

ASSE CENTRAL OHIO CHAPTER

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**OSHA AND RECENT DEVELOPMENTS
IMPACTING OHIO WORKPLACE SAFETY**

**Douglas J. Suter, Esq.
Hahn Loeser + Parks, LLP
65 E. State Street, Suite 1400
Columbus, OH 43215
(phone): 614/221-0240
(fax): 614/221-5909
E-mail: DSuter@hahnlaw.com**

Douglas J. Suter

Biography

Douglas J. Suter is a partner with the Columbus Office of Hahn Loeser + Parks, LLP. He is listed in the 2013 and 2014 editions of *The Best Lawyers in America* in the area of labor and employment law and he has been named an Ohio Super Lawyer in both commercial litigation and labor/employment law. In 2011, Doug was featured in *Ohio Super Lawyers* magazine as one of the top five lawyers in Ohio and has been named one of the top 100 trial lawyers in Ohio by the National Trial Lawyers. He has been named one of the top attorneys in Central Ohio by both *Business First* magazine and *Columbus C.E.O.* magazine. Douglas is "AV" rated by Martindale Hubbell.

Doug devotes a large portion of his litigation practice to representing employers nationwide in OSHA litigation before the Occupational Safety & Health Review Commission, MSHA litigation, and defending employers in other labor and employment matters, including wrongful death defense, defense of employers in multi-employer worksite accidents and fatalities, workers' compensation matters, V.S.S.R. actions, intentional tort actions and construction litigation. In 1992, Doug defended the first Ohio company ever charged with criminal willful OSHA violations by the United States Justice Department following a workplace fatality and he has been involved in at least one hundred wrongful death and significant injury cases and over three hundred OSHA cases, including numerous OSHA cases with penalties of nearly \$400,000.00.

Doug has lectured and written on OSHA, workplace safety, and liability matters for The Ohio State University, Marshall University, the American Society of Safety Engineers, the Ohio Division of Safety & Hygiene, the Builders Exchange of Central Ohio, the Ohio State Bar Association Continuing Legal Education Institute, the Columbus Area Chamber of Commerce, the National Business Institute, The Greater Columbus Safety Council, The County Engineers Association of Ohio, The American Gas Association, Ohio Rural Electric Cooperative and numerous trade associations and safety councils. In 2001, he represented the Builders Exchange of Central Ohio in contract negotiations with the United States Department of Labor, resulting in the OSHA/Builders Exchange Partnership Agreement.

Mr. Suter obtained his B.S. degree in Business Administration with honors from West Liberty State College, where he was named management student of the year. He obtained his Juris Doctorate degree *cum laude* from the Capital University Law School, where he was one of the editors of the Law Review. He was appointed by the American Bar Association to the Occupational Safety & Health Law Committee in 1992. He is also a member of the Society of Ohio Safety Engineers, National Safety Council, Builders Exchange of Central Ohio Safety Advisory Council and American Society of Safety Engineers.

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1. REPRESENTATIVE OSHA CASES (OHIO)

OSHA Enforcement is still way up in 2012, 2013 AND 2014, including Ohio.

- May 6, 2014:** Columbus OSHA Office cites Coshocton manufacturer with fall and amputation hazard related Repeat and Serious citations and penalties totaling \$155,900.00.
- March 24, 2014:** Toledo OSHA Office cites Columbus restoration company with lead and fall hazard citations and penalties totaling \$119,000.00.
- March 24, 2014:** Toledo OSHA Office cites Bellefontaine painting company with two willful and eight serious citations and penalties totaling \$49,600.00 for violations of OSHA's lead standard.
- March 17, 2014:** Columbus OSHA Office cites multi-state company with 13 repeat and serious citations for violation of OSHA's machine guarding regulations, assessing penalties totaling \$117,000.00.
- March 11, 2014:** Cleveland OSHA Office cites Canton boiler manufacturer with willful violations for failure to comply with OSHA's machine guarding regulations. OSHA assessed penalties totaling \$112,000.00 and placed company on OSHA's Severe Violator List.
- March 10, 2014:** Cleveland OSHA Office cites recycler and plastics products supplier with 12 serious violations for lack of employee training, PPE, chemicals, forklift safety and fire extinguishers. OSHA assesses penalties totaling \$51,800.00.
- March 5, 2014:** Toledo OSHA Office cites Findlay company with 2 willful and 5 serious citations, for electrical hazards, lockout/tagout, machine guarding hazards and fire hazards. OSHA assesses penalties totaling \$81,450.00.
- February 19, 2014:** Toledo OSHA Office cites Troy Ohio printing company with 24 serious safety and health violations. OSHA assesses penalties totaling \$91,800.00.
- February 13, 2014:** Cincinnati OSHA Office cites Southern Ohio facility with 2 repeat citations and 5 serious citations for PPE, lockout/tagout. OSHA assessed penalties totaling \$86,900.00.
- February 6, 2014:** Columbus OSHA Office cites Marietta chemical facility with one repeat citation and 11 serious citations related to OSHA's process safety management regulations. OSHA assesses penalties totaling \$77,000.00.

- January 30, 2014:** Cincinnati OSHA Office cites Dayton facility with 5 repeat violations and 2 serious violations of electrical hazards, haz-com, powered industrial vehicles, machine guarding, lockout/tagout. OSHA assesses penalties totaling \$103,800.00.
- January 27, 2014:** Cleveland OSHA Office cites stamping facility with 20 serious citations including lockout/tagout, machine guarding and electrical hazards. OSHA assesses penalties totaling \$63,000.00.
- January 22, 2014:** Cleveland OSHA Office cites Barberton company with 1 willful violation and 2 serious citations for machine guarding and lockout/tagout hazards following employee fatality. OSHA assesses penalties totaling \$69,000.00.
- December 26, 2013:** Toledo OSHA Office cites Sidney Ohio facility with repeat, willful and serious citations for struck by, crushing and amputation hazards. OSHA assessed penalties totaling \$293,700.00.
- December 17, 2013:** Cleveland OSHA Office cites Painesville Ohio facility with 1 willful and 1 serious violation for machine guarding and lockout/tagout hazards. OSHA assesses penalties totaling \$52,500.00.
- December 16, 2013:** Columbus OSHA Office cites Columbus metal company with 1 willful citation and 11 serious citations after employee suffered blinding injury while in a scissor lift. OSHA assessed penalties totaling \$90,090.00.
- September 24, 2013:** Milford Ohio retirement home ordered to pay whistleblower employee who reported bed bugs back wages.
- September 19, 2013:** OSHA fines Delaware Ohio company \$81,000 after 4 employees injured due to inadequate machine guarding.
- September 9, 2013:** OSHA fines Reynoldsburg Ohio manufacturer \$61,600 for machine guarding violations after numerous employee injuries.
- August 29, 2013:** Tiffin Ohio company fined \$50,000 for lack of emergency control procedures.
- August 28, 2013:** Norwalk Ohio manufacturer fined \$65,000 after two workers were injured by unguarded machines.
- August 26, 2013:** Home Depot fined \$150,700 for repeat safety hazards at Columbus Ohio facility.
- August 19, 2013:** OSHA cites Sandusky Ohio manufacturer \$58,500 for lack of adequate machine guarding lock out/tag out, electrical violations, haz-com.

August 13, 2013: Republic Steel cited for \$1,138,500.00 for 15 willful violations of OSHA's fall protection standard at Republic's Canton Ohio facility.

August 7, 2013: OSHA cites Ravenna Ohio machine company \$188,300 for employee exposure to lead and copper fumes and company placed on Severe Violator list.

July 29, 2013: OSHA cites Zanesville Ohio glass manufacturer \$61,000 for lack of exit signs.

July 24, 2013: OSHA cites Sidney Ohio polyethylene foam product manufacturing facility \$128,700 following plant explosion.

July 23, 2013: OSHA cites Lancaster Ohio facility \$74,600 after employee suffers burn injuries. Employee's clothing caught fire after being saturated with oil mist.

