Does the employer have a safety and/or health program? Does the program address the type of hazard that resulted in the fatality/catastrophe? How are the elements of the program specifically implemented at the worksite?

**6.** **Multi-Employer Worksite** Describe the contractual and in practice relationships of the employer with the other employers involved with the work being performed at the worksite.

**7.** **Records Request**. Potential records include: Disciplinary Records; Training Records; and Next of Kin information.

a. *NOTE: Next of kin information should be gathered as soon as possible to ensure that condolence letters can be sent in a timely manner.*

**F. Potential Criminal Penalties in Fatality and Catastrophe Cases.**

**1. Criminal Penalties.**

a. Part 5 of the Act provides criminal penalties for an employer who is convicted of having willfully violated a TOSHA standard, rule or order when the violation results in the death of an employee. However, Part 5 does not apply to violations of the general duty clause. When there are violations of a TOSHA standard, rule or order, or a violation of the general duty clause, criminal provisions relating to false statements and obstruction of justice may also be relevant.

b. The circumstances surrounding all occupationally-related fatalities will be evaluated to determine whether the fatality was caused by a willful violation of a standard, thus creating the basis for a possible criminal referral. The evidence obtained during a fatality investigation is of paramount importance and must be carefully gathered and considered.

c. Early in the investigation, the Area Supervisor, in consultation with the investigator, should make an initial determination as to whether there is potential for a criminal violation. The decision will be based on consideration of the following:

(i) A fatality has occurred.

(ii) There is evidence that a TOSHA standard has been violated and that the violation contributed to the death.

(iii) There is reason to believe that the employer was aware of the requirements of the standard and knew it was in violation of the standard, or that the employer was plainly indifferent to employee safety.

(iv) If the Section Manager agrees with the Area Supervisor’s assessment of the case, the Section Manager will notify the TOSHA Administrator who will notify the TOSHA Attorney At the discretion of the TOSHA

Administrator, a team may assist in or perform portions of an investigation.

(v) When there is a potential criminal referral in a case, it is essential that the Area Supervisor through the Section Manager and TOSHA Administrator involves the TOSHA Attorney in the early stages of the investigation during the evidence gathering process.

**2.** **Additional Prosecution**. In addition to criminal prosecution under the Act, employers may potentially face prosecution under a number of other sections of the Tennessee Code, including, but not limited to:

a. Crimes and Criminal Procedures, for actions such as conspiracy, making false statements, fraud, obstruction of justice, and destruction, alteration or falsification of records during an investigation.

b. The Clean Water Act.

c. The Clean Air Act.

d. The Resource Recovery and Conservation Act (RCRA).

e. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

**G. Families of Victims.**

**1.** **Contacting Family Members.** Family members of employees involved in fatal or catastrophic occupational accidents or illnesses shall be contacted early in the investigation and given the opportunity to discuss the circumstances of the injury or illness. TOSHA staff contacting family members must exercise tact and good judgment in their discussions.

See CPL 02-00-153, Communicating OSHA Fatality Inspection Procedures to a Victim's Family

**2.** **Information Letter**. The standard information letter will normally be sent to the individual(s) listed as the emergency contact on the victim's employment records (if available) and/or the otherwise determined next of kin within 5 working days of determining the victim's identity and verifying the proper address where communications should be sent.

*NOTE: In some circumstances, it may not be appropriate to follow these exact procedures; i.e., in the case of a small business, the owner or supervisor may be a relative of the victim. Modify the form letter to take any special circumstances into account or do not send the letter, as appropriate.*

**3.** **Interviewing the Family**.

a. When taking a statement from families of the victim(s), explain that the interview will be handled following the same procedures as those in effect for witness interviews. Sensitivity and professionalism are required during these interviews. Carefully evaluate the information received and attempt to corroborate it during the investigation.

b. Maintain follow-up contact with key family members or other contact persons so that these parties can be kept up-to-date on the status of the investigation.

Provide family members or their legal representatives with a copy of all citations, subsequent settlement agreements or Review Commission decisions as these are issued, or as soon thereafter as possible upon request. However, such information will only be provided to family members after it has been provided to the employer.

c. The releasable portions of the case file will not be made available to family members until after the contest period has passed and no contest has been filed. If a contest is filed, the TOSHA Attorney will be contacted to determine if the case file will be made available. Additionally, if a criminal referral is under consideration or has been made, the case file may not be released to the family without approval of the TOSHA Attorney. Notify the family of these policies and inform them that this is necessary so that any potential litigation is not compromised.

**H. Public Information Policy**. TOSHA's public information policy regarding response to fatalities and catastrophes is to refer all inquiries to the Department's Public Information Office. It is not to issue periodic updates on the progress of the investigation. The Department's Public Information Officer will normally handle all responses to media inquiries.

**I. Recording and Tracking for Fatality/Catastrophe Investigations**.

**1. TOSHA Notification Form**. The TOSHA Notification Form is a pre-inspection form that must be completed for all fatalities and catastrophes unless knowledge of the event occurs during the course of an inspection at the establishment involved. Processing of the TOSHA Notification Form shall be as follows:

a. The Area Office will complete and enter into OIS a TOSHA Notification Form for all fatalities and catastrophes as soon as possible after learning of the event. As much information as is known at the time of the initial report should be provided; however, all items on the TOSHA Notification Form need not be completed at the time of this initial report. Wherever possible, the age of the victim(s) should be provided, because this information is used for research by TOSHA/OSHA and other agencies.

b. The Central Office will fax or e-mail a TOSHA Notification Form for each event that will be investigated to the OSHA Area Director within 48 hours of receipt.

c. If additional information relating to the event becomes available that affects the decision to investigate, the TOSHA Notification Form is to be updated and resubmitted via fax or e-mail to the Central Office.

**2. Investigation Summary Report (TOSHA-170).**

a. The TOSHA-170 is used to summarize the results of investigations of all events that involve fatalities, catastrophes, amputations, hospitalizations of two or more days, have generated significant publicity, and/or have resulted in significant property damage. A TOSHA-170 must be opened, logged into OIS, and saved as final as soon as the agency becomes aware of a workplace fatality and determines that it is within its jurisdiction, even if most of the data fields are left blank. The information on this form enables the Agency to track fatalities and summarizes circumstances surrounding the event.

*NOTE: The two-day hospitalization criterion is a cutoff to preclude completing a TOSHA-170 for events that may not be serious. There is no relationship*

*between this criterion and the definition of hospitalization in Section II. A. of this chapter,* Definitions.

b. For fatality/catastrophe investigations, the TOSHA-170 will be:

(i) Opened in OIS at the beginning of the investigation and saved as *final*, even if most of the data fields are left blank, so that the Agency can track fatality/catastrophe investigations in a close to "real time" fashion.

(ii) Modified as needed during the investigation to account for updated information.

(iii) Updated with all data fields completely and accurately completed at the conclusion of the investigation, including a thorough narrative description of the incident.

c. The TOSHA-170 narrative should not be a copy of the summary provided on the TOSHA Notification Form pre-inspection form. The narrative must comprehensively describe the characteristics of the worksite; the employer and its relationship with other employers, if relevant; the employee task/activity being performed; the related equipment used; and other pertinent information in enough detail to provide a third party reader of the narrative with a mental picture of the fatal incident and the factual circumstances surrounding the event.

d. In addition, a single fatality or catastrophe event shall normally result in only one fatality [catastrophe] inspection of the employer of the deceased employee(s) [injured employees], but one event at a multi-employer work site may possibly lead to one or more unprogrammed- related inspection(s) of other involved employers. The exception to this would occur if an event involves multiple fatalities of workers of two or more employers, resulting in more than one fatality inspection.

**EXAMPLE 11-1**: A fatality occurs in employer's facility in August. Both a safety and health inspection are initiated. One TOSHA-170 should be filed to summarize the results of the inspections that resulted from the August fatality. However, in September, while the employer's facility is still undergoing the inspections, a second fatality occurs. In this case, a *second* TOSHA-170 should be submitted for the second fatality and an additional inspection should be opened.

