



## OSHA WILLFUL CITATIONS INCREASE EMPLOYER LIABILITIES

By: Mark A. Lies, II \*

and

Elizabeth Leifel Ash

### OSHA Pursuing Willful Citations

As employers should know, an OSHA willful citation opens the door to significant OSHA and other liabilities. Under the current Administration, willful citations are being issued with increased frequency. A willful citation can be an intimidating enforcement tool for the agency, having an immediate negative impact on an employer.

### Willful Citations Multiplying

OSHA's current strategy has resulted in more alleged violations and more alleged willful violations. OSHA's current preference for willful violations is often at odds with the standard of proof required for a willful violation. A willful violation is committed either *intentionally* or *with plain indifference* to the requirements of the Occupational Safety and Health Act. This contrasts with a serious violation, which requires only that the employer "knew or should have known" of the violation. Willful violations carry

---

\* Mark A. Lies II is a Labor and Employment Law attorney and Partner with Seyfarth Shaw LLP, 131 South Dearborn Street, Suite 2400, Chicago, Illinois 60603, (312) 460-5877, mlies@seyfarth.com. He specializes in occupational safety and health law and related personal injury and employment law litigation. Liz Ash is also an attorney with Seyfarth Shaw LLP, specializing in occupational safety and health and environmental law. Ms. Ash can be reached at (312) 460-5845 or eash@seyfarth.com.

higher civil penalties—up to \$70,000 per violation compared with \$7,000 for a serious violation—and can result in criminal prosecution of the employer and its individual managers if the willful violation caused an employee's death. They can also impact potential civil liabilities, insurance rates and business opportunities, particularly job bidding.

### **Courts Resisting OSHA's Expanding Interpretation of Willfulness**

Despite the enhanced use of willful citations, OSHA must still prove its case and the case law indicates that the burden of proof is still recognized as meaningful. The Occupational Safety and Health Review Commission and the courts have resisted the Agency's attempts to lower the standard for willfulness. In *American Wrecking Corp. v. Secretary of Labor*, 351 F.3d 1254 (D.C. Cir. 2003), the court affirmed the important distinction between serious and willful violations, noting that willfulness involves more than just negligence. It stated that the distinction "exists only if willful means knowledge that the conditions violate the statute or regulations—actual rather than imputed knowledge, for otherwise we are back to negligence." The case involved the demolition of a building. Two columns collapsed and bricks suspended above the columns fell, killing an employee. The supervisor testified that he believed the bricks were secure and did not create a hazard. OSHA alleged that the hazardous condition was so obvious that the supervisor's belief was unreasonable. The Review Commission rejected the notion that a willful violation exists simply because a hazardous condition "should have been obvious." *American Wrecking* also articulated the legal analysis necessary to determine if an employer's conduct constitutes a willful violation—rejecting the ALJ's vague observations and conclusions about the employer's state of mind and requiring competent and specific evidence of the employer's knowledge or indifference at the time of the alleged violation.

In *Secretary of Labor v. Active Oil Service, Inc.*, OSHRC Docket No. 00-0553 (July 15, 2005), the Review Commission also rejected OSHA's attempt to reduce willfulness to a "should have known" standard. Active Oil Service was hired to remove two oil

tanks. An employee entered one of the tanks to clean it prior to removal and was overcome by fumes. A second employee, serving as the attendant, attempted a rescue and was also overcome. The Review Commission overturned the ALJ's finding that the employer had committed a willful violation of the general duty clause by permitting an employee to enter a permit-required confined space without first evaluating it. The Review Commission concluded that OSHA had not demonstrated the employer had actual knowledge of the violation. The testimony was not clear whether the foreman saw, or was even in a position to see, the employee enter the tank. Having eliminated the intentional disregard prong of the test, the Review Commission moved to the plain indifference prong—asking whether the employer was “so indifferent to safety that ‘if he were informed of the rule, he would not care.’” The Review Commission concluded that even though the employer was lax in its approach to safety, its actions did not demonstrate plain indifference. The fact that the employer had a safety program that, if followed, would have avoided the violation, had the required equipment onsite at the time of the accident, and had followed the requirements in the past (including the previous day) undermined the allegations of plain indifference. The Review Commission affirmed that “knew or should have known” is not the standard for a willful violation and amended the citation to serious.

The Review Commission likewise rejected a willful citation in *Secretary of Labor v. Southern Pan Services Co.*, OSHRC Docket No. 99-0933 (September 30, 2005) because the evidence showed neither a conscious effort to disregard the OSHA requirements nor a plain indifference to safety. The suggestion that company officials and supervisors were present in the area and “should have” been aware that the exposed employee was working without fall protection was not enough to support a finding of willfulness. Again, the Review Commission downgraded the citation to serious.

The Review Commission has also recently affirmed that an employer's mistaken belief as to whether an OSHA standard was met does not rise to the level of willfulness. In *Secretary of Labor v. ASM-Sanders, Inc.*, OSHRC Docket No. 09-1158 (July 6, 2010),

OSHA cited an excavation contractor under 29 C.F.R. § 1926.652(a)(1) where employees were working in a trench greater than five feet deep without cave-in protection. While the Administrative Law Judge (ALJ) found that the employer had, in fact, violated the cited standard, he found that OSHA had not satisfied its burden of proving that the employer had acted willfully. Specifically, the ALJ found that the employer had not measured the trench, but rather had “eyeballed” its depth and concluded that it was under five feet in depth. The ALJ held that although the employer was mistaken in its judgment of the depth of the trench, the mistake did not rise to the level of willfulness.

As these cases demonstrate, the issue of willfulness often turns on one or two facts regarding the employer’s knowledge and steps taken to address safety hazards. In each of the cases cited above, as is often the case with willful citations, the knowledge, statements and conduct of the on-site supervisors was the key to whether a willful citation was issued and whether that citation survived judicial scrutiny.

### **Recommendations**

Employers can protect themselves from OSHA’s penchant for willful citations by establishing an effective safety program that:

- includes programs and procedures addressing the hazards of the workplace and the requirements of the standards
- communicates the importance of safety to employees and supervisors both in writing and in action;
- ensures that employees and supervisors are properly trained (including addressing potential language barriers or literacy issues involving employees), have the necessary equipment and properly use it;
- incorporates regular site inspections and work observations and corrects noted deficiencies in a timely manner;

- contains an effective and progressive disciplinary system that is routinely and consistently followed; and
- documents these elements.

### **Conclusion**

In the event OSHA initiates an inspection, especially an investigation involving a fatality, an employer should seriously consider engaging counsel. Counsel can, among other things, conduct privileged investigations, participate in OSHA's interviews with management representatives (and sometimes non-management personnel) and in the closing conference, and otherwise help shape how OSHA interprets the evidence. If OSHA issues a willful citation, an employer must carefully evaluate the case—the evidence, OSHA's rationale for the willful classification and the impact of a willful violation on any civil cases, potential criminal liability, insurance rates, and future business opportunities—and pursue all available resources to defend against such citations because of the drastic consequences of failure to do so.