July 18, 2013: OSHA orders Shaker Heights Ohio employer to pay \$161,228 for back wages after whistleblower complained to OSHA of unsafe lead abatement practices.

July 17, 2013: OSHA cites Stow Ohio metal processing company \$131,320 for failure to abate hearing conservation and haz-com violations.

July 1, 2013: OSHA cites Upper Sandusky Ohio electronics recycling facility \$66,000 for exposing workers to cadmium.

June 20, 2013: Cincinnati waste treatment facility cited for 22 OSHA citations totaling \$325,710 and placed on Severe Violator list after a fire and explosion burns two employees, killing one.

June 6, 2013: OSHA cites McArthur Ohio explosives company \$258,000 for multiple process safety management violations.

May 28, 2013: OSHA cites Cleveland manufacturer \$55,300 for noise and machine guarding violations.

May 21, 2013: OSHA cites Franklin Ohio foundry and machine company \$170,107 for noise, respiratory and machine guarding violations.

April 25, 2013: OSHA cites North Jackson Ohio aluminum extruder \$175,000 and puts employer on Severe Violator list after employee was severely burned by hot parts and another employee pinned between rack, resulting in death.

- March 26, 2013:** OSHA cites Sandusky Ohio bearing manufacturer \$65,000 for violations of OSHA's asbestos regulations.
- March 11, 2013:** OSHA cites Wooster Ohio auto parts manufacturing company \$65,800 for 21 OSHA citations for lack of adequate machine guarding following employee finger amputation.
- March 4, 2013:** OSHA cites Milford Ohio food flavoring company \$55,000 for repeat violations of OSHA's respiratory protection regulations.
- February 28, 2013:** OSHA cites Dayton nursing and rehab center \$46,000 for failure to train employees on OSHA's bloodborne pathogen hazards.
- January 7, 2013:** OSHA cites Columbiana Ohio foundry \$56,880 for violations of OSHA's noise regulations 1910.095.
- January 7, 2013:** OSHA cites roofing company \$87,010 in willful and repeat violations for violating OSHA's fall protections regulations.
- January 28, 2013:** OSHA cites Miamisburg Roofing Company after employee dies August 22, 2012 from a heat stroke. \$8,820 penalty.
- December 13, 2012:** Cleveland OSHA Office cites Timken Company \$170,500.00 in safety violations for machine guarding and lock out/tag out.
- December 12, 2012:** Cleveland OSHA Office cites Uniontown Ohio excavator \$115,000 for trenching hazards. Employer had been on Severe Violator list since 2011.
- December 3, 2012:** Cincinnati OSHA Office cites Dayton Ohio manufacturing facility \$63,000 after employee fatality for failing to guard employee exposure to moving machinery.
- November 28, 2012:** Columbus OSHA Office cites Dover Ohio chemical company \$545,000 and places employer on Severe Violator list after release of hazardous materials led to shutdown of the plant and an adjacent highway.
- November 14, 2012:** Cincinnati OSHA Office cites Dayton Ohio company \$65,500 for 13 safety and health violations.
- November 7, 2012:** Toledo OSHA Office cites iron foundry \$205,000 for 25 safety and health violations.
- October 23, 2012:** Cincinnati OSHA Office cites Piqua company \$57,144 after a follow-up inspection revealed lock out/tag out deficiencies and worker exposure to

chromium.

- October 17, 2012:** Cincinnati OSHA Office cites Jeffersonville Ohio auto parts manufacturing facility \$51,000 for machine guarding and lock out/tag out violations.
- October 11, 2012:** Toledo OSHA Office cites Mt. Gilead nursing/care facility \$89,000 for exposing employees to biological hazards.
- October 3, 2012:** Cleveland OSHA Office cites Cleveland tank and supply company \$72,800 for failure to adequately assess and monitor exposure to chromium.
- October 3, 2012:** Cincinnati OSHA Office cites Fairfield Ohio residential care facility \$8,700 for exposing employees to workplace violence.
- September 24, 2012:** Cincinnati OSHA Office cites construction company \$68,500 for excavation hazards.
- September 24, 2012:** Cleveland OSHA Office cites Kent Ohio plastics manufacturing facility \$64,400 for lock out/tag out and machine guarding hazards.
- September 24, 2012:** Toledo OSHA Office cites glass manufacturer \$126,700 in willful and repeat violations for lead exposure.
- September 20, 2012:** Columbus OSHA Office cites local company \$138,600 for process safety management violations after a cloud of flammable vapors was released from the company's Columbus, Ohio facility.
- September 4, 2012:** Cleveland OSHA Office cites Akron machine company \$66,600 for multiple OSHA violations (powered industrial truck, lock out/tag out, and machine guarding).
- August 27, 2012:** Toledo OSHA Office cites Toledo Steel Processor Company \$66,330 for repeat forklift violations.
- August 9, 2012:** Toledo OSHA Office cites Bucyrus employer \$95,700 for repeat guarding violations.
- August 7, 2012:** Cleveland OSHA Office cites U.S. Cotton \$133,000 following employee amputation injury. Company placed on Severe Violator list.
- August 7, 2012:** Cleveland OSHA Office cites Heritage/WTI of East Liverpool, Ohio \$126,000 for process safety management violations.
- July 24, 2013:** Cincinnati OSHA Office cites Greenville Ohio dry ice manufacturer \$60,435 for process safety management procedures.

July 12, 2012: Columbus OSHA Office cites Dover Ohio manufacturing facility \$56,000 for machine guarding violations.

July 9, 2012: Columbus OSHA Office cites California based company \$59,400 for lead and cadmium exposure at Lancaster, Ohio battery recycling facility.

June 20, 2012: Cleveland OSHA Office cites Wooster truck manufacturer with \$90,000 in penalties and six citations, including one willful citation after second worker suffered amputated fingers one month after a similar amputation injury.

June 13, 2012: Charleston, WV OSHA Office cites Reynoldsburg Ohio company with \$69,000 in OSHA penalties and 17 serious citations for OSHA violations found at two the company's West Virginia truck maintenance facilities.

June 5, 2012: Cleveland OSHA Office cites Cleveland Manufacturing facility \$64,400 in OSHA penalties and 19 serious citations including four repeat citations for lack of PPE, machine guarding, lockout/tagout.

May 16, 2012: Cleveland OSHA Office cites North Royalton Excavator \$123,750 in OSHA penalties and two willful violations after workers were observed riding inside excavator bucket to access a trench.

May 9, 2012: Cleveland OSHA Office cites Cleveland cement contractor \$38,000 in OSHA penalties and six serious OSHA violations after Casino parking garage collapse.

May 2, 2012: Toledo OSHA Office cites excavator \$73,000 in OSHA fines for inadequate trench protection.

May 1, 2012: Cincinnati OSHA Office cites pallet manufacturer \$101,000 in OSHA fines initiated after a SSI program inspection – willful violations of OSHA hearing conservation program.

May 1, 2012: Toledo OSHA Office cites battery manufacturer \$188,000 in OSHA fines after employees found overexposed to lead. Willful and repeat violations.

April 25, 2012: Cleveland OSHA Office cites metal fabrication shop \$94,000 in OSHA fines after an employee complaint. Confined space, hearing conservation, respirator deficiencies, PPE, lock out/tag out and other violations.

April 25, 2012: Cleveland OSHA Office cites steel manufacturer with 14 OSHA violations after employee complaint. Lock out/tag out, fire extinguishers, machine

guarding, electric violations, hearing conservation violations. \$51,300 penalty.

April 23, 2012: Cincinnati OSHA Office cites food processing facility with repeat and serious violations after inspection initiated under National Emphasis Program for amputation hazards. \$47,000 penalty.

April 11, 2012: Cincinnati OSHA Office cites manufacturing facility with willful and repeat serious violations and placed the manufacturer on the Severe Violator Enforcement List after employee's arm is amputated while performing maintenance work on mechanical power press. \$111,000 penalty.

April 9, 2012: Toledo OSHA Office cites Lima manufacturer for multiple serious violations. \$67,400 penalty.

