

Preparing for and Managing an OSHA Inspection



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ERIC J. CONN is Head of the OSHA Practice Group at Epstein Becker & Green, where he focuses his practice on all aspects of occupational safety & health law:

- Represents employers in inspections, investigations & enforcement actions involving OSHA, CSB, MSHA, & EPA
- Responds to and manages investigations of catastrophic industrial, construction, and manufacturing workplace accidents, including explosions and chemical releases
- Handles all aspects of OSHA litigation, from criminal prosecutions to appeals of citations
- Writes & speaks regularly on safety & health law issues
- Conducts safety training & compliance counseling

Agenda

- ✓ Employers' Goals for Managing an OSHA Inspection
- ✓ Inspection Rights of OSHA, Employees and Employers
- ✓ Stages of OSHA Inspections
- ✓ Post-Citation Considerations



Goals of the Inspection



The OSHA Inspection

Sec. 8(a) of the OSH Act:

“OSHA may inspect at reasonable times any workplace during regular working hours and at other reasonable times within such reasonable limits and in a reasonable manner.”

Public Law 91-596
84 STAT. 1590
91st Congress, S.2193
December 29, 1970,
as amended through January 1, 2004. (1)

An Act

To assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act; by assisting and encouraging the States in their efforts to assure safe and healthful working conditions; by providing for research, information, education, and training in the field of occupational safety and health; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Occupational Safety and Health Act of 1970."

OSHA's Inspection Rights

- Right to inspect workplaces (with probable cause/violations in plain view)
- No Advance Notice
- Right to inspect records
- Right to collect physical evidence
- Right to conduct interviews



Employees' Inspection Rights

- Right to file a Complaint
- Right not to be discriminated or retaliated against
- Participation Rights:
 - Opening Conference
 - Walkaround
 - Private interviews
 - Closing Conferences
 - Informal Settlement Conferences
 - Access to inspection records

Familiarize Employees with Employees' OSHA Inspection Rights

Employees should understand that employees have a right to:

- » *File a safety or health complaint with OSHA.*
- » *Participate in the inspection by having a designated employee participate in the:*
 - *opening and closing conferences;*
 - *CSHO walkaround;*
 - *private interviews with OSHA; and*
 - *informal settlement conference.*
- » *Access inspection records (e.g., citations, notice of contest, and abatement records).*
- » *Protection from retaliation and discrimination for exercising these rights.*

Employer's Inspection Rights

- “Reasonable Inspection” at “Reasonable Times”
- Demand Inspection Warrants
- Hold Opening Conference
- Access a copy of Complaints
- Protect Trade Secrets/CBI
- Accompany the CSHOs during walkarounds
- Participate in Management Interviews
- A Closing Conference
- Challenge Citations



Pre-Inspection Checklist

- ✓ Review applicable special emphasis programs and compliance directives
- ✓ Audit written safety programs (privileged)
- ✓ Audit physical conditions (privileged)
- ✓ Implement Safety Programs
- ✓ Think beyond a single facility
- ✓ Determine Warrant Philosophy

Warrant or Consent?

4th Am.: “The right of the people to be secure in their houses, papers and effects, against unreasonable searches and seizures shall not be violated and no warrant shall issue but upon probable cause....”

Benefits of Warrant:

- Restraint on OSHA
- Passage of time

Risks of Warrant:

- Potential retaliation
- Lose control of inspection

Practitioner’s Tip:

Waive the warrant requirement and consent to an inspection, but only after negotiating an acceptable scope.

Stages of an OSHA Inspection

Opening Conference



Document Production



Walk-Around Inspection



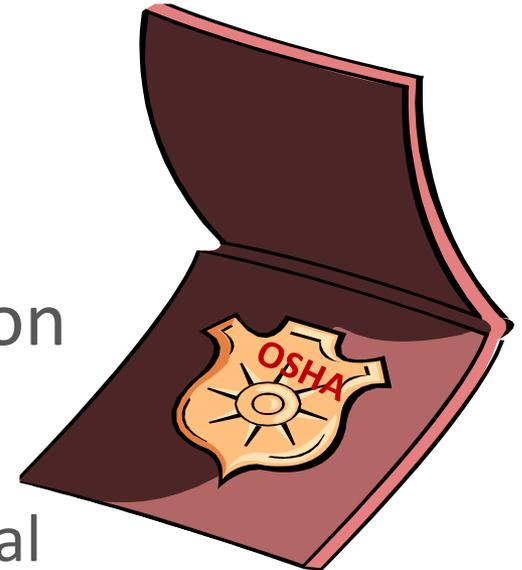
Non-Management Employee
and Supervisor Interviews