**3. Immigrant Language Questionnaire (IMMLANG)**.

a. The IMMLANG Questionnaire is designed to allow the Agency to track fatalities among Hispanic and immigrant employees and to assess the impact of potential language barriers and training deficiencies on fatal accidents. Information for this questionnaire should be collected as early in the investigation as possible, as the availability of immigrants for questioning later in the process is often uncertain.

b. The IMMLANG Questionnaire shall be completed before the conclusion of a fatality investigation according to the procedures outlined in the December 16, 2003, memorandum from Deputy Assistant Secretary R. Davis Layne to the Regional Administrators, It should be completed only if "IMMLANG-Y" is indicated on the TOSHA-1 (N-10 Optional Information Code).

c. The IMMLANG Questionnaire shall be submitted via OIS. A copy of the completed questionnaire should be printed and placed in the case file.

**4.** **Related Event Code (REC)**. The violation worksheet provides specific supplemental information documenting hazards and violations. If any item cited is directly related to the occurrence of the fatality or catastrophe, select FAT/CAT/Accident. If multiple related event codes apply, the only code that has priority over relation to a fatality/catastrophe is imminent danger.

**J.** **Pre-Citation Review**.

**1.** Because cases involving a fatality may result in civil or criminal enforcement actions, the Area Supervisor is responsible for reviewing all fatality and catastrophe investigation case files to ensure that the case has been properly developed and documented in accordance with the procedures outlined here.

**2.** The Area Supervisor is responsible for ensuring that a TOSHA-170 is reported to OIS for each incident (see Paragraph II.I.2. of this chapter, *Investigation Summary Report (TOSHA-170)*).

**3.** Review all proposed violation-by-violation penalties in accordance with CPL-TN 02-00-080, *Handling of Cases to be Proposed for Violation-by-Violation Penalties*, dated September 15, 2009.

**4.** Each Section Manager should establish a procedure to ensure that each fatality or catastrophe is thoroughly investigated and processed in accordance with established policy.

**K.** **Post-Citation Procedures/Abatement Verification**. The regulation governing abatement verification is found in Rule 0800-01-04-.23, and TOSHA's enforcement policies and procedures for this regulation are outlined in Chapter 7, *Post-Citation Procedures and Abatement Verification*.

**1.** Due to the transient nature of many of the worksites where fatalities occur and because the worksite may be destroyed by the catastrophic event, it is frequently impossible to conduct follow-up inspections. In such cases, the Area Supervisor should obtain abatement verification from the employer, along with an assurance that appropriate safety and health programs have been implemented to prevent the hazard(s) from recurring.

**2.** While site closure due to the completion of the cited project is an acceptable method of abatement, it can only be accepted as abatement without certification where a CSHO directly verifies that closure; otherwise, certification by the employer is required. Follow-up inspections need not be conducted if the CSHO has verified abatement during the inspection or if the employer has provided other proof of abatement.

**3.** Where the worksite continues to exist, TOSHA will normally conduct a follow-up inspection if serious citations have been issued.

**4.** Include abatement language and when appropriate safety and health system implementation language in any subsequent settlement agreement.

**5.** If there is a violation that requires abatement verification, the "abatement documentation required" button in the Abatement Details tab on the violation worksheet must be completed with the date of abatement verified.

**6.** If the case is a Severe Violator Enforcement Program (SVEP) case, follow-up inspections will be conducted in accordance with OSHA Instruction CPL 02-00-149, *Severe Violator Enforcement Program (SVEP)*. Follow-up inspections will normally be conducted even if abatement of cited violations has been verified through abatement verification.

**L.** **Audit Procedures**. The following procedures will be implemented to evaluate compliance with, and the effectiveness of, fatality/catastrophe investigation procedures:

**1.** Section Managers will review and analyze all fatality/catastrophe files. The review and analysis will utilize random case files to address the following:

a. **Inspection Findings**. Ensure that hazards have been appropriately addressed and violations have been properly classified. Also ensure that criminal referrals are made when appropriate.

b. **Documentation**. Ensure that the TOSHA-170 narrative and data fields and the violation worksheet narrative have been completed accurately and detailed enough to allow for analysis at the national level of the circumstances of fatal incidents. Ensure that the IMMLANG Questionnaire is completed, if relevant.

c. **Settlement Terms**. Ensure that settlement terms are appropriate, including violation reclassification, penalty reductions, and additional abatement language.

d. **Abatement Verification**. Ensure that abatement verification has been obtained.

e. Review OIS reports to identify any trends or cases that may indicate that a further review of those cases may be necessary.

**M.** **Relationship of Fatality and Catastrophe Investigations to Other Programs and Activities**.

**1.** **Homeland Security**. OSHA's *National Emergency Management Plan (NEMP)*, as contained in HSO 01-00-001, dated December 18, 2003, clarifies the procedures and policies for OSHA's National Office and Regional Offices during responses to incidents of national significance. Generally, TOSHA will provide technical assistance and consultation in coordinating the protection of response worker and recovery worker safety and health. When the President makes an emergency declaration under the Stafford Act, the National Response Framework (NRF) is activated. The NEMP can then be activated by the Assistant Secretary, the Deputy Assistant Secretary, or by request from a Regional Administrator. Whether TOSHA will conduct a formal fatality or catastrophe investigation in such a situation will be determined on a case-by-case basis.

**2.** **Significant Enforcement Cases**. Significant enforcement cases are defined as inspection cases with initial proposed penalties over $100,000. An inspection resulting from an employee fatality or a workplace catastrophe may well be a significant enforcement case and, therefore, particularly thorough documentation is necessary to sustain legal sufficiency.

**3.** **Special Emphasis Programs**. If a fatality or catastrophe investigation arises with respect to an establishment that is also in the current inspection cycle to receive a programmed inspection under any Site Specific Targeting program, the investigation and the inspection may be conducted either concurrently or separately.

**4.** **Cooperative Programs**. If a fatality or catastrophe occurs at a Voluntary Protection Program (VPP), Strategic Partnership Program site, or TOSHA's Safety and Health Achievement Recognition Program (SHARP), the VPP Manager or Consultation Project

Manager should be notified. When enforcement activity has concluded, the VPP Manager or Consultation Project Manager should be informed so that the site can be reviewed for program issues.

**5. Severe Violator Enforcement Program**

a. Inspections that result in citations being issued for at least one of the following are considered Severe Violator Enforcement Program (SVEP) cases:

(i) A fatality/catastrophe inspection in which OSHA finds one or more willful or repeated violations or failure-to-abate notices based on a serious violation related to a death of an employee or three or more hospitalizations;

(ii) An inspection in which OSHA finds two or more willful or repeated violations or failure-to-abate notices (or any combination of these violations/notices), based on high gravity serious violations related to a High-Emphasis Hazard as defined in Section XII., of OSHA Instruction CPL 02-00-149, Severe Violator Enforcement Program (SVEP);

(iii) An inspection in which OSHA finds three or more willful or repeated violations or failure-to-abate notices (or any combination of these violations/notices), based on high gravity serious violations related to hazards due to the potential release of a highly hazardous chemical, as defined in the PSM standard; or

(iv) All egregious (e.g., per-instance citations) enforcement actions.

b. In such cases, the instructions outlined in OSHA Instruction CPL 02-00-149, Severe Violator Enforcement Program (SVEP), shall be followed to ensure that the proper measures are taken regarding classification, coding and treatment of the case.

**N. Special Issues Related to Workplace Fatalities**.

**1. Death by Natural Causes.** Workplace fatalities caused by natural causes, including heart attacks, must be reported by the employer. The Area Supervisor in consultation with the Section Manager will then decide whether to investigate the incident.

**2. Workplace Violence**. As with heart attacks, fatalities caused by incidents of workplace violence must be reported to TOSHA by the employer. The Area Supervisor in consultation with the Section Manager will determine whether or not the incident will be investigated.

**3. Motor Vehicle Accidents**.

a. TOSHA does not require reporting motor vehicle accidents that occur on public roads or highways, unless the accident occurs in a construction work zone.

b. Although employers who are required to keep records must record vehicle accidents in their OSHA-300 Log of Work-Related Injuries and Illnesses, TOSHA does not investigate such accidents.