April 5, 2012: Cincinnati OSHA Office cites auto parts manufacturer \$151,300 in OSHA fines, including two willful violations as part of National Emphasis Program on amputation hazards.

March 29, 2012: Toledo OSHA Office cites auto parts manufacturer \$83,000 in OSHA fines for exposing employees to fire hazards and dangerous fumes, lock out/tag out, PPE.

March 27, 2012: Cleveland OSHA Office cites Akron industrial finishing company for lock out/tag out and other safety violations. \$88,200 penalty.

March 26, 2012: Cleveland OSHA Office cites aerospace company with \$87,000 in OSHA fines including willful violations for inadequate machine guarding. Inspection was initiated under National Emphasis Program to reduce amputation hazards.

March 21, 2012: Columbus OSHA Office cites janitorial service \$98,000 in OSHA fines for not protecting workers assigned to clear an indoor gun range from lead exposure. Willful and serious violations.

March 19, 2012: Cleveland OSHA Office cites manufacturer \$103,500 for exposing employees to amputation hazards and other hazards, lock out/tag out, lack of PPE.

March 13, 2012: Cincinnati OSHA Office cites excavator with willful and serious violations for inadequate trench cave in protection and inadequate training. \$49,200 penalty.

- March 6, 2012:** Cleveland OSHA Office cites stamping company \$125,000 in OSHA fines and puts company on Severe Violator Enforcement List after reports that employees were exposed to amputation hazards. Willful citations issued for lockout/tagout and repeat citations issued for inadequate machine guarding.
- March 5, 2012:** Toledo OSHA Office cites manufacturer \$175,000 in OSHA fines and 55 OSHA violations including lock out/tag out, fall protection, noise sampling, machine guarding. Employer was on site Specific Targeting Inspection list.
- February 22, 2012:** Toledo OSHA Office cites snack food producer \$112,000 including two willful violations for lock out/ tag out and machine guarding violations.
- February 21, 2012:** Cleveland OSHA Office cites Akron company with 24 safety violations for inadequate machine guarding after receiving a complaint of unsafe working conditions. \$56,400 penalty.
- January 30, 2012:** Cleveland OSHA Office cites Cuyahoga Falls employer with willful and repeat violations after a worker's hand was amputated by a rubber cutting shear with a malfunctioning safety device. \$74,900 penalty.
- January 24, 2012:** Huron Ohio automotive component supplier fined \$59,500 for 10 serious violations after worker's finger was crushed in a mold being lifted by a remote control crane.
- January 18, 2012:** Toledo OSHA Office cites steel and concrete erector \$50,820 for repeat fall protection violations after OSHA received a tip that fall protection was not being used on the job site.
- January 1, 2012:** Columbus OSHA Office cites chicken processing plant \$288,000 in fines for process safety management violations.

2. REPRESENTATIVE FATALITIES (OHIO):

- May 29, 2013:** Cincinnati Ohio employee killed after being pinned under front tire of powered industrial vehicle.
- May 29, 2013:** Hospital employee killed after being struck by hospital shuttle bus.
- May 27, 2013:** Two employees killed after company truck collides with semi.
- May 24, 2013:** Elyria Ohio employee fatally crushed inside a thermo-forming press

machine.

- May 23, 2013:** Attorney dies after falling through roof while inspecting for wind damage.
- May 17, 2013:** Employee dies after apron becomes entrapped in rotating machine.
- May 4, 2013:** Canton Ohio; two employees killed when crane boom used to lift a load collapsed.
- May 3, 2013:** Oil Co. employee killed by vehicle accident.
- April 12, 2013:** Hebron Ohio worker making bridge repairs killed after being struck by falling beam.
- April 3, 2013:** Batavia Ohio employee killed after being crushed between truck bed and load of construction materials.
- March 20, 2013:** Philadelphia Ohio worker dies from fall.
- February 25, 2013:** Carrollton Ohio worker killed when struck by drilling equipment.
- February 19, 2013:** Perry Ohio worker dies after falling off scaffolding.
- December 28, 2012:** Cincinnati Ohio - employee killed when chemicals from industrial filter shredded, ignited and exploded.
- December 19, 2012:** Lima Ohio employee killed after falling 20 feet from roof.
- October 27, 2012:** Tallmadge Ohio worker dies while repairing construction equipment when crushed by machine.
- October 24, 2012:** Dublin Ohio employee falls off 8 foot ladder and dies.
- October 9, 2012:** Cincinnati Ohio employee dies after being struck by tree limb.
- September 12, 2012:** Ohio employee working in a temporary work zone struck and killed by motor vehicle.
- September 4, 2012:** Columbus Ohio worker died after fall from ladder.
- August 6, 2012:** Chillicothe Ohio employee killed when he was run over by a bulldozer that he tried to jump off of.
- August 4, 2012:** New Albany Ohio residential construction worker killed after falling 20 feet from roof.

August 1, 2012: Toledo Ohio glass manufacturing employee dies from fall at work.

July 27, 2012: Dayton Ohio employee operating a core pole assembly machine died after being caught between two conveyors.

July 16, 2012: Two Ohio workers killed when gas well they were painting exploded.

June 26, 2012: General Motors employee killed at Cleveland area metal processing plant after being caught between machinery.

June 6, 2012: Salem Ohio worker suffered fatal fall while installing telecommunications equipment.

May 31, 2012: Youngstown tree trimming worker clearing trees from power lines killed after falling 45 feet.

May 25, 2012: Cincinnati roofing employee killed at a residential site after falling off the roof.

May 16, 2012: Kent Ohio trucking company employee killed by mast of a lift truck.

April 30, 2012: Willoughby Ohio worker performing electrical work died from head injuries after falling 20 feet from a ladder.

March 27, 2012: Worker crushed between pre-cast concrete slab and excavator.

March 20, 2012: Columbus Ohio worker pulled into machine used to make rolls of plastic.

January 30, 2012: Toledo Ohio worker dies when his shirt gets caught and pulls him into a moving conveyor.

January 27, 2012: Worker struck and killed by a part ejected from a machine.

January 24, 2012: Cleveland Ohio building collapses during demolition work, killing two workers.

January 10, 2012: Worker crushed by moving equipment.

December 20, 2011: Worker dies when bales of paper fall on him.

December 15, 2011: New Albany Ohio worker servicing a leaking refrigerator unit collapses and dies.

November 17, 2011: Worker fell off roof.

November 14, 2011: Worker electrocuted.

November 12, 2011: Fairborn Ohio worker repairing a sewer line in a trench killed after natural gas ignites.

November 10, 2011: Kokosing worker setting up traffic control board is hit by a semi.

October 12, 2011: Worker fell off roof.

October 10, 2011: Worker fell 14 feet from roof to concrete floor.

October 6, 2011: Troy, Ohio worker performing interior construction fell 20 feet to basement and died.

September 6, 2011: Upper Arlington worker trimming trees fell 30 feet out of truck mounted basket lift.

3. CURRENT ACTIVE OSHA NATIONAL EMPHASIS PROGRAMS AND ENFORCEMENT PROGRAMS

A. Severe Violator Enforcement Program – Note: 34 Ohio facilities/employers are currently on OSHA’s Severe Violator List with more to follow after 2013-2014 OSHA inspections.

(Effective June 18, 2010)

OSHA’s focus is on employers who have demonstrated indifference to OSHA regulations, evidenced by willful, repeat or failure to abate violations.

High Emphasis Hazards

Fall hazards (general industry and construction)
Amputation hazards
Combustible Dust hazards
Grain Handling facilities
Silica hazards

Lead hazards
Excavator/Trenching hazards
Ship breaking hazards process Safety Mgmt.

Criteria for Severe Violator Enforcement Case

- Fatality/catastrophe inspection where OSHA finds one or more willful, repeat or failure to abate violations.
- Non-fatality/catastrophe inspections when OSHA finds two or more willful, repeat or failure to abate violations based on high gravity serious hazards.