Closing Conference

Opening Conference

- CSHO arrives and displays credentials
- Opening Conference begins:
 - Employee reps. may participate
 - CSHO explain purpose of inspection
 - CSHO discuss scope and duration:
 - Wall-to-Wall
 - Complaint / Referral
 - NEP / LEP
 - Accident
 - Resolve warrant issue
 - CSHO requests documents/information



Opening Conference

Practitioner's Tips:

- Insist on an Opening Conference
- Select location & participants in advance
- Ask for purpose/scope of inspection
- Introduce Inspection Team
- Explain Document Production Protocol
- Establish Interview Protocol
- Arrange for daily close-out meetings
- Arrange to screen photos/video for Trade Secrets/CBI

Document Production

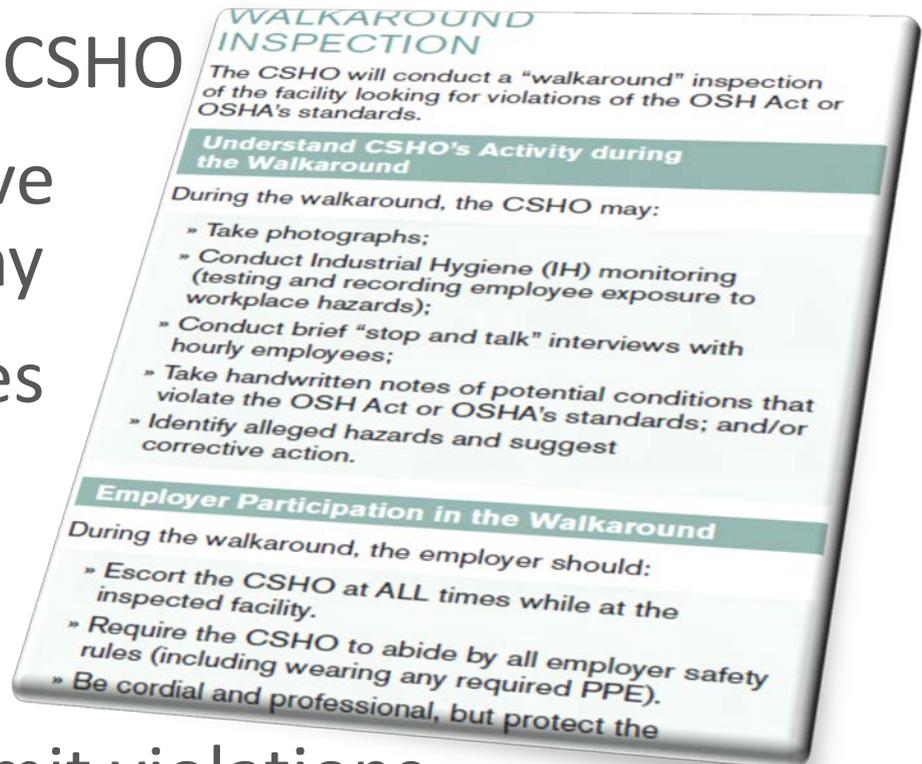
- Insist on written requests for documents
- Voluntary vs. Subpoena
- Do not create new documents
- Do not volunteer information
- Keep a copy of all documents produced
- Maintain a Document Control Log

OSHA INSPECTION DOCUMENT CONTROL LOG

REQ #	DATE REC'D	DESCRIPTION OF REQUEST	EMPLOYEE ASSIGNED	DATE OF ACTION	DOCUMENTS PRODUCED	TRADE SECRET OR CBI	BATES RANGE
1-1	3/22/11	OSHA 300 Logs for the past 5 years	J. Doe	3/22/11	2006, 2007, 2008, 2009 & 2010 OSHA 300 Logs		OSHA00001 – OSHA00010
1-2	3/22/11	Completed Bin Entry Permits for the last year	J. Smith	3/24/11	Copies of completed PRCS entry permits for entries into grain bins dated 1/1/10 - present	X	OSHA000011 – OSHA00036

Walkaround Inspection

- Scope depends on nature/purpose of inspection
- Always accompany the CSHO
- Employee representative permitted to accompany
- Take side-by-side images
- Act professionally but protect your rights
- Fix hazards identified by CSHO but do not admit violations
- Require CSHO to follow safety rules