## III. Rescue Operations and Emergency Response.

**A. TOSHA's Authority to Direct Rescue Operations**.

**1. Direction of Rescue Operations**. TOSHA has no authority to direct rescue operations. These are the responsibility of the employer and/or local political subdivisions or state agencies.

2. **Monitoring and Inspecting Working Conditions of Rescue Operations**. TOSHA may monitor and inspect working conditions of covered employees engaged in rescue operations to ensure compliance with standards that protect rescuers, and to provide technical assistance where appropriate.

B. **Voluntary Rescue Operations Performed by Employees**. TOSHA recognizes that an employee may choose to place himself/herself at risk to save the life of another person. The following provides guidance on TOSHA citation policy toward employers whose employees perform, or attempt to perform, rescues of individuals in life-threatening danger.

1. **Imminent Danger**. Rule 0800-01-04-.15 provides that no citation may be issued to an employer because of a rescue activity undertaken by an employee of that employer with respect to an individual in imminent danger [i.e., the existence of any condition or practice that could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated] unless:

a. Such employee is designated or assigned by the employer to have responsibility to perform or assist in rescue operations, AND

the employer fails to provide protection of the safety and health of such employee, including failing to provide appropriate training and rescue equipment; or

b. Such employee is directed by the employer to perform rescue activities in the course of carrying out the employee's job duties, AND

the employer fails to provide protection of the safety and health of such employee, including failing to provide appropriate training and rescue equipment; or

c. Such employee is employed in a workplace that requires the employee to carry out duties that are directly related to a workplace operation where the likelihood of life-threatening accidents is foreseeable, such as operations where employees are located in confined spaces or trenches, handle hazardous waste, respond to emergency situations, perform excavations, or perform construction over water; AND

such employee has not been designated or assigned to perform or assist in rescue operations and voluntarily elects to rescue such an individual; AND

the employer has failed to instruct employees not designated or assigned to perform or assist in rescue operations of the arrangements for rescue, not to attempt rescue, and of the hazards of attempting rescue without adequate training or equipment.

2. **Citation for Voluntary Actions**. If an employer has trained employees in accordance with Rule 0800-01-04-.15, no citation will be issued for an employee’s voluntary rescue actions, regardless of whether they are successful.

C. **Emergency Response**.

1. **Role in Emergency Operations**. While it is TOSHA's policy to respond as quickly as possible to significant events that may affect the health or safety of employees, the agency does not have authority to direct emergency operations.

2. **Response to Catastrophic Events** ***(Note: these are not catastrophes as defined in paragraph II.A.2 of this chapter)***. TOSHA responds to catastrophic events promptly and acts as an active and forceful protector of employee safety and health during the response, cleanup, removal, storage, and investigation phases of these incidents, while maintaining a visible but limited role during the initial response phase.

3. **TOSHA's Role**.

   a. For inspections of an ongoing emergency response or post-emergency response operation where there has been a catastrophic event, or where TOSHA is acting under the National Emergency Management Plan (NEMP), the TOSHA Administrator will determine the overall role that TOSHA will play. See CPL 02-02-073, *Inspection Procedures for 29 CFR 1910.120 and 1926.65, Paragraph (q): Emergency Response to Hazardous Substance Releases*, dated August 27, 2007.

   b. During an event that is covered by the NEMP, TOSHA has a responsibility and authority to both enforce its regulations and provide technical advice and assistance to the on-scene coordinator.

   c. For details on TOSHA's response to occupationally-related incidents involving multiple fatalities, extensive injuries, massive toxic exposures, extensive property damage, or potential employee injury that generates widespread media interest consult with the TOSHA Administrator.

# CHAPTER 12
# SPECIALIZED INSPECTION PROCEDURES

I. **Multi-Employer Workplace/Worksite [Reserved].** See CPL 02-00-124, *Multi-Employer Citation Policy*.

II. **Temporary Labor Camps**.

A. **Introduction**. 29 CFR 1910.142, the Temporary Labor Camp standard, is applicable to both agricultural and non-agricultural workplaces.

B. **Definitions**.

*NOTE: Section 1910.142 does not contain a definition section. The following definitions reflect OSHA's interpretation of the standard.*

1. **Temporary**. The term *temporary* in §1910.142 refers to employees who enter into an employment relationship for a discrete or defined time period. As a result, the term *temporary* refers to the length of employment, and not to the physical structures housing employees.

2. **Temporary Labor Camp Housing**. Temporary labor camp housing is required employer-provided housing that, due to company policy or practice, necessarily renders such housing a term or condition of employment. See *Frank Diehl Farms v.Secretary of Labor*, 696 F.2d 1325 (11th Cir. 1983).

3. **New Construction**. All agriculture housing construction started on or after April 3, 1980, including totally new structures and additions to existing structures, will be considered new construction. Cosmetic remodeling work on pre-1980 structures will not be considered new construction and should be treated as existing housing.

C. **Enforcement of Temporary Labor Camp Standards.**

1. **Agriculture Worksites**. For agriculture worksites §1928.21 lists which Part 1910 standards apply.

2. **Enforcement for Non-Agriculture Worksites**.

a. For non-agriculture worksites other Part 1910 standards may be cited for hazards which are not covered under §1910.142. For non-agriculture worksites, the TLC standard has no provisions that specifically apply to fire protection, so those standards are not explicitly pre-empted by the TLC standard. The same is true for §§1910.36 and 37 (exit routes). However, §1910.38 (emergency action plans) applies only where an emergency action plan is required by a particular TOSHA standard, so it cannot be used with TLCs.

D. **Employee Occupied Housing**. Generally, inspections shall be conducted when housing facilities are occupied and as soon as feasible so that any hazards identified may be corrected early in the work season.

1. Since employees may not speak English, or may only speak English as a second language, every effort shall be made to send a bilingual CSHO on the inspection or have a bi-lingual person accompany the CSHO to translate conversations with employees.

2. CSHOs shall conduct inspections in a way that minimizes disruptions to those living in the housing facilities. If an occupant of a dwelling unit refuses entry for inspection

purposes, CSHOs shall not insist on entry and shall continue the rest of the inspection unless the lack of access to the dwelling unit involved would substantially reduce the effectiveness of the inspection. In that case, valid consent should be obtained from the owner of the unit. If the owner also refuses entry, the procedures for refusal of entry shall be followed. See Chapter 15, *Legal Issues*. The same shall apply in cases where employers refuse entry to the housing facility and/or to the entire worksite.

3. During inspections, CSHOs shall encourage employers to correct hazards as quickly as possible. Particular attention shall be paid to identifying instances of failure to abate and repeated violations from season to season or past occupancy. These violations shall be cited in accordance with normal procedures.

E. **Primary Concerns**. When conducting a housing inspection, CSHOs shall be primarily concerned with those facilities or conditions that most directly relate to employee safety and health. Accordingly, all housing inspections shall address at least the following:

1. **Site**.

   a. Review the location of the site for adequate drainage in relation to periodic flooding, swamps, pools, sinkholes, and other surfaces where water may collect and remain for extended periods.

   b. Determine whether the site is adequate in size to prevent overcrowding and whether it is located near (within 500 feet of) livestock.

   c. Evaluate the site for cleanliness and sanitation; i.e., free from rubbish, debris, wastepaper, garbage, and other refuse.

2. **Shelter**.

   a. Determine whether the shelter provides protection against the elements; has the proper floor elevation and floor space; whether rooms are used for combined purposes of sleeping, cooking and eating; and whether all rooms have proper ventilation and screening.

   b. Determine which rooms are used for sleeping purposes, the number of occupants, size of the rooms, and whether beds, cots, or bunks and lockers are provided.

   c. Determine what kind of cooking arrangements or facilities are provided, and whether all heating, cooking and water heating equipment are installed in accordance with state and local codes.

3. **Water Supply**. Determine whether the water supply for drinking, cooking, bathing and laundry is adequate and convenient, and has been approved by the appropriate local health authority.

4. **Toilet Facilities**. Determine the type, number, location, lighting, and sanitary conditions of toilet facilities.

5. **Sewage Disposal**. Determine, in camps where public sewers are available, whether all sewer lines and floor drains are connected.