OSHA's example: During Local Emphasis Program for Residential Construction, CSHO observes two employees in an unguarded trench. Qualifies as a severe violator case.

Severe Violator Enforcement Procedures

- Mandatory follow-up inspections of employers on severe violator list unless construction site is no longer active or a manufacturing operation has moved/closed.
- Nationwide Inspection of Workplaces/Work Sites.

Construction inspections will result in OSHA Settlement Agreement requiring employer to provide a list of worksites for the following one year period or OSHA will issue an administrative subpoena to obtain list of construction sites for the next 12 months.

- Enhanced Settlement Provisions

May require violating employer to hire a safety and health consultant, interim abatement, provide list of current and future job sites, submit OSHA logs to area OSHA officer.

B. Site Specific Targeting **(Effective date January 4, 2013)**

Directive Number 13-01 (CPL 02)

OSHA is using injury and illness dates to compile list of companies targeted for OSHA inspections. Focuses on non-construction workplaces with 20 or more employees. Companies on Inspection Target List will receive comprehensive safety inspection.

This is a continuation of OSHA's prior site specific targeting inspection plan. OSHA targets industries with the highest injury rates per SIC/NAICS and industrial classifications and targets those employers for comprehensive safety inspections.

C. Active National Emphasis Programs

- Combustible dust
- Federal Agencies
- Hazardous machinery/amputations
- Hexavalent Chromium
- Isocyanates
- Lead
- Nursing and Residential Care Facilities (April 2012)
- Primary Metals
- Process Safety Management
- Trenching/Excavation
- Recordkeeping
- Shipbreaking
- Silica

4. OSHA REGION V (OHIO) ACTIVE LOCAL EMPHASIS PROGRAMS

- **Building Renovation/Rehabilitation**
Directive CPL-04-00 (LEP 001)
(effective date December 2011).
Focus on rehab/renovation of older builders.
- **Powered Industrial Vehicles**
Directive CPL-04-00 (LEP 002)
(effective date December 2011).
- **Fall Hazards in Construction**
CPL-04-00 (LEP 007)
(effective date December 2011).
- **Dairy Farm Operations**
CPL-04-00 (LEP 009)
(effective date November 2011).

- **Grain Handling Facilities**
CPL-04-00 (LEP 17)
(effective date November 2011).
- **Primary Metal Industry**
CPL-04-00 (LEP-11-04)
Looking for industry falling into NAICS 331 classification.
(Corresponds with May 19, 2011 National Emphasis Program
For Primary Metals Industries with SIC Code 33).
Emphasis on Blast furnaces.
- **Tree Trimming Operations**
CPL-04-00 (LEP 026)
(effective date April 1, 2013)
- **Maritime Industries**
CPL-04-00 (LEP 100)
(effective date April 1, 2013)

5. VSSR PROCEEDINGS BEFORE THE INDUSTRIAL COMMISSION OF OHIO

A. INTRODUCTION

VSSR actions are another means by which an injured employee or the estate of a deceased employee can obtain additional money from the employer in the event of a workplace accident or fatality. Ohio Revised Code Section 4121.47 and Ohio Administrative Code Section 4121-3-20 govern Ohio VSSR actions. Ohio Revised Code Section 4123.89 governs VSSR actions for minors injured on the job.

Pursuant to O.R.C. Section 4121.47, if an employee can show that he or she was injured as a proximate result of the employer's failure to comply with an Ohio specific safety requirement, the Industrial Commission has the authority to award the claimant an additional 15% to 50% of the claimant's total workers compensation award.

Further, if an employee is assessed with two VSSR violations in a 24 month period, the

Industrial Commission can assess an additional civil penalty against the employer, up to \$50,000.00.

B. VSSR ACTIONS CAN PUT A COMPANY OUT OF BUSINESS

The Industrial Commission can assess up to a 50% award against an employer who violated an Ohio specific safety requirement. In the case of a death, that number can be substantial. For purposes of a VSSR award, the Industrial Commission uses the maximum weekly wage for the year of the accident in computing the VSSR base award.

For example, in the case of a 30 year old employee who leaves behind a family, if the spouse does not remarry, the wrongful death benefits are paid until the spouse dies, not retires. See e.g. O.R.C. Sec. 4123.59.

VSSR awards against an employee are considered a penalty. *State ex. rel. Burton v. Indus. Comm.* (1989) 45 Ohio St.3d 170. As such, there is no insurance available to an employer to satisfy a VSSR award. Also, since a VSSR award is a penalty, it is not likely dischargeable in bankruptcy.

C. VSSR PROCEEDINGS CAN BE RISKY

Most practitioners will tell you that VSSR proceedings are unpredictable. First, unlike a court of law, the Rules of Evidence are not binding in Industrial Commission or BWC proceedings. See e.g., O.R.C. Sec. 4123.10. See also: *State ex. rel. Danjanck v. Industrial Commission* (1994), 69 Ohio St.3d 693 (held: the Industrial Commission is exempt from following the formal rules of evidence). *Baxter v. Industrial Commission*, 44 Ohio App.3d 539 (1939) (held: Industrial Commission has discretion to ascertain truth of claim by what it considers reliable evidence, even evidence that is hearsay).

While the hearing officers are attorneys, many of them have never practiced law. The

Ohio Supreme Court will not reverse a hearing officer's decision as long as there is "some evidence" to support the Industrial Commission's findings. *State ex rel. Burley v. Coil Packaging* (1987) 31 Ohio St.3d 18.

D. VSSR LAW GENERALLY

In regard to an application for an additional VSSR award, the claimant must establish that an applicable and specific safety requirement exists, which was in effect at the time of the injury, that the employer failed to comply with the requirement, and that the failure to comply was the cause of the injury in question. *State ex. rel. Trydie v. Indus. Comm.* (1972), 32 Ohio St.2d 257, 291 N.E. 2d 748. The interpretation of a VSSR is within the final jurisdiction of the Industrial Commission. In making a VSSR award, the Industrial Commission must determine that the employee-decedent's injury resulted from the employer's failure to comply with one of Ohio's specific safety requirements. Section 35, Article II, Ohio Constitution; *State ex. rel. Allied Wheel Products, Inc. v. Indus. Comm.* (1956), 166 Ohio St. 47, 139 N.E. 2d 41. Because a VSSR award is a penalty, however, it must be strictly construed, and all reasonable doubts concerning the interpretation of the safety standard are to be construed against its applicability to the employer. *State ex rel. Burton v. Indus. Comm.* (1989), 45 Ohio St.3d 170, 545 N.E.2d 1216. Where the record contains "some evidence" to support the Industrial Commission's findings, there has been no abuse of discretion and mandamus will not lie. *State ex. rel. Burley v. Coil Packaging, Inc.* (1987), 31 Ohio St.3d 18, 31 Ohio B. 70, 508 N.E.2d 936.

E. THE EMPLOYER'S SAFETY RECORD AND SAFETY TRAINING ARE IMPORTANT!

An employer's safety training, supply of safety equipment to the employees and overall safety record can have an impact on a VSSR award. A claimant's unilateral negligence, failure to

follow the employer's safety rules and failure to utilize safety equipment provided by the employer can be a defense to a VSSR claim. *State ex. rel. Quality Tower v. Indus. Comm.* (2000), 88 Ohio St.3d 190; *State ex rel. Frank Brown & Sons, Inc. v. Indus. Comm.* (1988) 37 Ohio St.3d 152; *State ex. rel. Danstar Builders* (2006), 108 Ohio St.3d 315.

Moreover, the Industrial Commission has the discretion to review the employer's OSHA violations in determining the amount of a VSSR penalty. *State ex rel. Kenton v. Indus. Comm.* (2001), 91 Ohio St.3d 411.