Walkaround Inspection

Practitioner's Tips:

- Escort OSHA at all times
 - Gather information about focus of inspection
 - Control flow of information
 - Ensure safety of CSHO
- Ask for notice of sampling
- Take detailed notes
- Hold daily close out meetings
 - Ask about concerns
 - Ask about interviews and tasks for next visit



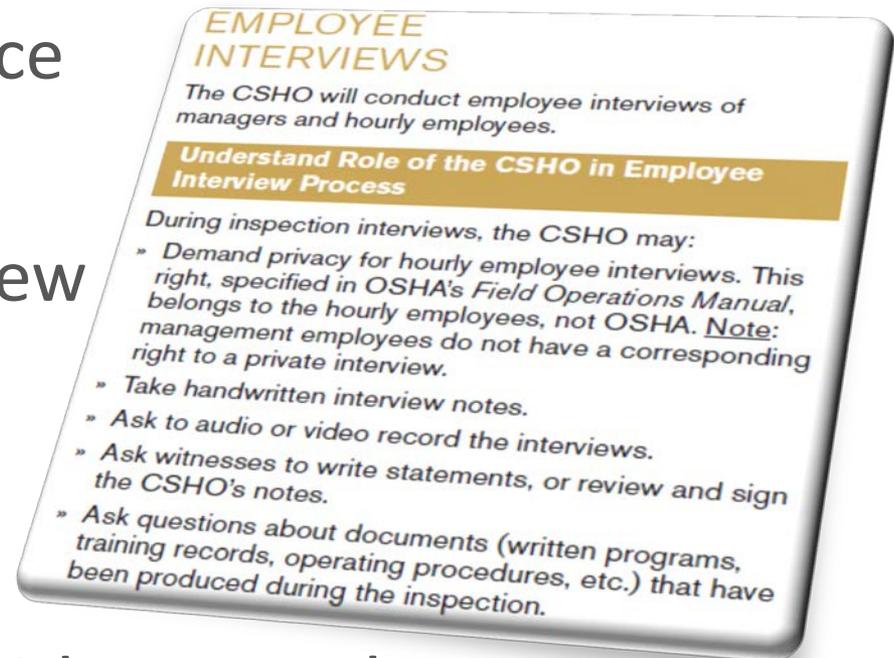
OSHA Inspection Interviews

- Arrange through interview procedure
- Pre-select office or conference room
- Stop and Talk vs. Interview
 - 5 Minute Rule
 - OSHA must be reasonable
- Voluntary vs. Subpoena



Hourly Employee Interviews

- OSHA demands privacy for hourly employee
 - Per FOM and experience
 - Union Representation
 - Right to private interview belongs to employee
 - Consider a “Choice of Representative” Form
- Do not coerce or intimidate employees
- Do not discriminate against employees



Management Interviews

- Supervisor's knowledge imputed to employer
- No impromptu management interviews
- Participate in all management interviews
 - Right belongs to employer, not the witness
- Prepare all management witnesses

Prepare All Employees for Interviews

Explain
Witness'
Rights



Give
Interview
Tips



Review
Substantive
Issues

- ✓ Voluntary interview
- ✓ Right to reasonable schedule
- ✓ Right to be represented
- ✓ Right to not be recorded
- ✓ Right to not sign/write/draw
- ✓ Right to examine documents
- ✓ Right to take a break any time

