SEYFARTH SHAW LLP
ATTORNEYS

Writer's direct phone
(312) 460-5877

Writer's e-mail
mlies@seyfarth.com

Writer's direct fax
(312) 460-7877

131 South Dearborn Street
Suite 2400
Chicago, Illinois 60603
(312) 460-5000
fax (312) 460-7000
www.seyfarth.com

Too Good to Be True: Potential Pitfalls of OSHA Settlements

By Mark A. Lies II[*]
& Daniel R. Flynn[†]

Introduction

If your Company has received citations from the Occupational Safety and Health Administration ("OSHA"), it may be tempting to accept the initial penalty reduction that the Agency offers and settle the matter quickly at the informal conference. Accepted citations, however, can be the basis for subsequent "Repeat" citations at any other of your company's facilities nationwide, which can result in a penalty of $70,000 for each citation. Furthermore, depending on the jurisdiction in which you are located, accepted citations can be used against your Company in subsequent civil litigation. This heightened concern is heightened where citations result from an accident involving an independent contractor's or subcontractor's employee(s). Therefore, before accepting any settlement offer, you should carefully evaluate the citations to ensure that they are factually and legally accurate and that no defenses exist. If you reach acceptable settlement terms with OSHA, you should ensure that the settlement agreement contains language that protects your company in any subsequent civil litigation.

---

[*] Mark A. Lies, II, is a partner with the law firm of Seyfarth Shaw LLP, 131 South Dearborn Street, Suite 2400, Chicago, IL 60603 (312) 460-5877, mlies@seyfarth.com. He specializes in occupational safety and health and related employment and civil litigation.

[†] Daniel R. Flynn is an associate with Seyfarth Shaw, (312) 460-5976, dflynn@seyfarth.com. His practice focuses on occupational safety and health and environmental matters.

This article discusses recent developments in the willingness of courts to allow evidence of OSHA citations to be admitted and considered in civil litigation, as well as the steps you can take to limit the admissibility of the underlying citations and settlement agreements with OSHA.

Recent Developments

Doty v. Darwin Olson, No. 0-733/09-1852 (Iowa Ct. App., Dec. 8, 2010).

In *Doty*, the defendant, a homebuilder named Darwin Olson ("Olson"), hired the plaintiff, a plumber named Doty ("Doty"), as an independent contractor to perform work on new homes. While inspecting a home under construction to evaluate a bid for the plumbing work, Doty fell down a stairway shaft, seriously injuring his heel. Doty subsequently sued Olson, alleging that they failed to take proper safety precautions at the worksite. The Court of Appeals held that if Doty had been an employee of Olson, evidence of the Iowa OSHA citations would have constituted negligence per se.[‡] That is, the fact that Olson violated an OSHA requirement would have been all the evidence needed to establish Olson's liability to Doty. However, because Doty was an independent contractor, the Iowa Court of Appeals held that Iowa OSHA citations constituted relevant evidence, though not conclusive proof, of negligence. Consequently, under the holding in *Doty*, a hastily settled OSHA citation could end up as evidence of negligence before a jury.

Iowa's holding appears to be the emerging majority view across jurisdictions. Other jurisdictions that have recently held that OSHA citations constitute relevant evidence of negligence, though not negligence per se, as to a non-employee include Arizona, Colorado,

[‡] It should be noted that many state workers' compensation laws bar an employee from recovering damages from his or her employer under a claim of negligence.

Vermont, California, Connecticut, Georgia, Nebraska, New Jersey, North Carolina, Ohio, Oregon, and Pennsylvania.

Conclusion

While quickly settling an OSHA citation arising out of an accident may seem at the time to be the easiest way to put the matter behind you, making a hasty decision could result in unintended consequences and potential civil liability down the road. Not only can accepted citations form the basis for a future repeat OSHA citation, but accepted citations could be used against the company by the injured individual in a civil action for negligence. Therefore, the employer should only accept citations that are factually and legally accurate. Further, if you reach agreeable settlement terms with OSHA, you should always request that the settlement agreement include an exculpatory clause which may result in the exclusion of the underlying citations and settlement agreement from a subsequent civil action. Frequently, such settlement agreements contain the following information:

> Except for these proceedings, and matters arising out of these proceedings, and any other subsequent OSHA proceedings between the parties, none of the foregoing agreements, statements, findings, and actions taken by Respondent shall be deemed an admission by the Respondent of the allegations contained within Citations and Notification of Penalty and the Complaint. The agreements, statements, findings, and actions taken herein are made for the purpose of compromising and settling this matter economically and amicably, and they shall not be used for any other purpose whatsoever, except as herein stated.

It has been our experience that although OSHA will frequently comply with this request, OSHA will rarely include such a cause in its initial settlement agreement.