


SHERMAN & HOWARD

PRACTICAL  
ASPECTS OF AN  
OSHA  
INVESTIGATION




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# CONSIDERATIONS BEYOND THE OSHA CITATION

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- Civil Litigation
- Workers' Compensation
- Publicity and Family Issues

# CIVIL LITIGATION

- Is most common to follow a “catastrophic accident”
  - Fatality of employee, contractor employee or visitor
  - Multiple injuries
  - Significant property damage

# WHY CATASTROPHIC ACCIDENTS MUST BE HANDLED DIFFERENTLY

- Potential legal liability:
  - OSHA/MSHA civil and criminal penalties
  - Workers' compensation claims
  - Lawsuits from injured parties
  - Lawsuits related to property damage

# WHY CATASTROPHIC ACCIDENTS MUST BE HANDLED DIFFERENTLY

- In civil cases, OSHA citations may be used as evidence of negligence (degree depends upon the state in which the case arises)
- Always, always, always demand non-admissions language in any settlement with OSHA, no matter how small the injury

# WHY CATASTROPHIC ACCIDENTS MUST BE HANDLED DIFFERENTLY

- More extensive OSHA/MSHA investigations
- Multiple simultaneous investigations:
  - Local law enforcement
  - State or federal agencies
  - Insurance companies
  - Internal investigations by the Company
- Employee issues

# PRESERVE CRITICAL EVIDENCE – “SPOILIATION OF EVIDENCE”

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- A legal duty to gather and preserve critical evidence
- Significant liability, civil and criminal, for the destruction of, tampering with or failure to preserve evidence in an accident case

# PRESERVE CRITICAL EVIDENCE

- Local fire, rescue and police control the accident scene until released
- Except as necessary to immediately protect personal safety, the accident scene must remain “frozen” until released by authorities, management and/or legal counsel
- Take appropriate steps to control access to the accident scene
- Do not allow anyone, including government agencies, to remove evidence from the scene without approval of legal counsel
- Preservation of accident scene evidence following release



# PRESERVE CRITICAL EVIDENCE – THE “LEGAL HOLD” LETTER

- Issuance of a “Legal Hold” letter by legal counsel
- What the “Legal Hold” requires

# OSHA AND WORKERS' COMPENSATION

- Exclusivity does not always mean the employer won't get sued
  - “Statutory employer?”
  - Indemnification provisions in contracts?
  - Third-party action over claims?

# OSHA AND WORKERS' COMPENSATION

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- Remember that OSHA files sometimes are subpoenaed by comp. attorneys
- Comp. carriers appreciate non-admissions language in settlements

# PUBLICITY ISSUES

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- Direct all media inquiries to the designated company contact
- Do not allow the press onto the property unless authorized

# FAMILY ISSUES

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- Be sensitive and supportive of family members impacted by the accident
- A family-relations representative should provide assistance with family-related issues, such as insurance benefits, funeral arrangements, etc.

# EMPLOYEE ISSUES

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- Make sure all employees are safe to work, including managers
- Make sure employees and managers are ok, mentally and physically, to undergo any investigation interviews
- Grief counseling and other employee assistance

# COMMON MISTAKES DURING INSPECTIONS

- Incorrect designation of management/non-management
- Allowing onsite management interviews
- Under-utilizing or over-utilizing drug tests
- Failing to properly document the scene
- Failing to properly document activities at the scene (such as removal of evidence)
- Allowing private parties to disturb the scene
- Not identifying all interested parties for evidence preservation purposes

# WHAT TO EXPECT FROM OSHA IN THE BIDEN ADMINISTRATION

- Under President Trump, there never was an Assistant Secretary of Labor for OSHA
- Inspections were relatively flat
- Very few new standards
- Significant enforcement was rare
  
- What will 2021 portend . . . .?



# WHAT TO EXPECT FROM OSHA IN THE BIDEN ADMINISTRATION

Back to the  
Future??



# WHAT TO EXPECT FROM OSHA IN THE BIDEN ADMINISTRATION

- A lot depends on the outcome of the Georgia Senate runoffs
- In either event, expect more enforcement
- Potential emergency COVID standards?



# QUESTIONS / ANSWERS