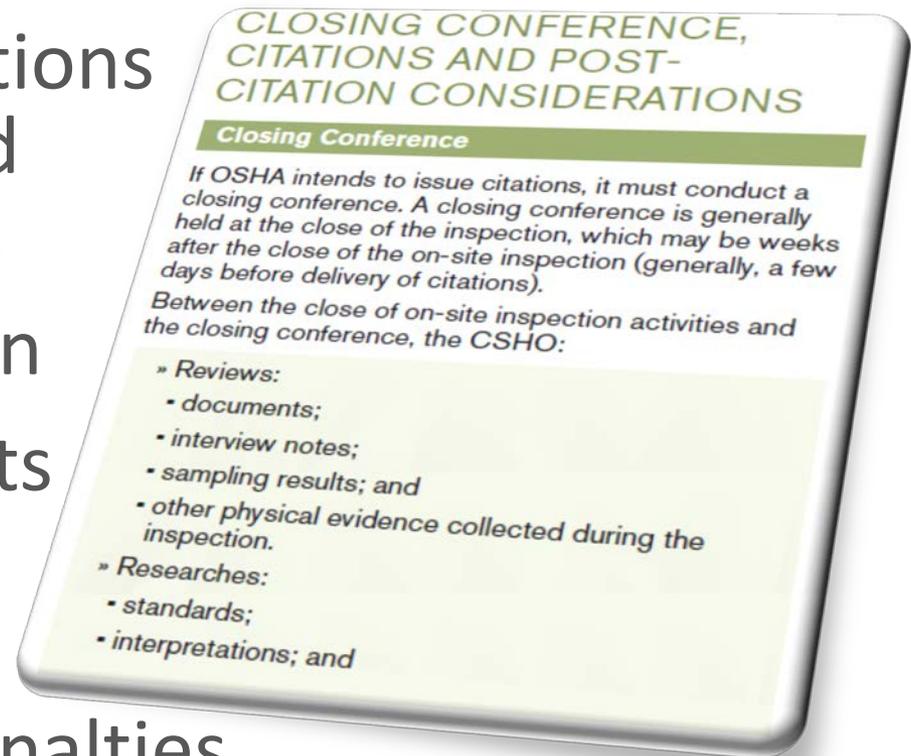
- ✓ Always tell the truth
- ✓ Listen carefully
- ✓ Answer only the question asked
- ✓ Short, concise answers
- ✓ Stick to the facts
- ✓ Do not guess or speculate
- ✓ No silence is awkward
- ✓ Don't let CSHO answer for you₂₀

Closing Conference

- Held at close of inspection
 - May occur weeks after on-site inspection
- CSHO explains post-citation rights
- CSHO communicates findings:
 - Standards allegedly violated
 - Bases for alleged violations
 - Possible abatement and abatement dates
 - Usually will not share classification or penalty

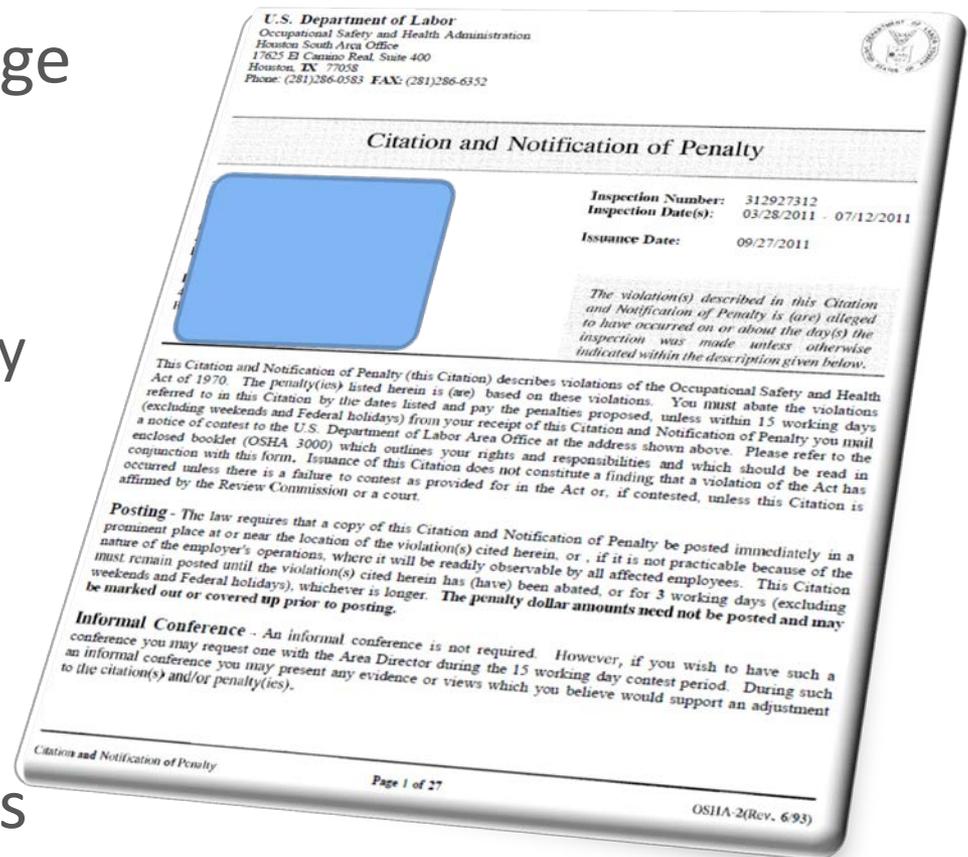
Closing Conference

- Correct obvious errors/misimpressions
- Identify alleged violations you already corrected
- Request time to offer additional information
- Offer no commitments about abatement
- Ask about citation classifications and penalties
- Take detailed notes