F. OSHA CITATIONS ARE READILY ADMITTED IN OHIO VSSR ACTIONS

OSHA citations always find their way into Industrial Commission VSSR cases. In *State ex rel. Kenton Structural & Ornamental Iron Works v. Indus. Comm.* (2001), 91 Ohio St.3d 411, the Ohio Supreme Court held that the Industrial Commission could rely upon OSHA citations issued to an employer in assessing an appropriate penalty for a VSSR violation:

4. Award Amount

The amount of VSSR award can vary from fifteen to fifty percent, inclusive, of the maximum award established by law. Section 35, Article II, Ohio Constitution. **The commission levied the maximum penalty "because of the extent and serious nature of the injuries involved in the case, the number of violations found by OSHA and the fact OSHA found a number of the violations to be serious."** Kenton alleges that the commission abused its discretion in relying in part on OSHA violations. We reject the contention.

Kenton (2001), 91 Ohio St.3d at 417.

In *Kenton*, the Industrial Commission also relied upon factual portions of OSHA's fatality inspection, with the approval of the Ohio Supreme Court:

Kenton maintains that because the evidence relied upon by the commission estimated the rigging angle to at "approximately" forty-five degree, it is insufficient to establish that the angle was exactly forty-five degrees . . . we disagree

* * *

This is not a situation where the commission itself chose a number. **OSHA arrived at the forty-five degree figure.**

Kenton (2001), 91 Ohio St.3d at 415.

In *State ex. rel. Martin Painting & Coating Co. v. Indus. Comm.* (1997), 78 Ohio St.3d 333, the Ohio Supreme Court affirmed a VSSR violation against an employer following an employee fatality. The award was based in part upon evidence OSHA gathered during the fatality investigation.

In *State ex. rel. Orbit Mover & Erectors, Inc. v. Indus. Comm.* (1992), 65 Ohio St.3d 344, the Ohio Supreme Court upheld a substantial VSSR award against an employer, relying heavily on the OSHA transcript of the underlying OSHA proceeding.

In *State ex. rel. Gilbert v. Industrial Commission* (2007) 116 Ohio St.3d 243, the Ohio Supreme Court upheld the hearing officer's reliance upon OSHA inspection records as being relevant to the employee's VSSR claim for respiratory exposure. In *State ex. rel. Scott v. Industrial Commission*, 2013 Ohio 2445 (2013), the Ohio Supreme Court held that OSHA air sampling results could be admitted into evidence in a VSSR case involving employee exposure to cobalt and tungsten dust.

**G. TEMPORARY EMPLOYEES ARE GENERALLY CONSIDERED
EMPLOYEES OF THE CUSTOMER EMPLOYER AND
NOT EMPLOYEES OF THE TEMPORARY AGENCY FOR VSSR PENALTIES**

Customer companies of temporary service agencies are "employers" subject to claims for violations of specific safety requirements. *State ex. rel. Newman v. Indus. Comm.* (1997), 77 Ohio St.3d 271; *State ex. rel. Mahoney v. Team America* (2003), 99 Ohio St.3d 532.

H. GENERAL CONTRACTOR/SUBCONTRACTORS CAN BE LIABLE FOR VSSR

PENALTIES FOR INJURIES TO ANOTHER EMPLOYER'S WORKER UNDER CERTAIN CIRCUMSTANCES

If an employer who neither owns nor is responsible for the condition and maintenance of a device used by his employee and the employee is injured in its use and because of its condition, such employer is not the “employer” comprehended by Ohio Const. Art. II, §35, for whose disregard of a specific safety requirement the Industrial Commission is empowered to make an additional compensation award to the injured employee. A company which has no “authority to alter or correct” a defective condition should not be unfairly termed the “employer” for purposes of a safety violation. The converse is also true. An employer who owns or is responsible for the condition and maintenance of a device used by any employee may be an “employer” potentially liable under §35. A general contractor may have the requisite degree of responsibility to justify imposition of “employer status” when scaffolding constructed by a subcontractor proves defective. The “authority to alter or correct” is often a primary factor in determining who is the responsible party or employer for VSSR liability. *State ex. rel. Lyburn Const. v. Indus. Comm.* (1985), 18 Ohio St.3d 27. See also *State ex. rel. Zito* (1980), 64 Ohio St.2d 53; *State ex. rel. Grunau Fire Protection v. Indus. Comm.* (1992), 65 Ohio St.3d 320.

I. COMPLIANCE WITH OSHA REGULATIONS DOES NOT AUTOMATICALLY GUARANTEE COMPLIANCE WITH OHIO'S SPECIFIC SAFETY REGULATIONS

Even though Ohio's State safety regulations are generally comparable and parallel to Federal OSHA regulations, an employer can still be liable for a violation of an Ohio Specific Safety Regulation despite being in compliance with a related Federal OSHA regulation. *State ex. rel. Danstar Builders v. Industrial Commission* (2006) 108 Ohio St.3d 315.

In *Danstar*, the general contractor provided the independent roofing/framing contractors

with wood for use as slide guards on the roof. OSHA recognized the use of slide guards as an acceptable method of fall protection in some circumstances. However, Ohio's Construction Safety Regulations do not specifically identify slide guards as one of the types of fall protection methods allowed by the State. Thus, even if OSHA recognized slide guards as a means of fall protection, the Ohio Supreme Court ruled that the use of slide guards was still a violation of Ohio's Safety Regulations. *Danstar*, 108 Ohio St.3d at p. 317.

A few years back, the Ohio Division of Safety & Hygiene attempted to reconcile Ohio's specific safety regulations for construction with OSHA's construction regulations (29 C.F.R. Part 1926) but the Division of Safety & Hygiene never completed a review of the General Industrial Regulations.

6. CURRENT STATUS OF OHIO EMPLOYER INTENTIONAL TORT LAW UNDER OHIO REVISED CODE SECTION 2745.01

OLD LAW:

The Ohio Supreme Court held in *Fyffe v. Jeno's, Inc.* (1990), 59 Ohio St.3d 115 that a plaintiff/employee must prove all three of the following elements to establish an employer intentional tort claim:

1. knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation;
2. knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and
3. that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task.

NEW LAW: For Injuries Arising after April 17, 2005.

§ 2745.01 Employer's Liability for Intentional Tort

- (A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortuous act with the intent to injure another or with the belief that the injury was substantially certain to occur.
 - (B) As used in this section, "substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.
 - (C) Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result.
 - (D) This section does not apply to claims arising during the course of employment involving discrimination, civil rights, retaliation, harassment in violation of Chapter 4112 of the Revised Code, intentional infliction of emotional distress not compensable under Chapters 4121 and 4123 of the Revised Code, contract, promissory estoppel or defamation.
- *Kaminski v. Wire Products* (March 23, 2010) and *Stetter v. RJ Corman Derailment Services, LLC* (March 23 2010).

Ohio Supreme Court upholds constitutionality of Ohio's new Employer Intentional Tort Statute; Ohio Revised Code Chapter 2745.01.

Result:

- Deliberate removal of any safety guard creates a rebuttal presumption that an Ohio employer deliberately intended to injure the employee.
- No stop gap liability insurance coverage now for Ohio employers sued for a workplace intentional tort.

- O.R.C. 4123.931. State of Ohio BWC and Ohio Attorney General can pursue Ohio employer found responsible for an employer workplace intentional tort for all workers compensation benefits, etc., paid out. See O.R.C. 4123.931.

Case Developments

- *Sampson v. Cuyahoga Metro Housing Authority*, 131 Ohio St.3d 418 (2012) held:

Ohio political subdivision not immune from employee workplace injuries or deaths under Ohio's Political Subdivision Tort Immunity Statute – Ohio Revised Code Chapter 2744.

- *McKinney v. CSP of Ohio LLC*, 2011 Ohio App. LEXIS 2637 (6th Dist. 2011) held:

Employee showed employer deliberately intended to injure her by ordering her to run a press that was improperly programmed making the safety device malfunction and because supervisor knew the press was malfunctioning;

“It is undisputed that the press at issue was improperly programmed at the time of appellant's injury. It is also undisputed that had the press been properly programmed, certain safety devices would have been in place and appellant would not have been injured. To that end, we agree with appellant that the improper programming amounted to the removal of a safety device in that the result was to render the T-stand button and the safety curtains inoperable.