6. **Laundry, Handwashing and Bathing Facilities**.

a. Determine the number, kind, locations and conditions of these facilities, and whether there is an adequate supply of hot and cold running water.

b. Determine also whether such facilities have appropriate floors, walls, partitions and drains.

7. **Lighting**.

a. Determine whether electric service is available, and if so, if appropriate light levels, number of ceiling-type light fixtures, and separate floor- or wall-type convenience outlets are provided.

b. Determine also whether the light fixtures, floor and wall outlets are properly grounded and covered.

8. **Refuse Disposal and Insect and Rodent Control**. Determine the type, number, locations and conditions of refuse disposal containers, and whether there are any infestations of animal or insect vectors or pests.

9. **First-Aid Facilities**. Determine whether adequate first-aid facilities are available and maintained for emergency treatment.

F. **Dimensions**. The relevant dimensions and ratios specified in §1910.142 are mandatory; however, CSHOs may exercise discretion to not cite minor variations from specific dimensions and ratios when such violations do not have an immediate or direct effect on safety and health. In those cases in which the standard itself does not make reference to specific dimensions or ratios but instead uses adequacy as the test for the cited conditions and facilities, the Area Supervisor shall make the determination as to whether a violation exists on a case-by-case basis considering all relevant factors.

G. **Documentation for Housing Inspections**. The following facts shall be carefully documented:

1. The age of the dwelling unit, including any additions. For recently built housing, date the construction was started.

2. Number of dwelling units, number of occupants in each unit.

3. Approximate size of area in which the housing is located and the distance between dwelling units and water supply, toilets, livestock and service building.

H. **Condition of Employment**. The Act covers only housing that is a term and condition of employment. Factors in determining whether housing is a term and condition of employment include situations where:

1. Employers require employees to live in the housing.

2. The housing is in an isolated location or the lack of economically comparable alternative housing makes it a practical necessity to live there.

3. Additional factors to consider in determining whether the housing is a term and condition of employment include, but are not limited to:

a. Cost of the housing to the employee – is it provided free or at a low rent?

b. Ownership or control of the housing – is the housing owned or controlled or provided by the employer?

c. Distance to the worksite from the camp, distance to the work-site from other non-camp residences – is alternative housing reasonably accessible (distance, travel, cost, etc.) to the worksite?

d. Benefit to the employer -- does the employer make the camp available in order to ensure that the business is provided with an adequate supply of labor?

e. Relationship of the camp occupants to the employer – are those living in the camp required to work for the employer upon demand?

# Chapter 13
# PUBLIC SECTOR SAFETY AND HEALTH PROGRAMS

**A. Program Responsibilities.**

**1.** T.C.A. Section 50-3-906 states, "It shall be the responsibility of each administrative department, commission, board, division or other agency of the State to establish and maintain an effective and comprehensive occupational safety and health program consistent with the standards promulgated under this chapter."

**2.** T.C.A. Section 50-3-910(a) states, "It is the duty of county, municipal, and other local governments to provide their employees with conditions of employment consistent with the objectives of this chapter, and to comply with standards developed under Section 50-3-101."

**3.** The Public Sector Section of TOSHA is responsible for ensuring that state agencies and local governments meet their statutory responsibilities as set forth above pursuant to the provisions of T.C.A. Section 50-3-908 in the case of state agencies and T.C.A. Section 50-3-912 in the case of local governments.

**B. Program Applicability**. The provisions of this chapter and of Rules of the Department of Labor and Workforce Development, Chapter 0800-01-05, apply to state agency programs and to local governments which have elected the option provided by T.C.A. Section 50-3-910(b)(2) of developing their own programs of compliance and have fulfilled the requirements of T.C.A. Section 50-3-910(c). Pursuant to T.C.A. Section 50-3-910(d), local governments which have not elected the option provided by T.C.A. Section 50-3-910(b)(1) are treated as private employers.

**C. Public Sector Monitoring Program**. In order to assure that state agency and local government programs are providing effective safety and health coverage to their employees, they will be monitored by the Public Sector Section biennially. Such monitoring shall include inspection of at least one (1) worksite in at least two (2) departments and reports of violations will be sent to agency/local government chief executive officers with abatement dates specified. (See Chapters III and IV, Part IV - *Public Sector, Tennessee Occupational Safety and Health Plan.*)

**D. Public Sector Consultation Program**. As public employers can not avail themselves of consultation resources provided under 29 U.S.C. 670(d)(1), such service shall be provided by the Public Sector Section upon a public sector employer's request.

**E. Public Sector Operations In General.** Activities of the Public Sector Operations Branch shall be in accordance with the guidance contained in this manual as they apply to public sector operations except for provisions that do not apply such as Chapter 6 - Penalties and Debt Collection. When questions arise about the appropriateness of a provision in this manual as it applies to the public sector, the following documents shall be consulted:

**1.** T.C.A. Title 50, Chapter 3, Part 9 *Miscellaneous Administrative and Enforcement Provisions*.

**2.** The Tennessee Department of Labor Rule 0800-01-05 *Safety and Health Provisions for the Public Sector*.

**3.** The Tennessee Occupational Safety and Health Plan Part IV - *Public Sector*.

*(NOTE: The T.C.A. is the highest authority, followed by the Department of Labor and Workforce Development Rules, followed by the provisions contained in the Tennessee Occupational Safety and Health Plan).*

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# Chapter 14
# HEALTH INSPECTION ENFORCEMENT PROGRAMS

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# Chapter 15
# LEGAL ISSUES

**I.** **Administrative Subpoenas**. **When to Issue**. An Administrative Subpoena may be issued whenever there is a need for records, documents, testimony or other supporting evidence necessary for completing an inspection or an investigation of any matter falling within TOSHA's authority.

The Commissioner of the Tennessee Department of Labor and Workforce Development or the Commissioner's designee has the authority to issue administrative subpoenas.

A. **Two Types of Subpoenas**. There are two types of subpoenas used to obtain evidence during a TOSHA investigation:

1. A *Subpoena Duces Tecum* is used to obtain documents. It orders a person or organization to appear at a specified time and place and produce certain documents, and to testify to their authenticity. Usually, these type subpoenas will also give the person or organization the option in lieu of appearing to send all the responsive documents and to certify under oath that the documents produced are authentic and are all the documents responsive to the subpoena. Employers are not required to create a new record in order to respond to these types of subpoenas.

2. A *Subpoena Ad Testificandum* commands a named individual or corporation to appear at a specified time and place, such as the Area Office, to provide testimony under oath. A verbatim transcript is made of this testimony.

B. Information shall be requested from the employer or holder of records, documents, or other information-containing materials.

1. If this person/entity refuses to provide requested information or evidence, the TOSHA representative serving the subpoena shall explain the reason for the request.

2. If there is still a refusal to produce the information or evidence requested, the TOSHA representative shall inform the person/entity that the agency may take further legal action.

C. **Administrative Subpoena Content and Service**.

1. Model administrative subpoenas are provided at the end of this chapter. If the TOSHA Administrator believes that there is reason for any departure from the models due to circumstances of the case, the TOSHA Attorney shall be consulted.

2. The subpoena shall be prepared for the appropriate party and will normally be served by personal service (delivery to the party named in person). Leaving a copy at a place of business or residence is not personal service.

a. In exceptional circumstances, service may be by certified mail with return receipt requested.

b. Where no individual's name is available, the subpoena can be addressed to a business' or organization's "Custodian(s) of Records."

3. Examples of language for a routine *Subpoena Duces Tecum* are provided below. This language should be expanded when requesting additional or more detailed information for accident, catastrophe, referral or fatality investigations.

a. "Copies of any and all documents, including information stored electronically, which reflect training procedures for the lockout/tagout procedures and hazard communication program in effect at the [insert site name]in [*insert city, state*], during the period [*insert month/day/year*], to present."

b. "Copies of the OSHA-300 and the OSHA-301 forms, for the entire site, during calendar years [*insert year*] and [*insert year*]."

c. "Copies of any and all documents, including information stored electronically, such as safety and health program handbooks, minutes of safety and health meetings, training certification records, audits and reprimands for violations of safety and health rules by employees of the [*insert site name*] in [*insert city, state*], that show [*insert employer's name*] had and enforced safety rules relating to the use of [trench boxes] during the period [*insert month/day/year*], to present."

