OSHA AND WORKERS’ COMPENSATION
An Overview of Claims Involving
Occupational Safety and Workplace Injury

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OVERVIEW

- The OSHA Perspective
  Randy Rabinowitz, Esq.
- OSH Act of 1970
- OSHA Standards and Enforcement
- OSHA Relationship to Workers’ Compensation and Tort

Reference: Occupational Safety & Health Law
Second Edition, BNA Books
ABA OSH Law Committee
Co-Editor in Chief Randy Rabinowitz
Ch. 23, The OSH Act, Workers’ Compensation, and Workplace Tort Liability
OVERVIEW, cont.

- Exclusivity and Workers’ Compensation
  Albert B. Randall, Jr., Esq.
- Exclusivity of Workers’ Compensation Remedy
- Exceptions to Exclusivity
- Other Exclusivity Issues

Handout: The Exclusive Remedy Provision
State-by-State Survey
The National Workers’ Compensation Defense Network
Co-Author: Albert B. Randall, Jr.
OVERVIEW, cont.

• Enhanced Workers’ Compensation Awards or Penalties

Richard J. Swanson, Esq.

• Effect of Safety Violations and Employer Misconduct
• Intentional/Negligent Failure to Comply
• Serious and Willful Misconduct
• Failure to Provide Safety Equipment
THE OSHA PERSPECTIVE

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Occupational Safety & Health Act of 1970

- 29 USC 651
- Occupational Safety and Health Administration (OSHA)
- National Institute of Occupational Safety and Health (NIOSH)
- Occupational Safety and Health Review Commission (OSHRC)
OSH Act

- Imposes regulatory duties on employers
- Sometimes imposes regulatory duties on manufacturers and property owners
- No mandatory duties are imposed on employees
Relationship to Workers’ Compensation and Tort

- Section 4(b)(4) of OSHA provides OSH Act does not supersede or in any manner affect workers’ compensation law or enlarge, diminish or otherwise affect common law or statutory rights, duties and liabilities of employers.
- This provision has been interpreted to bar a private right of action to enforce OSHA regulatory duties.
OSHA Standard Setting

- Consensus Standards under 6(a)
- Permanent Standards under 6(b)
Consensus Standards

- Agreed to by industry before 1970 – described by Congress as the lowest common denominator of safety
- Adopted by OSHA without notice and comment before 1972
- Woefully out of date
- Often used by employers or manufacturers to show they met their duty of care.
Permanent Standards

• Issued following notice and comment. OSHA holds a rulemaking hearing with cross examination before issuing permanent standards.
• OSHA must extensively analyze health and safety data to show hazard causes material impairment.
• OSHA must determine that hazard poses a significant risk at exposures likely to be present in the workplace. *Industrial Union Dep’t. v. American Petroleum Inst.*, 448 US 607 (1980).
• OSHA relies on the “best available evidence” to make scientific determinations. Best available evidence allows OSHA to rely on inconclusive but suggestive data showing risk or causation.
• OSHA’s findings are reviewed under the “substantial evidence” test. This is a heightened administrative law standard, but not as rigorous a standard of proof as preponderance of the evidence.
Examples of OSHA Standards Which Have Impacted Workers’ Comp

- Asbestos
- Cotton Dust
- Lockout
Examples of Likely Obama Standards Which May Impact Future Cases

- Silica
- Diacetyl
- Combustible Dust
Effects of Standards

- When government publishes a comprehensive analysis of scientific evidence of harm, that analysis represents mainstream scientific view.
- Under Daubert experts whose views disagree with government analysis face greater obstacles.
- OSHA analysis of risks affects not only employers, but manufacturers as well.
- Government’s burden in developing scientific analysis during rulemaking is lower than it would be in other forums.
Other Agencies

- EPA
- NIOSH
- National Academy of Sciences
- Chemical Safety Board
OSHA Enforcement

- OSHA issues citations for violations of standards and general duty clause
- Citations include proposed penalties
- OSHA characterizes the violation as willful, repeat, serious, non-serious or *de minimis*
- OSHA describes required abatement
- In 24 jurisdictions, a state agency is responsible for OSHA enforcement.
Abatement of OSHA Violations

- Employers are not required to abate OSHA violations until a final order affirming a citation is issued.
- A Final order issues, as a matter of law, if an employer does not contest the citation or contests only the penalty.
- Final orders issue for contested citations only when OSHRC litigation concludes.
Defenses to Violations

- Unpreventable Employee Misconduct
- Infeasibility
- Greater Hazard
- Invalidity of the standard
- Preemption by another federal agency
OSHA Multi-Employer Citations

- OSHA may cite employers who do not employ the injured worker
- OSHA multi-employer policy applies to contractor – subcontractor situations. It also sometimes applies to contract workers and leased employees
- OSHA often cites some or all employers who control the hazard, who expose workers to the hazard, who create the hazard, or who are responsible for correcting the hazard
- OSHA citations do not depend on who signs a paycheck.
OSHA Citations May be Double Edged Sword

- Employers may rely on compliance to show they met a duty of care. May also rely on OSHA’s decision not to issue citations as evidence of compliance.
- Employees may try to rely on OSHA violations as evidence of negligence.
Exclusivity and Workers’ Compensation

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Workers’ Compensation in General

- No-fault system to provide benefits to injured employees

- Key component is exclusivity of remedy
  - Protects employers from employee lawsuits in tort
Exceptions to Exclusivity