Given the deposition testimony in this case that the supervisor was notified there was a problem with the press, a complaint he either ignored or did not appreciate the seriousness of, and, given the testimony that the workers were told to keep running the press after the complaint, and given the testimony from a CSP supervisor that “none of the right people were present” to ensure that the two safety measures were on press 5 the night of appellant's accident, we find that appellant has established a rebuttable presumption that the removal was committed with intent to injure.”

- *Dudley v. Powers & Son*, 2011 Ohio App. LEXIS 1679 (6th Dist.) held:

It is a jury question whether employer deliberately intended to injure employee when employer removed the two hand palm buttons on a hydraulic press and replaced the palm buttons with an optical sensor which failed, causing the employee's hand to be crushed.

- *Beravdelli v. Faster-Wheeler Zack Inc.*, 2010 U.S. Dist. LEXIS 102151 (S.D. Ohio E.D.) held:

Employer's failure to utilize scaffolding for the final phase of a boiler project when scaffolding had previously been utilized on the project for the earlier boiler work states a plausible basis for the argument that the employer deliberately removed a safety guard.

- *In Re Thomas, et al. v. McMillen, et al.*, 2012 Bankr. LEXIS 2691 (U.S. Bankruptcy Ct.) held:

Employer found liable in Ohio State Court lawsuit for removing safety devices on table saw leading to employee's hand injury could not discharge employer intentional tort judgment in Bankruptcy Court.

Bankruptcy Court held that deliberate intent under Ohio employer intentional tort statute has same meaning as "willful and malicious injury" under Bankruptcy Code which prohibits debtor from discharging claims based upon willful and malicious injury. 11 U.S.C. 523(a)(6).

- *Conley v. Endres Processing Ohio*, 2013 Ohio 419 (3rd Dist. 2013).

Failure to follow lock out/tag out and failure to provide employee with lock out/tag out devices does not equate to deliberate removal of a safety guard.

- *Wineberry v. North Star Painting Co.*, 2012 Ohio 4212 (7th Dist. 2012). Safety guard as contemplated by O.R.C. 2745.01 not only encompasses the act of removing a safety device but also the act of failing to install a safety device required by the manufacturer.
- *Tichon v. Wright Tool & Forge*, 2012 Ohio 3147 (9th Dist. 2012). Ohio employer intentional tort claims arising under O.R.C. 2745.01 are governed by a two year statute of limitations.
- *Beyer v. Reiter Automotive North America*, 2012 Ohio App. LEXIS 2464 (6th Dist.) held: Upon authority of *Hewitt v. L.E. Myers*. Failure to provide PPE to employees for respiratory protection does not constitute removal of an "equipment safety guard."
- *Vacha v. City of North Ridgeville, Ohio*, 136 Ohio St.3d 199 (2013) held: Immunity provided in Ohio's Political Subdivision Tort Immunity Statute (O.R.C. Chapter 2744) does not apply to employee claims for intentional tort against an Ohio Political Subdivision employer.
- *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199 (2012) held Employer's failure to

provide employee exposed to energized high voltage power lines with protective rubber gloves did not constitute a deliberate removal of a safety device so as to create liability for the employer under O.R.C. 2745.01.

- *Pixley v. Pro-Pack Industrial*, 2013 Ohio App. Lexis 1995 (6th Dist.); discretionary appeal allowed, 136 Ohio St.3d 1472 (Sept. 4, 2013). Employer's deliberate bypass of a safety bumper could constitute deliberate removal of safety guard.
- *Smith v. Ray Esser & Sons, Inc.*, 2013 Ohio App. Lexis 983 (9th Dist. 2013). Jury question exists whether employer's failure to provide trench protection to 17 year old employee in accordance with OSHA regulations constitutes "deliberate intent to injure the employee."
- *Meadows v. Air Craft Wheels*, 2012 Ohio App. Lexis 230 (8th Dist. 2012). Application of O.R.C. Section 2745.01 to foundry explosion.
- *Beary v. Larry Murphy Dump Truck Service, Inc.*, 134 Ohio St.3d 359 (2012) held: case remanded to Trial Court to determine if a non-functioning backup alarm is an "equipment safety guard."
- *Wright v. Mar-Bal, Inc.*, 2013 Ohio 5647 (11th Dist.). An employer's failure to follow proper safety procedures might be classified as grossly negligent or wanton, but does not constitute an intentional tort under O.R.C. 2745.01.
- *Estate of Johnson v. Rumpke of Ohio*, 2013 Ohio 4760 (12th Dist.). Court erred in directing a verdict for employer finding that interlock switch was not an "equipment safety guard." Rigging tire shredder to bypass the interlock switch and removing the hood (cover) constituted a deliberate removal of an equipment safety guard.

Whether employer rebutted presumption of intent to injure is a jury question.

- *Hoyle v. Cincinnati Ins. Co.*, 2013 Ohio 3223 (9th Dist), accepted for review 137 Ohio St.3d 1421 (Dec. 4, 2013). Trial Court erred in granting insurer's summary judgment motion since there was a question of fact whether an employer intentional tort claim falling under O.R.C. 2745.01(c) (rebuttable presumption) fell within the policy exclusion.

Court held that if employer failed to rebut statutory presumption of intent to injure, Plaintiff could prevail on his claim without actual proof of deliberate intent to injure. Although deliberate intent to injure may be presumed for purposes of the statute where there is a deliberate removal of a safety guard, Court of Appeals concluded that this did not in itself amount to "deliberate intent" for purposes of the insurance exclusion.

- *Irondale Industrial Contractors, Inc. v. Virginia Surety Co.*, 754 F. Supp.2d 927 (ND Ohio WD 2010). Insured properly denied coverage for Employer Intentional Tort claim based upon exclusion in the insurance policy because the essence of the underlying action was that the insured was liable under O.R.C. 2745.01(C) and the policy excluded such a claim.

7. **RELATIONSHIP BETWEEN OSHA AND CIVIL SUITS, WORKERS' COMPENSATION AND OTHER PROCEEDINGS**

OSHA regulations, OSHA inspection files, and prior OSHA citations against an employer can have a direct positive or negative effect on other lawsuits or proceedings and are often admitted as evidence in these other proceedings:

A. EVIDENCE OF OSHA IN CRIMINAL MATTERS

Evidence of prior OSHA and safety inspections may be introduced to a grand jury and ultimately introduced as evidence in a criminal workplace case. In Ohio and in most jurisdictions, grand jury proceedings are secret and the accused is not entitled to testify before the grand jury. Therefore, the only evidence a grand jury may have about an employer's safety record and safety history may be the OSHA inspection reports and file, or the employer's written safety program. An employer's OSHA history is also reviewed by OSHA and the Justice Department in deciding whether an employer should be subjected to Federal Criminal OSHA prosecution in the event of a workplace fatality. (See OSHA Field Operations Manual).

B. EVIDENCE OF OSHA IN INTENTIONAL TORT ACTIONS, VSSR ACTIONS, CIVIL SUITS & WORKERS' COMPENSATION

Review of Ohio intentional tort, product liability, VSSR cases and workers' comp proceedings over the past 10 years shows a strong correlation between workplace accidents/exposure and OSHA violations. In most cases, accidents can usually be traced to some

applicable OSHA regulation.

While Ohio courts vary on how they treat the admission of evidence regarding OSHA, in nearly every case where an employee sues an employer or a manufacturer, some party to that lawsuit seeks to introduce evidence regarding OSHA in one form or another.