*NOTE: Where particular information is being sought, a subpoena's description should be narrow and specific in order to increase the likelihood for prompt compliance with the request.*

4. A copy of the subpoena, signed by the Commissioner of the Tennessee Department of Labor and Workforce Development or the Commissioner's designee, shall be forwarded as soon as possible to the Area Supervisor and shall also be maintained at the Area Office and a copy included in the case file.

D. **Compliance with the Subpoena**. The person/entity served may comply with the subpoena by making the information or evidence available to the compliance officer immediately upon service, or at the time and place specified in the subpoena.

1. With respect to any record required to be made or kept pursuant to any statute or regulation, the subpoena shall normally allow three days from the date of service for production of the required information although a shorter period may be appropriate.

2. With respect to other types of records or information, such as safety programs or incident reports, the subpoena shall normally allow at least five working days from the date of service for production of the required information.

3. Separate subpoenas for items 1 and 2 above may be necessary.

4. Any witness fees or mileage costs potentially associated with administrative subpoenas should be discussed with the TOSHA Administrator and the TOSHA Attorney prior to the issuance.

E. **Refusal to Honor Subpoena**.

1. If the person/entity served refuses to comply with (or only partially honors) the subpoena, the compliance officer shall document all relevant facts and advise the TOSHA Administrator before taking further action.

2. To enforce a subpoena, the TOSHA Administrator shall follow the procedures outlined for obtaining warrants, and shall refer the matter to the TOSHA Attorney for appropriate action.

F. **Anticipatory Subpoena**. Generally, agency policy is to seek voluntary production of evidence before an administrative subpoena is issued. However, a subpoena may be executed and served without making a prior request where there is reason to believe that the corporate entity and/or

person from whom information is sought will not voluntarily comply, or where there is an urgent need for the information. Anticipatory subpoenas require consultation with the TOSHA Attorney.

*NOTE: For example, pre-inspection preparation of subpoenas for issuance at the opening conference is appropriate in cases where the employer has previously denied access to records or where complex inspections, involving extensive review of records, are planned.*

**II. Service of Subpoena on TOSHA Personnel**.

A. **Proceedings to which the Commissioner of Labor and Workforce Development is a Party**. If any, TOSHA personnel is served with a subpoena or order either to appear or to provide testimony in, or information for, a proceeding where the Commissioner of Labor and Workforce Development is a party, they shall immediately contact the TOSHA Administrator who shall refer the matter to the TOSHA Attorney for instructions regarding the manner in which to respond.

*NOTE: Review Commission rules provide that any person served with a subpoena, whether to testify in any Commission hearing or to produce records and testify in such hearing shall, within five days after date of service, move to revoke the subpoena if the person does not intend to comply with its terms. See Review Commission Rule 1030-4-6(2). Therefore, expeditious handling of any subpoena served on TOSHA employees is essential. When any such subpoena is served, the TOSHA Attorney must immediately be notified by telephone or email.*

B. **Proceedings to which the Commissioner of Labor and Workforce Development is Not a Party**. If any TOSHA personnel is served with a subpoena or order either to appear or to provide testimony in, or information for, a proceeding to which the Commissioner of Labor and Workforce Development is not a party (e.g., a private third party tort suit for damages associated with a workplace injury), they shall immediately contact the TOSHA Attorney who will access whether there is any basis to file a Motion to Quash the subpoena. If no basis exists for quashing the subpoena and if an agreement cannot be obtained to substitute deposition testimony for live testimony then the CSHO will comply with the subpoena.

**III. Obtaining Warrants**.

A. **Warrant Applications**.

1. Upon refusal of entry, or if there is reason to believe an employer will refuse entry, the Area Supervisor shall proceed according to guidelines and procedures established for warrant applications.

2. Warrant applications for establishments where consent has been denied for a limited scope inspection (i.e., complaint, referral, accident investigation) shall normally be limited to the specific working conditions or practices forming the basis of the inspection. However, a broad scope warrant may be sought if there is evidence of potentially pervasive violative conditions or if the establishment is on a current list of establishments targeted for a comprehensive inspection.

B. **General Information Necessary to Obtain a Warrant**. The Area Supervisor through the Section Manager shall inform the TOSHA Attorney in writing after the determination is made and provide all information necessary to obtain a warrant, including:

1. Area Office, telephone number, and name of Supervisor involved;

2. Name of CSHO attempting inspection and inspection number, if assigned. Identify whether the inspection to be conducted will include safety items, health items or both;

3. Legal name(s) of establishment and address, including City, State and County. Include site location if different from mailing address;

4. Estimated number of employees at inspection site;

5. Standard Industrial Classification (SIC) or North American Industry Classification System (NAICS) Code;

6. Summary of all facts leading to the refusal of entry or limitation of inspection, including:

   a. Date and time of entry/attempted entry;

   b. Date and time of denial;

   c. Stage of denial (entry, opening conference, walkaround, etc.);

7. A narrative of all actions taken by the CSHO leading up to, during, and after refusal, including:

   a. Full name and title of the person(s) to whom CSHO presented credentials;

   b. Full name and title of person(s) who refused entry;

   c. Reasons stated for the denial by person(s) refusing entry;

   d. Response, if any, by CSHO to the denial name and address (if known) of any witnesses to denial of entry.

8. Any information related to past inspections, including copies of previous citations.

9. Any previous requests for warrants. Attach details, if applicable.

10. All completed information related to the current inspection report, including documentation of any observations of violations in plain view discovered prior to denial.

11. If a construction site involving work under contract from any government agency, the name of the agency, the date of the contract, and the type of work involved.

12. Other pertinent information, such as: description of the workplace; the work processes; machinery, tools and materials used; known hazards and injuries associated with the specific manufacturing process or industry.

13. Investigative procedures that may be required during the proposed inspection (e.g., interviewing of employees/witnesses, personal sampling, photographs, audio/videotapes, examination of records, access to medical records, etc).

C. **Specific Warrant Information Based on Inspection Type**. Document all specific reasons for the selection of the establishment to be inspected, including proposed scope of the inspection:

1. **Imminent Danger**.

   a. Description of alleged imminent danger situation;

   b. Date information received and source of information;

c. Original allegation and copy of typed report, including basis for reasonable expectation of death or serious physical harm and immediacy of danger; and

d. Whether all current imminent danger investigative procedures have been followed.

2. **Fatality/Catastrophe**. The TOSHA Notification Form should be completed with as much detail as possible.

3. **Complaint or Referral**.

a. Original complaint or referral and copy of typed complaint or referral;

b. Reasons TOSHA believes that a violation threatening physical harm or imminent danger exists, including possible standards that could be violated if the complaint or referral is credible and representative of workplace conditions;

c. Whether all current complaint or referral processing procedures have been followed; and

d. Any additional information pertaining to the evaluation of the complaint or referral.

4. **Programmed**.

a. Targeted safety – general industry, construction;

b. Targeted health; and/or

c. Special emphasis program--Special Programs, Local Emphasis Program, Migrant Housing Inspection, etc.

5. **Follow-up**.

a. Date of initial inspection;

b. Details and reasons follow-up was conducted;

c. Copies of previous citations which served as the basis for initiating the follow-up;

d. Copies of settlement agreements and final orders, if applicable; and/or

e. Previous history of failure to correct, if any.

6. **Monitoring**.

a. Date of original inspection;

b. Details and reasons monitoring inspection is to be conducted;

c. Copies of previous citations and/or settlement agreements that serve as the basis for the monitoring inspection; and/or

d. Petition for Modification of Abatement Date (PMA) request, if applicable.

D. **Warrant Procedures**. Where a warrant has been obtained, CSHOs are authorized to conduct the inspection in accordance with the terms of the warrant. All questions from employers concerning the reasonableness of a compulsory process inspection shall be referred to the TOSHA Attorney.