- Employer’s intentional acts
  - *E.g., assaults, knowing violations of safety standards*
- Failure to secure WC coverage
- Contractual “bargaining away” of exclusivity
  - *Be wary of indemnification agreements*
Exceptions to Exclusivity

- Dual capacity
  - *E.g., medical providers, product manufacturers*

- Fraudulent concealment

- Retaliatory discharge
Other Issues Pertaining to Exclusivity

- “Non-employees”
  - *E.g., independent contractors, “casual employees”*
- Parent companies/subsidiaries/affiliated companies
- Co-employee suits
- Statutory employers
Enhanced Worker’s Compensation Awards or Penalties Based on Safety Violations or Employer Misconduct

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Traditional Worker’s Compensation Award

- Medical treatment
- Temporary total/partial disability
- Permanent partial impairment
- Permanent partial/total disability
Option to Sue at Common Law for:

- Willful misconduct (Arizona)
- Willful act or gross negligence causing death (Texas)
- Intentional injury by the employer (Illinois, Indiana, Kentucky, Oregon, Washington, West Virginia)
## Increased Penalties and Awards Based on Safety/OSHA Violations and Employer Misconduct

<table>
<thead>
<tr>
<th>State</th>
<th>Description of Law</th>
<th>Penalty/Award</th>
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<tr>
<td>Arizona</td>
<td>Any willful or repeated violation of occupational safety and health standards, emergency orders issued by the Industrial Commission of Arizona or failure to keep the workplace free from recognized hazards</td>
<td>Penalties may be assessed, ranging from $5,000 - $70,000 depending on the offense; if death results, the employer may be charged with a Class 6 felony</td>
<td>§ 23-418</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Any employer who fails to utilize safety services and an injury or death results</td>
<td>Employer must participate in the Extra-Hazardous Employer Program</td>
<td>§ 11-9-409 (c)(2)-(8), § 11-9-503</td>
</tr>
<tr>
<td>California</td>
<td>An employee is injured by serious and willful misconduct of the employer</td>
<td>Award increased by 50 %</td>
<td>Labor Code § 4553</td>
</tr>
<tr>
<td>Connecticut</td>
<td>An employer violates OSHA or state health and safety regulations resulting in injury or illness</td>
<td>Award increased to 100% of Average Weekly Wage</td>
<td>§ 31-307(b)</td>
</tr>
<tr>
<td>Illinois</td>
<td>An employer willfully violates the state Health and Safety Act (ILCS 225)</td>
<td>Award increased by 25 %</td>
<td>§ 820 ILCS 305/19(m)</td>
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### Increased Penalties and Awards Based on Safety/OSHA Violations and Employer Misconduct, cont.

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<td>Kentucky</td>
<td>An accident caused by intentional failure of the employer to comply with statutes/regulations relative to installation or maintenance of safety appliances or methods</td>
<td>Employer liability increases 30%</td>
<td>§ 342.165</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Employer's serious and willful misconduct causes injury</td>
<td>Award is doubled</td>
<td>Chap. 152 § 28</td>
</tr>
<tr>
<td>Missouri</td>
<td>Failure of employer to comply with state statute or order by the Missouri Division of Workers' Compensation</td>
<td>Award increased by 15 %</td>
<td>§ 287.120(4)</td>
</tr>
<tr>
<td>New Mexico</td>
<td>Failure of employer to provide safety devices or negligence in failing to provide reasonable safety equipment</td>
<td>Award increased by 10 %</td>
<td>§ 52-1-10</td>
</tr>
<tr>
<td>North Carolina</td>
<td>Willful failure of employer to comply with statutory requirements or order by the North Carolina Industrial Commission</td>
<td>Award increased by 10 %</td>
<td>§ 97-12(3)</td>
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## Increased Penalties and Awards Based on Safety Violations and Employer Misconduct, cont.

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<td>Ohio</td>
<td>Injury, disease or death caused by failure to comply with requirements for the health, safety and lives of employees</td>
<td>Award increased by 15 - 50 %</td>
<td>OH Const. Art. II § 35</td>
</tr>
<tr>
<td>South Carolina</td>
<td>Employer willfully or repeatedly violates occupational safety or health rules/regulations</td>
<td>Civil penalty of up to $70,000; if death results, the employer may be charged with a misdemeanor punishable by up to six months in jail and an additional $10,000 fine</td>
<td>§ 41-15-320</td>
</tr>
<tr>
<td>Utah</td>
<td>Employer willfully fails to comply with the statute or a rule/order from the Utah Labor Commission</td>
<td>Award increased by 15 %</td>
<td>§ 34A-2-301</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Injury caused by failure of employer to comply with any statute, rule or order of the Wisconsin Department of Workforce Development</td>
<td>Award increased by 15 %</td>
<td>§ 102.57</td>
</tr>
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</table>
Proving Violations Of Safety Regulations

- Non-compliance with statutes or safety regulations governing certain industries
- Ohio - Violation of Specific Safety Requirements (VSSR)
  - 50% increase in WC award
  - VSSR strictly construed against applicability to employer
- Required causal connection between injury and violation
Failure to Comply with Federal or State OSHA Requirements

- Violation of federal OSHA standard alone may not be sufficient if not adopted by state (Arkansas, Illinois, Ohio)
- Violation of “safety rule required by statute” includes federal OSHA standards (Florida)
- Violation of federal or state OSHA requirement alone not sufficient to elicit penalty for failure to provide safety device required by law (New Mexico)
Evidence of Safety Violations

- Was safety device consistent with industry practice?
- Was the device inspected and approved?
- Was the proximate cause of injury failure to use safety device or negligence of co-employee?
Further Discussion