C. USE OF OSHA RECORDS TO SUPPORT WORKERS' COMP, VSSR OR OHIO EMPLOYER INTENTIONAL TORT CLAIMS

In a claimant's attempt to support a workers' compensation claim for an occupational disease or injury, a claimant's attorney, to the extent he or she can obtain such evidence, could use the following materials (that the employer is required by OSHA to maintain) to support an employee's claim for injury/illness in the workplace:

- ★ OSHA 300 log, and summary of occupational injuries and illnesses (29 C.F.R. 1904.2, 1904.4, 1904.5, 1904.6, and 1904.7);
- ★ Annual OSHA injury and illness survey (29 C.F.R. 1904.17);
- ★ Employer's hazard communication program with Material Safety Data Sheets for all chemicals and substances used by employees in the workplace (29 C.F.R. 1910.1200 and 1926.59);
- ★ Noise monitoring results measuring employee exposure to noise, as well as audiograms to measure threshold shift changes and effects to employee hearing (29 C.F.R. 1910.95);
- ★ Information relative to process safety and information pertaining to the hazards of high hazard chemicals used in a particular process (29 C.F.R. 1910.119);
- ★ Results of medical surveillance, exposure monitoring and other programs, including medical exams under a number of OSHA regulations to determine employee exposure to a particular chemical or product such as lead exposure, asbestos exposure, cadmium, benzene, methylene chloride and a whole host of air contaminants identified in 29 C.F.R. 1910.1000, tables Z-1, Z-2 , Z-3. 29 C.F.R. 1910.1000, 1910.120);
- ★ Reports of injuries to employees operating mechanical power

presses (29 C.F.R. 1910.217(g));

- ★ Various required inspection records;
- ★ In addition, the National Institution for Occupational Safety and Health has the authority to conduct medical and industrial hygiene studies and exposure monitoring to determine employee exposure to hazards/contaminants in the workplace and to recommend permissible exposure limits. (See, e.g., 42 C.F.R. part 85; 29 U.S.C. Sec. 671(c)(2); 29 U.S.C. Sec. 669(a); *General Motors v. Director of the National Institute for Occupational Safety & Health*, 636 F.2d 163 (6th Cir. 1980). *In the Matter of Established Inspection of Keokuk Steel Castings*, 638 F.2d 42 (8th Cir. 1981); *General Motors v. NIOSH*, 459 F.Supp. 235 (W.D. Ohio 1978); *Southern Indiana Gas & Electric Co. v. NIOSH*, 522 F.Supp. 850 (S.D. Ind. 1981).

D. SOME EMPLOYER DEFENSES TO OSHA CITATIONS OVERLAP WITH EMPLOYER DEFENSES TO OTHER CIVIL CLAIMS

Some employer affirmative defenses to OSHA citations mirror employer defenses to other civil or administrative claims.

Unforeseeable Employee Misconduct

As an example of how employer OSHA defenses may overlap with state law defenses, the Sixth Circuit Court of Appeals and the Occupational Safety and Health Review Commission recognize an employer's affirmative defense of unforeseen/unpreventable employee misconduct, which, if established by the employer by a preponderance of the evidence, justifies that the citations be vacated. See *Brock v. L.E. Myers Co.*, 818 F.2d 1270 (6th Cir. 1987); *All Erection & Crane Rental v. OSHRC*, 2012 U.S. App. Lexis 25033 (6th Cir. 2012).

According to the Sixth Circuit and the Review Commission, once an employer sets out the affirmative defense of unforeseen/unpreventable employee misconduct by a preponderance or greater weight of the evidence, the citations must be vacated unless the defense is then rebutted by the Secretary of Labor. See, e.g., *Brock v. L.E. Myers Co.*, 818 F.2d at 1276 (6th Cir. 1987):

(A)n employer may defend the citation on the grounds that, due to the existence of a thorough and adequate safety program which is communicated and enforced as written, the conduct of its employees in violating that policy was idiosyncratic and unforeseeable.

* * *

If the employer's evidence preponderates, it has successfully established the defense of unforeseen employee misconduct.

The Sixth Circuit and Review Commission recognize four elements to the unforeseen/unpreventable employee misconduct defense:

1. Established work rules to prevent the violation;
2. Communication of the work rules to employees;
3. Steps taken to discover violations;
4. Enforcement of the safety rules when safety violations are discovered.

In comparison, the Ohio Supreme Court has held that an employee's failure to abide by the employer's safety rules or utilize safety devices provided by the employer may preclude a VSSR award against an employer as a matter of law. *State ex. rel. Quality Tower v. Industrial Comm.*, 88 Ohio St.3d 190; *State ex. rel. Frank Brown & Sons, Inc.* (1988), 37 Ohio St.3d 162; *State ex. rel. Northern Petrochemical Co.* (1991), 61 Ohio St.3d 453; *State ex. rel. Kale v. Indus. Comm.*, 10th Dist. Case No. 83AP-968 (Ct. App. Franklin Cty. 1984); *State ex. rel. Lewis v. Indus. Comm.*, 10th Dist. Case No. 83AP-756 (Ct. App. Franklin Cty. 1984); *State ex. rel. Danstar Builders v. Industrial Commission* (2006) 108 Ohio St.3d 315.

E. OVERLAPPING MULTI-EMPLOYER DEFENSES

Similarly, an employer's defense to an OSHA multi-employer citation where a number of employers are cited by OSHA for causing, creating, or failing to take corrective action to

minimize employee exposure to hazards on a multi-employer worksite may carry over into an Ohio frequenter statute claim against an owner, general contractor, employer or subcontractor. See, e.g., *Sopkovich v. Ohio Edison* (1998), 81 Ohio St.3d 628; *Bond v. Howard* (1995), 72 Ohio St.3d 332; *Conley v. Brown Corp. of Waverly* (1998), 82 Ohio St.3d 470. These Ohio cases set out the parameters of when an owner, general contractor or subcontractor can be liable for injury to an employee of an independent contractor. See also, *Nibert v. Columbus/Worthington Heating and Air*, 2010 Ohio App. Lexis 1051 (12th Dist.); *Pinkerton v. J&H Reinforcing & Structural Erectors, Inc.*, 2012 Ohio App. Lexis 1408 (4th Dist.); *Ellis v. Time Warner Cable, Inc.*, 2013 Ohio App. Lexis 195 (1st Dist.) on liability of independent contractor for injuries to employees of another independent contractor.

In comparison, an employer may avoid a OSHA citation in a multi-employer setting if the employer shows (1) the employer did not create the hazard, (2) the employer did not have the responsibility or authority to remedy the hazard, (3) the employer notified the employer who created the hazard that it should be fixed, and (4) the employer instructed its own employees about this danger and took steps to protect its own employees. (See, e.g., O.S.H.A. Field Inspection Reference Manual, Sec. III-28). *Secretary of Labor v. Trinity Industries*, 504 F.3d 397 (3rd Cir. 2007) OSHA multi-employer enforcement permissible when specific OSHA regulations prescribe multi-employer duties). **See OSHA Compliance Directive CPL 2-0-124 Multi-Employer Citation Policy.**

Also, employer control of a particular workplace condition on a multi-employer worksite might also impact a VSSR claim against an employer. The Ohio Supreme Court requires that a VSSR claimant prove not only a violation of a specific safety regulation that proximately caused the claimant's injury; **but that the claimant also prove that it was the claimant's employer**

and not some other contractor who violated the specific safety requirement. *State ex. rel. Grunau Fire Protection Systems, Inc. v. Indus. Comm.*, (1992) 65 Ohio St.3d 320.

For example, in a case involving a floor opening and claim of a lack of guardrail or toeboards, a claimant must prove that it was the claimant's employer who created the unsafe condition and who was in control of the work area at the time the unsafe condition was created, as opposed to some other contractor. *State ex. rel. Warr. v. Indus. Comm.* (1977) 49 Ohio St.2d at 269-270.

F. OSHA CITATIONS ARE OFTEN ADMITTED INTO COURT AS EVIDENCE OF STANDARDS OF CARE

Courts are split on how they treat admission of OSHA citations and OSHA files in civil proceedings. A majority of Courts allow the admission of OSHA regulations as evidence of negligence. Some states hold that evidence that a defendant in a tort case paid an OSHA fine was admissible as a declaration against interest. *Industrial Tile, Inc. v. Stewart*, 388 So.3d 171 (Ala. 1980). See *Angel v. U.S.*, 775 F.2d 136 (6th Cir. 1985); *Teal v. E.I. DuPont & Co.*, 728 F.2d 799 (6th Cir. 1984); *Wren v. Sullivan Elec.*, 797 F.2d 323 (6th Cir. 1986); *Masemer v. Delmaria Power & Light Co.*, 723 F.Supp. 1019 (D. Del. 1989); *Hines v. Brandon Steel Decks, Inc.* 754 F.Supp. 199 (M.D. Ga. 1991).