1. **Action Taken Upon Receipt of Warrant (Compulsory Process**).

a. The inspection will normally begin within 24 hours of receipt of a warrant or from the date authorized by the warrant for initiating the inspection. An administrative warrant expires ten (10) days after its issuance.

b. Upon completion of the inspection, if the warrant includes a return of service space for entering inspection dates, CSHOs shall complete the return of service on the original warrant, sign and forward it to the TOSHA Attorney.

2. **Serving a Subpoena for Production of Records**. Where appropriate, even where the scope of an inspection is limited by a warrant or an employer's consent to specific conditions or practices, any subpoena for production of records shall be served in accordance with the section on administrative subpoenas in this chapter.

E. **Second Warrant**. Under certain circumstances, a second warrant may be sought to expand an inspection based on a records review or "plain view" observations of other potential violations discovered during a limited scope walkaround.

F. **Refused Entry or Interference**.

1. When an apparent refusal to permit entry or inspection is encountered upon presenting the warrant, CSHOs shall specifically inquire whether the employer is refusing to comply with the warrant.

2. If the employer refuses to comply or if consent is not clearly given, CSHOs shall not attempt to conduct the inspection at that time, and shall leave the premises and contact the Area Supervisor regarding further action.

a. CSHOs shall fully document all facts relevant to the refusal (including noting all witnesses to the denial of entry or interference).

b. The Area Supervisor through the Section Manager and TOSHA Administrator shall then contact the TOSHA Attorney. They shall jointly decide the action to be taken.

3. **Law Enforcement Assistance**. In unusual circumstances, a law enforcement officer may be asked to accompany a CSHO when a warrant is presented. A request for law enforcement’s assistance shall be made only by the TOSHA Administrator after consultation with the TOSHA Attorney, and only when there is a potential for violence, harassment and/or interference with the inspection, or reason to believe that the presence of a law enforcement officer will assist with compliance with the warrant.

## IV. Uniform Administrative Procedures Act (UAPA).

A. **Prevailing Party May be Awarded Fees**. The Uniform Administrative Procedures Act (UAPA) provides that a party prevailing against a State agency in a contested case hearing may be awarded fees payable by the agency if the agency's position in litigation was not “well grounded in fact and was not warranted by existing law, rule, or regulation” or if it is found that the citation was issued “for an improper purpose such as to harass, to cause unnecessary delay or cause needless expense to the party cited”.

B. **TOSHA's Position Must be Well Grounded**. Pursuant to the UAPA, the Tennessee Occupational Safety and Health Review Commission (Review Commission) or the court may award an employer fees if TOSHA proceeds in litigation on a position that is not well grounded or for an improper purpose. If a UAPA award is assessed by the Commission or a court following a TOSHA proceeding and the award becomes a final order, TOSHA is responsible for paying the award.

C. **UAPA Should Not Affect How the Agency Operates**. UAPA should not affect the manner in which the agency operates, as citations are issued only after TOSHA determines that there is adequate evidence that a violation exists, and proposed penalty amounts are determined based on established statutory and administrative criteria, and facts derived during the inspection/investigation. However, the potential for incurring UAPA costs underscores the importance of thoroughly documenting each element of a violation with evidence supporting the violative condition and characterization. In addition, because TOSHA generally bears the burden of proof in litigation, it is important that CSHOs promptly discuss with the Section Manager and TOSHA Attorney during the early stages of an investigation any factors affecting TOSHA's ability to support an alleged violation or penalty proposal (e.g., the likely unavailability of a critical witness or the need for an expert).

**V.** **Notice of Contest**. The Review Commission is an independent State agency created to decide contests of citations or penalties resulting from TOSHA inspections. The Review Commission, therefore, functions as an administrative court, with established procedures for conducting hearings, receiving evidence and rendering decisions. The Act states that the Review Commission operate as an independent agency (i.e., not part of another State department) to ensure that parties to agency cases receive impartial hearings.

A. **Time Limit for Filing a Notice of Contest**.

1. The Act provides employers and employees twenty (20) calendar days following the receipt of a notice of a citation to notify TOSHA of the employer's or employee's desire to contest a citation and/or proposed assessment of penalty.

2. Where a written notice of contest was not received within the 20 calendar day period allowed for contest, the TOSHA Administrator shall follow the instructions for Late Notices of Contest. A copy of any untimely notice of contest shall be retained in the case file.

NOTE: If the 20th calendar day period falls upon a Saturday, Sunday, or state holiday, the notice of contest will be considered timely if received the next business day, per TCA 1-3-102 which reads:

> The time within which any act provided by law is to be done shall be computed by excluding the first day and including the last, unless the last day is a Saturday, a Sunday, or a legal holiday, and then it shall also be excluded.

B. **Contest of Abatement Period Only**. If the notice of contest is submitted to TOSHA after the 20 calendar day period, but contests only the reasonableness of the abatement period, it shall be treated as a Petition for Modification of Abatement and handled in accordance with PMA procedures.

C. **Communication Where the Intent to Contest is Unclear**.

1. If a written communication is received from an employer or employee containing an objection, criticism or other adverse comment as to a citation or proposed penalty, but which does not clearly appear to contest the citations, the TOSHA Administrator, through the Section Manager or Area Supervisor, shall contact the employer to clarify the intent of the communication.

a. After receipt of the communication, any clarification should be obtained within the 20-day contest period, so that if a determination is made that it is a notice of contest, the file may be timely forwarded to the Review Commission.

b. In cases where the Area Office receives a written communication from an employer or employee requesting an informal conference that also states an intent to contest, the employer or employee must be informed that there can be no informal conference unless the notice of contest is withdrawn. If the employer or employee still wants to pursue an informal conference, the notice of contest must be rescinded in writing. All documents pertaining to such communications shall be retained in the case file.

2. If the Area Supervisor or Section Manager determines that the employer or employee intends the document to be a notice of contest, it shall be transmitted to the Review Commission. If contact with the employer or employee reveals a desire for an informal conference, the employer or employee shall be informed that the conference does not stay the running of the 20 calendar day contest period.

*NOTE: Settlement is permitted and encouraged at any stage of Review Commission proceedings. See Review Commission Rule 1030-7-1(1)*

## VI. Late Notice of Contest.

A. **Failure to Notify TOSHA of Intent to Contest**. If the employer or employee fails to notify TOSHA of its intent to contest a citation or penalty within twenty calendar days following the receipt of a citation, the citation and proposed penalties become final orders of the Department.

B. **Notice Received after the Contest Period**.

1. In every case where TOSHA receives notice of an employer's intent or employee's intent to contest a citation and/or proposed assessment of penalty beyond the 20 calendar day period, the TOSHA Administrator shall inform the employer or employee in writing that TOSHA will not accept the untimely notice of contest.

2. **The letter from the TOSHA Administrator will also indicate the following**:

a. Inspection number;

b. Citation number(s);

c. Corresponding proposed penalties;

d. Date on which TOSHA believes the employer received the notice of a violation (and proposed penalty, if applicable);

e. Date on which TOSHA received the employer's notice of contest, as well as any additional information the Administrator believes to be pertinent.

*NOTE: The postmarked envelope containing the late filed notice of contest is to be retained. A copy of the letter and envelope shall be sent to the TOSHA Attorney.*

C. **Retention of Documents**.

1. Area Offices shall maintain all documents reflecting the date on which the employer received the notice of a violation (and proposed penalty, if applicable), and the

employer's or employee's notice of contest was received, as well as any additional information pertinent to demonstrating failure to file a timely notice of contest. These documents shall be kept in the case file.

2. Written or oral statements from the employer or employee explaining the employer's or employee's reason for missing the filing deadline shall also be maintained (notes shall be taken to memorialize oral communications), in the case file.

**VII. Contested Case Processing Procedures**. The notice of contest and related documents must be sent to the Review Commission within 20 days of receipt of the employer's notification. The TOSHA Attorney shall be consulted in any questionable cases.

A. **Transmittal of Notice of Contest to the Review Commission**. Upon receipt of a notice of contest, **t**he TOSHA Administrator through the Section Manager will forward the following documents to the Review Commission:

1. The employer or employee's original letter contesting TOSHA's action; and

2. One copy of the Citation and Notification of Penalty Form (TOSHA-2) or of the Notice of Failure to Abate Form (TOSHA-2B).