Post-Citation Considerations

- Cost of Abatement & Future Compliance
- Competitive Disadvantage
- Cumulative Impact:
 - SVEP
 - Increased OSHA scrutiny
 - Government contracts
 - Bid Pre-qualification
 - Insurance premiums
 - Negative Publicity
- Risk of Repeat Violations
- Impact of Citations on Civil Litigation



Be In The Know



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QUESTIONS?



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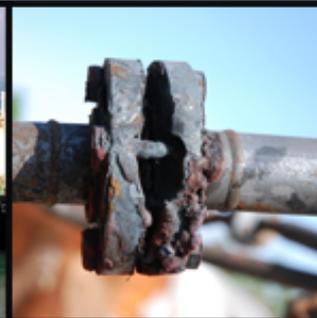
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Identifying Hazards

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Who Are The Authors



- Justin Bishop – Electrical Engineer, Fire and Explosion Investigation, Hazard Analysis



- Mark Fecke – Mechanical Engineer, Fire and Explosion Investigation, Hazard Analysis



Who is Exponent?

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- Government





Overview

- Methods of Identifying Hazards
- Documentation
- Prevention of Fugitive Dust
- Emergency Action Plan
- Ignition Source Control



Methods of Identifying Hazards

- Structured Analysis
 - Process Hazard Analysis (PHA)
 - Checklist Evaluations
 - What-If Studies
 - Hazard and Operability (HazOp) Studies
 - Fault Tree Analysis
 - Failure Modes Effects Analysis
 - Gap Analysis
 - Quantitative Risk Assessment
- Site Inspection
 - Typically one day on site
 - Review of site safety and hazards
 - Based on non-conformance with
 - Industry Guidelines
 - Codes
 - Standards
 - OSHA Regulations
 - Good Engineering Practice



Documentation

- Incident reporting
- Process flow diagram (PFD)
- Employee training schedule
- Housekeeping
- Preventative maintenance program
- Sensor/interlock testing/review
- Process hazard analysis
- Classified (hazardous) locations
- Safety Program



Prevention of Fugitive Dust

- Repair leaks instead of increasing housekeeping
- Clean spills/leaks when they are found
- When leaks are found, the process is shut down and the leak is repaired with a long term fix
- Dust collector outside
- Housekeeping
 - Brooms and shovels to clean fugitive dust
 - Vacuums may be APPROVED for a combustible dust...
 - BUT may not be approved/certified for use in a classified area



Emergency Action Plans and Fire Fighting

- Required by NFPA 664 Section 10.12 Emergency Planning and Response
 - “A written emergency plan shall be developed for preventing, preparing for, and responding to work-related emergencies including but not limited to fire and explosion.”
- Specific written procedure for pellet mill fires
- Specific written procedure for silos fires
- Communication with local fire departments in pre-planning exercise
- Training with local fire departments in pre-planning exercise
- Increased awareness of silo fire hazards within the fire protection community.



Bonding, Grounding, and Wiring

- Grounding structures and equipment
- Bonding equipment and piping
- Scheduled inspections and maintenance of operating equipment
- Scheduled testing of grounding/bonding system
- Equipment in classified locations is certified for the area



Industrial Trucks

- Used to move raw material into and out of raw material storage
- Wood Flour → Group G Dust
- Type DX (diesel) or EX (electric) industrial trucks required (NFPA 505)



Elimination and Detection of Ignition Sources

- CCTV
- Spark detection
- Rock Trap
- Magnetic separators
- Abort gate
- Rotary valves
- CO2 extinguishing bottles on Pellet Mills
- Dust Collection
- Any unclassified sources inside classified area prohibited
- Dust Collectors placed outside
- Temperature Sensors on bearing
- Carbon monoxide, oxygen detectors
- Visual inspection for signs of Smoke, odor, discoloration of material
- Monitor Bulk material temperature
- Monitor Headspace temperature & humidity

Detection

Monitoring

Suppression

Ex™



Thank You

Questions?

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