While the Ohio Supreme Court has ruled that a violation of the Occupational Safety & Health Act, Title 29, U.S. Code does not constitute negligence per se, *Hernandez v. Martin Chevrolet* (1995), 72 Ohio St.3d 302; a number of Ohio Courts allow OSHA citations and OSHA investigation files into evidence in civil cases.

In *Feldene v. Ashland Chemical Co.*, 91 Ohio App.3d 48 (Ct. App. Cuyahoga Cty. 1993), an employee was awarded \$3.5 million dollars after suing his employer for an intentional tort.

The Court of Appeals upheld the trial court's decision to allow the employee to introduce the OSHA investigation file into evidence and to discuss the employer's violation of OSHA regulations. The Court held that the OSHA investigation file was admissible as both a public record and business record. The Court also held that evidence of the employer's violation of OSHA regulations was directly related to the employer's knowledge of unsafe working conditions. *Feldene*, 91 Ohio App.3d at 62.

Similarly, in *Dirskin v. Blue Chip Architectural Products*, 100 Ohio App.3d 213 (Ct. App. Butler Cty. 1994), evidence of an employer's prior violation of OSHA regulations was relevant and admissible to prove an employer's knowledge of applicable safety regulation that should have been followed. See also, *Estate of Merrell v. M. Weingold & Co.*, 8th Dist. WL 1776357; *Brookover v. Flexmag Industries, Inc.*, 4th Dist., 2002 Ohio App. Lexis 2424 (held: OSHA citations are relevant and admissible to show that an employer committed an employer intentional tort; failure to comply with OSHA safety regulations is relevant to show that an employer required an employee to perform a dangerous task knowing of the substantial certainty of injury. See also, *Logan v. Birmingham Steel*, 8th Dist., 2003 Ohio 5068; *Medina v. Harold J. Becker*, 163 Ohio App.3d 832 (1st Dist.); *Haldeman v. Cross Enterprises, Inc.*, 5th Dist. 2004 Ohio 4997; *Neil v. Shook, Inc.*, 2nd Dist., Case No. 16422 – all holding OSHA citations against employers are admissible in intentional tort cases.

Ohio Courts routinely allow workplace safety experts to rely on OSHA citations and OSHA inspection records in providing opinion testimony in Ohio Employer Intentional Tort actions. *Dirksting v. Blue Chip Architectural Product*, 100 Ohio App.3d 213 (Butler Cty. 1994); *Miltenberger v. Exco Co.*, 12th Dist., 1998 Ohio App. Lexis 5540; *Izor v. James Goss Lumber Co.*, 12th Dist. 1998 Ohio App. Lexis 870.

Prior to the enactment of Ohio's Employer Intentional Tort Statute (O.R.C. Sec. 2745.01), Ohio Appellate Courts had followed a trend in denying employee intentional tort claims against Ohio employers if the employee disregarded an employer's safety policies or failed to use safety devices provided by the employer. See, *Spurlock v. Buckeye Boxes*, 2006 WL 3746127 (Franklin Cty. Dec. 21, 2006); *Vance v. Akers Packaging Services*, 2006 WL 3833874 (12th Dist.):

"An employer cannot be held to know that a dangerous condition exists and that harm is substantially certain to occur when he has taken measures that would have prevented the injury altogether had they been followed. * * * [W]hen safety devices or rules are available but ignored by employees, the requisite knowledge of the employer is not established. *Davis*, Butler App. No. CA2005-07-183."

See also, *Ferryman v. Conduit Pipe Products*, 2007 WL 4225745 (12th Dist.).

To the contrary, the Ohio Supreme Court had ruled before the enactment of O.R.C. Sec. 2745.01, that an Ohio employer's act of putting an employee in a dangerous situation for which the employee had no formal training created a jury issue as to whether the employer committed an intentional tort. See, *Hannah v. Dayton Power & Light Co.* (1998) 82 Ohio St.3d 482.

The old *Fyffe* Ohio Common Law test for an employer workplace intentional tort required the employee to show that the employer know with substantial certainty that the employee would be injured. OSHA defines a "serious" violation of the OSHA Act in 26 USC Section 666(b)(k):

For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations or processes which have been adopted or are in use in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

Thus, there can be a correlation between OSHA citations and Ohio workplace safety claims.

G. **OSHA REGULATIONS MAY ALSO SUPPORT AN OHIO EMPLOYEE'S WRONGFUL**

DISCHARGE CLAIM AGAINST AN EMPLOYER

In addition to protections afforded employees under Federal law who believe they have been discriminated against for making safety complaints or talking with OSHA (See 29 U.S.C. Sec. 660(c), OSHA 11(c)); 29 C.F.R. 1977.1 *et. seq.*); an employee's complaint to OSHA about safety, followed at some point by the employee's termination or adverse employment action, can support an Ohio law employment claim against an Ohio employer which may go to a jury. **Kulch v. Structural Fibers, Inc.** (1997), 78 Ohio St.3d 134.

In Kulch, an employee made a complaint to the Occupational Safety and Health Administration regarding employee health problems believed related to toxic chemicals in the air in the workplace. Employees had previously complained to management. The employee's complaint to OSHA prompted an inspection of the plant, including exposure monitoring. The employer received substantial OSHA fines.

After the OSHA inspection, the employee began to receive a series of reprimands and write-ups in his personnel file. Within five months of the OSHA inspection, Kulch was fired. Kulch made an 11(c) discrimination complaint to the OSHA 11(c) office. Following a full investigation, the Department of Labor dismissed Kulch's 11(c) complaint. Despite Federal OSHA dismissing the 11(c) complaint and finding no evidence of retaliation by the employer, Kulch sued his employer in state court alleging that he was fired for making complaints about safety to the Occupational Safety and Health Administration.

The Ohio Supreme Court held that an employee who claims to have been discharged for making safety complaints to OSHA can maintain an Ohio law wrongful discharge claim against his or her employer and held that this claim will usually go to the jury.

On January 16, 2002, the Ohio Supreme Court decided **Pytlinski u Brocar Products, Inc.** (2002), 94 Ohio St.3d 77, holding that Ohio public policy favoring workplace safety is an independent basis upon which a cause of action for wrongful discharge may be pursued. The **Pytlinski** court expanded upon its previous decision in **Kulch v. Structural Fibers, Inc.** (1997), 78 Ohio St.3d 134 and ruled that an employee who complains of safety violations does not need to file a complaint with OSHA or meet the statutory requirements of Ohio's whistle blower act, O.R.C. Section 4113.52 in order to pursue a "whistle blower" cause of action for wrongful discharge.

Since **Pytlinski** creates a public policy basis for wrongful discharge independent of Ohio's whistle blower statute, aggrieved employees have a four year statute of limitations to pursue a wrongful discharge claim, instead of the one hundred and eighty day limitation set out in O.R.C. Section 4113.52 and required of whistle blowers in **Contreras v. Ferro Corp.** (1993), 73 Ohio St.3d 244.

This area of public policy law favoring workplace safety continues to be addressed by the Courts. **Dohme v. Eurand Am, Inc.**, 130 Ohio St.3d 168 (2011); **Langley v. Daimler Chrysler Corp.**, 407 F. Supp.2d 897 (N.D. Ohio, W.D. 2005), *aff'd.* 502 F.3d 475 (6th Cir. 2007); **Sosby v. Miller Brewing Co.**, 415 F. Supp.2d 809 (S.D. Ohio, W.D. 2005), *aff'd.*, 211 Fed. Appx. 382 (6th Cir. 2006).