***Note:*** *A copy of the envelope containing the notice of contest shall be retained in the case file with the postmark intact.*

B. **Transmittal of File to the TOSHA Attorney**. Under the Review Commission's Rules of Procedure, the Commissioner of Labor and Workforce Development is required to file a complaint with the Review Commission within **20 calendar days** after the receipt of a notice of contest. Immediately after receiving a notice of contest, the TOSHA Administrator shall send to the TOSHA Attorney the notice of contest along with a complete copy of the investigative file (including color photos and videos).

**VIII. Communications while Proceedings are Pending before the Review Commission**.

A. **Consultation with the TOSHA Attorney**.

1. After a notice of contest is filed and the case is within the jurisdiction of the Review Commission, there shall be no subsequent investigations of, or conferences with, the employer or employee representatives that have sought party status relating to any issues underlying the contested citations, without prior clearance from the TOSHA Attorney.

2. Once a notice of contest has been filed, all inquiries relating to the Citation and Notification of Penalty shall be referred promptly to the TOSHA Attorney. This includes inquiries from the employer, affected employees, employee representatives, prospective witnesses, insurance carriers, other Government agencies, attorneys, and any other party.

B. **Communications with Review Commission Representatives while Proceedings are Pending before the Review Commission**. CSHOs, Supervisors, Managers, or other TOSHA personnel shall not have any direct or indirect communication relevant to the merits of any open case with the Review Commission Commissioners or employees of the Review Commission, or any of the parties or interveners. All inquiries and communications shall be handled through the TOSHA Attorney.

**IX. Review Commission Procedures**. Although the Review Commission typically conducts the contested case hearing its Rules permit the Review Commission to assign the matter to an Administrative Law Judge (ALJ). If assigned to an ALJ the ALJ will conduct the hearing and issue a recommendation to the Review

Commission. The Review Commission may adopt, modify, or reject the ALJ's recommendation in whole or in part.

A. **Rules of Procedure**. The Review Commission Rules of Procedure are found in Review Commission Rules 1030-01 through 1030-07 of the Tennessee Secretary of State's Rules and Regulations Division. For any matter not specifically addressed or covered in the Review Commission Rules the Tennessee Rules of Civil Procedure govern.

B. **Setting Case For Hearing**. After a complaint has been filed on behalf of the Commissioner of Labor and Workforce Development, and after all discovery is complete, the TOSHA Attorney will set the matter on the Review Commission's "Contested Case" docket for the next meeting of the Review Commission.

C. **Hearing Evidence**.

1. Review includes a new examination of all of the evidence, as well as briefs submitted by the parties.

2. Upon hearing all of the evidence, the Review Commission will issue a written decision, including both findings of fact and conclusions of law.

3. The Review Commission then issues a decision affirming, modifying or vacating the citations and penalties proposed by TOSHA.

4. The decision becomes final in 60 days unless, within that period, one of the Review Commissioners directs that the case be reviewed or one of the parties files a Petition for Judicial Review.

D. **Review of Review Commission's Decision**. If one of the parties requests review of the Review Commission's decision the petitioning party may request review by the Chancery Court of Davidson County, Tennessee by filing a Petition for Judicial Review. Review by Chancery Court of Davidson County, Tennessee must be sought within 60 days after the Review Commission's decision becomes final.

E. **Availability of Review Commission Decisions**. Federal OSHA Review Commission decisions, including Administrative Law Judge decisions, are available from the Review Commission website, www.oshrc.gov.

**X. Discovery Methods**. Once a proceeding has been initiated, each party has the opportunity to "discover" evidence in the possession of an opposing party. Traditionally, discovery methods include:

- Request for Admissions
- Interrogatories,
- Requests for Production of Documents, and
- Depositions.

The TOSHA Attorney will represent the agency in responding to discovery requests. It is essential that all TOSHA personnel coordinate and cooperate with the assigned attorney to ensure that such responses are accurate, complete, and filed in a timely manner.

A. **Interrogatories**. CSHOs shall draft and sign answers to interrogatories, with assistance from the TOSHA Attorney. It is the responsibility of the CSHO to answer each interrogatory separately and fully. The TOSHA Attorney shall sign any objections to the interrogatories. CSHOs should be

aware that they may be deposed and/or examined at hearing on the interrogatory answers provided.

B. **Production of Documents**.

1. If a request for production of documents is served on the TOSHA Attorney and that request is forwarded to the Area Office CSHOs, or staff member, they should immediately make all documents relevant to that discovery demand available to the TOSHA Attorney.

2. While portions of those materials may be later withheld based on governmental privileges or doctrine (e.g., statements that would reveal the identity of an informer), CSHOs must not withhold any information from the TOSHA Attorney.

3. It is the TOSHA Attorney's responsibility to review all material and to assert any applicable privileges that may justify withholding documents/materials that would otherwise be discoverable.

C. **Depositions**. Depositions permit an opposing party to take a potential witness' pre-hearing statement under oath in order to better understand the witness's potential testimony if the matter later proceeds to a hearing. CSHOs or other TOSHA personnel may be required to offer testimony during a deposition. In such cases, the TOSHA Attorney will be present with the witness.

XI. **Testifying in Hearings**. While instructions provided by the TOSHA Attorney take precedence, particularly during trial preparation, the following considerations will generally enhance the hearing testimony of CSHOs:

A. **Review Documents and Evidence**. In consultation with the TOSHA Attorney, CSHOs should review documents and evidence relevant to the inspection or investigation before the proceeding so that when testifying, they are very familiar with the evidence and need not regularly refer to the file or other documents.

B. **Attire**. Wear appropriate clothing that reflects the agency's respect for the court or other tribunal before which you are testifying. This also applies when appearing before a magistrate to seek an administrative warrant.

C. **Responses to Questions**. Answer all questions directly and honestly. If you do not understand a question, indicate that and ask that the question be repeated or clarified.

D. **Review Commissioner's or Judge's Instruction(s)**. Listen carefully to any instruction provided by the commissioner or judge and, unless instructed to the contrary by counsel for TOSHA, follow the commissioner's or judge's instruction.

XII. **Citation Final Order Dates**.

A. **Citation/Notice of Penalty Not Contested**. The Citation/Notice of Penalty and abatement date becomes a final order of the Department on the date the 20-day contest period expires. For purposes of computing the 20-day period, the day the employer receives the citation is not counted.

**Example 15-1**: An employer receives the Citation/Notice of Penalty on August 1st. The day the employer receives the Citation/Notice of Penalty is not counted. Therefore, the final order date would be August 21st.

B. **Citation/Notice of Penalty Resolved by Informal Settlement Agreement (ISA)**. Because there is no contest of the citation, an ISA typically becomes final, with penalties due and payable, thirty

(30) days after receipt of the Amended Citation and Notification of Proposed Penalty. (An ISA is effective upon signature by both the TOSHA Supervisor/Manager and the employer representative as long as the contest period has not expired).

C. **Citation/Notice of Penalty Resolved by Formal Settlement Agreement (FSA)**. The Citation/Notice of Penalty becomes final 60 days after the agency final order approving settlement agreement is signed by the TOSHA Administrator.

D. **Review Commission Decision Review by the Chancery Court**. The Chancery Court's decision becomes final after 60 days unless that decision is appealed to the Tennessee Court of Appeals.

XIII. **Court Enforcement of the Review Commission's Order**. An employer's obligation to abate a cited violation arises when there is a final order of the Review Commission upholding the citation.

A. **Court Enforcement Orders**. If necessary, The TOSHA Attorney may obtain an enforcement order from the appropriate Court enforcing final Review Commission orders. An employer who violates such a court order can be found in contempt of court. Potential sanctions for contempt include daily penalties and other fines, recovery of the Review Commissioner's costs of bringing the action, incarceration of an individual company officer who flouts the Court's order, and any other sanction which the court deems necessary to secure compliance. Employers who ignore ordinary enforcement actions may be induced to comply by the severity of these potential contempt sanctions. Enforcement orders can be an effective and speedier alternative to failure-to-abate notices that are typically issued when an employer does not abate a violation within the allowed time. They can be requested from the Court whether the final order results from a Review Commission decision, a settlement agreement, or an uncontested citation.

B. **Selection of Cases for Court Enforcement Order Action**. All final orders issued in enhanced enforcement cases should be considered for court enforcement orders.

1. Employer's citation history and/or other indications suggest serious compliance problems, such as widespread violations of the same or similar standards at multiple establishments or construction worksites. The OSHA OIS database should be searched for the employer's history of violations;

2. Employer statements or actions indicating reluctance or refusal to abate significant hazards, or behavior that demonstrates indifference to employee safety;

3. Repeated violations of the Act, particularly of the same standard, which continue undeterred by the traditional remedies of civil monetary penalties and Review Commission orders to abate;

4. Repeated refusal to pay penalties;

5. Filing false or inadequate abatement verification reports;

6. Disregard of a previous settlement agreement, particularly one that includes a specific or company-wide abatement plan.

C. **Drafting of Citations and Settlements to Facilitate Enforcement**. Proper drafting of citations and settlement agreements can facilitate obtaining an enforcement order and maximize its deterrent effect.

Notations stating "Corrected during inspection" or "Employer has abated all hazards" shall not be made on the citation in cases where there is evidence of a continuing violative practice by an employer that may be subject to a summary enforcement order (e.g., failure to provide fall protection is a recurring condition based on citation history or other indications suggesting

widespread violations of the same or similar standards at other establishments or construction worksites).

Where possible, TOSHA should attempt to identify cases that may warrant enforcement orders at least a month before issuing the citation. When TOSHA identifies such a case, it will contact the TOSHA Attorney to discuss citation language. If a case identified for potential enforcement order action is being resolved through a settlement agreement, whether formal or informal, language should be sought in the agreement that commits the employer to specific ongoing abatement duties.

Language in a settlement agreement that imposes a specific duty on the employer, such as a requirement that the employer hire a consultant to develop a safety program or provide TOSHA with a list of other worksites, can be enforced.

D. **Follow-up Inspections**. The TOSHA Attorney will notify the Administrator when a court has entered an enforcement order. TOSHA will then promptly schedule an inspection or investigation to determine whether the employer is complying with the court order. The TOSHA Administrator, in consultation with the TOSHA Attorney will determine the nature and extent of the inspection or investigation. The TOSHA Attorney will advise on the kind of "clear and convincing" evidence that would be needed to support a contempt petition in the event of the employer's noncompliance with the order of the court.

E. **Conduct of Verification Inspections.** Whenever an enforcement order is issued by a Court, an inspection shall be scheduled within six (6) months to determine whether the company is complying with the court order. If serious violations of the standard(s) subject to the enforcement order are found, the TOSHA Attorney shall be contacted immediately for guidance on what evidence will be needed for submission to the court.

APPENDIX A

State of Tennessee
**DEPARTMENT OF LABOR and WORKFORCE DEVELOPMENT**
**Occupational Safety and Health Administration**

# SUBPOENA

**DUCES TECUM**

**TN OSHA Inspection of Fatality at**

_____

TO:

_____

**PURSUANT TO Tenn. Code Ann. § 50-3-302(a) AND RULE 45 OF THE TENNESSE RULES OF CIVIL PROCEDURE YOU ARE HEREBY COMMANDED TO PRODUCE THE ITEMS OR INFORMATION LISTED BELOW. FAILURE TO PRODUCE SAID ITEMS OR INFORMATION ON OR BY FEBRUARY 24, 2015 MAY RESULT IN PUNISHMENT BY FINE AND/OR IMPRISONMENT AS PROVIDED BY LAW. IF YOU HAVE QUESTIONS REGARDING YOUR OBLIGATIONS PLEASE CALL TN OSHA ATTORNEY DAN BAILEY AT (615) 741-9550.**

_____

DATE: ITEM OR INFORMATION TO PRODUCE:

PLACE:
Tennessee Department of Labor &
Workforce Development – TN OSHA
1301 Riverfront Parkway Suite 202
Chattanooga, TN 37402

_____

This Subpoena is being issued on the _____ day of _____

Attorney's Signature: _____

Signature of Commissioner's Designee:

_____
Jim Flanagan,
Assistant Administrator TN OSHA

_____

**RETURN ON SERVICE**

_____

I certify that on the date below I served a copy of this subpoena on _____, 20, as stated above by mailing a copy, by personal service and/or certified mail, (name & title), (address), pursuant to T.C. A. 5-3-302(a).

Date of Service: _____

Sworn to and subscribed before me on this the _____day of _____, 20.
Signature of Notary Public: _____
My Commission Expires: _____

Signature of Attorney, or Attorney's Designee: _____

APPENDIX B

State of Tennessee
**DEPARTMENT OF LABOR and WORKFORCE DEVELOPMENT**
**Occupational Safety and Health Administration**

# SUBPOENA
**AD TESTIFICANDUM**

**TN OSHA Inspection #**

TO:

**PURSUANT TO Tenn. Code Ann. § 50-3-302(a) AND RULE 45 OF THE TENNESSE RULES OF CIVIL PROCEDURE YOU ARE HEREBY COMMANDED TO APPEAR AT THE TIME, DATE AND PLACE SPECIFIED FOR THE PURPOSE OF GIVING TESTIMONY. FAILURE TO APPEAR MAY RESULT IN PUNISHMENT BY FINE AND/OR IMPRISONMENT AS PROVIDED BY LAW.**

**DATE:**
**PLACE:**
Tennessee Department of Labor &
Workforce Development
TOSHA Hearing Room, 1st Floor
220 French Landing Drive
Nashville, TN 37243

ITEMS OR INFORMATION TO PRODUCE:

This Subpoena is being issued on the _____ day of _____, 2012

Attorney's Signature: _____

Signature of Commissioner's Designee: _____
Steve Hawkins, Administrator
TN OSHA

**RETURN ON SERVICE**

I certify that on the date below I served a copy of this subpoena as stated above by mailing a copy, by certified mail (######), addressed to (name), (address), pursuant to T.C. A. 5-3-302(a).

Date of Service: _____

Sworn to and subscribed before me on this the _____ day of _____, 20.

Signature of Notary Public: _____

My Commission Expires: _____

Signature of Attorney, or Attorney's Designee: _____

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# Chapter 16
# DISCLOSURE UNDER THE TENNESSEE OPEN RECORDS Act

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# Chapter 17
# PREEMPTION BY OTHER AGENCIES

I. It is recognized that within the state of Tennessee other agencies may possess authority over safety and health matters in certain industries. To avoid a duplication of federal effort and prevent conflict between different sets of regulations covering the same working condition, the Tennessee legislature provided in section 50-3-104 of the TOSHA Act that " The provisions of this chapter or any standard or regulation promulgated pursuant to this chapter shall apply to all employers and employees except:"

The federal government, including its departments, agencies and instrumentalities;
Employees whose safety and health are subject to protection under the Atomic Energy Act of 1954, as amended (42 U.S.C., §§ 2011-2296);

Employees whose safety and health are subject to protection under the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C., § 801 et seq.), the Federal Metal and Nonmetallic Mine Safety Act (30 U.S.C., § 725) [repealed], or title 59 of this Code;

Railroad employees whose health and safety are subject to protection under the Federal Safety Appliances Act (45 U.S.C., § 1 et seq.) or the Federal Railroad Safety Act of 1970 (45 U.S.C., §§ 431-441).

II. Generally speaking, there is a two-pronged test to determine whether or not working conditions are exempt from coverage of the TOSH Act: (1) Does a federal or state agency possess the statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health and (2) has the other agency "exercised" its statutory authority over the particular working condition? A "working condition" is generally a particular occupational hazard. Another agency's requirement dealing with an occupational hazard preempts TOSHA even if the requirement also protects public safety or heath, unless the other agency's requirement only incidentally affects occupational safety or health.

III. Where questions arise concerning jurisdictional issues, Area Supervisors should begin by referring to CSP-TN 01-03-003 Jurisdictional Coverage Reference - US DOL/OSHA and TDLWD/TOSHA. If after review, jurisdictional issues are unclear, the Area Supervisor should contact his/her manager for clarification.