

Appendix E

OSHA Response to Draft Report

U.S. Department of Labor

Assistant Secretary for  
Occupational Safety and Health  
Washington, D.C. 20210



SEP 28 2010

MEMORANDUM FOR:

ELLIOT P. LEWIS  
Assistant Inspector General  
for Audit

A handwritten signature in black ink, appearing to read "D. Michaels", is written over the typed name of David Michaels.

FROM:

DAVID MICHAELS, PhD, MPH

SUBJECT:

Response to OIG's Draft Audit Report  
No. 02-10-201-10-105  
"OSHA Needs to Evaluate the Impact and Use of Hundreds  
of Millions of Dollars in Penalty Reductions as Incentives  
for Employers to Improve Workplace Safety and Health."

This memorandum is in response to your August 18, 2010, transmittal of the Office of Inspector General (OIG) Draft Audit Report No. 02-10-201-10-105, "OSHA Needs to Evaluate the Impact and Use of Hundreds of Millions of Dollars in Penalty Reductions as Incentives for Employers to Improve Workplace Safety and Health." We appreciate this opportunity to respond to the findings and recommendations of the OIG. While we agree with most of the recommendations, we also convey our concerns about some of the audit findings and recommendations.

**The basis for the OIG's penalty reduction calculation is wrong**

As the draft audit report notes, OSHA is required to give consideration to the gravity of violations, and employer's size, good faith, and history. The OIG contends that penalties were reduced by 67 percent, or \$351.2 million, in the two year time period studied, but starts with an inaccurate premise that all penalties start at the highest level allowed after assessing the gravity of the violation. The Occupational Safety and Health Act (OSH Act) clearly requires that size of the employer, good faith of the employer and the history of previous violations be considered in the assessment of civil penalties. Therefore, the Agency believes that the OIG should recalculate penalty reductions it examined *after* those three criteria have been applied and change the title and content of the report to reflect the corrected calculations (see attached tables for an example of accurate penalty reduction calculations). This change would then accurately reflect the difference between the OSHA proposed and final penalties.

**The draft audit report findings incorrectly imply that penalty reductions were erroneously applied for employers with a history of serious violations, including some employers who had worksite fatalities.**

Although the Agency is aware of the limitations of its current inspection database, and is in the process of developing a new data management system (i.e., OSHA Information System (OIS)), which will provide the ability to more accurately track the history of an employer through the use of Dun & Bradstreet data, it does not believe that the penalties the OIG has identified were incorrectly assessed. While the OIG reports the cases identified all had serious violations, it failed to provide information on the gravity of these violations. In addition, the majority of the reductions cited in this subset of cases were for the size of employer. Furthermore, the draft report suggests that a fatality from a prior inspection should preclude an employer from receiving future reductions. This suggestion would require further evaluation and consideration by OSHA. A worksite fatality alone does not automatically mean the cause was work-related or the employer failed to maintain a safe workplace.

**The OIG inappropriately used internal monitoring reports to suggest systematic weaknesses in the penalty process.**

Internal monitoring reports are valuable tools that OSHA uses to oversee and improve its own field activities. They are OSHA office-specific and are provided to the manager of the specific office who is then required to explain how they plan to correct the problem. Rather than suggest systematic weaknesses, the internal monitoring reports serve as an effective internal review tool that helps the Agency monitor and improve many of its programs, including the penalty process. At the same time, we recognize the need to increase our audits and ensure we are calculating penalties correctly and consistently amongst Area Offices and across Regions. The Agency will evaluate audit procedures once the revised penalty policies are implemented to ensure they are being implemented correctly.

**Penalties cannot be assessed in a vacuum independent of contest rates**

Because employers are not required to abate violations during the contest period, OSHA's penalty adjustment process is a part of the settlement of a case and directly relates to ensuring expedited abatement. OSHA is always seeking ways to ensure the quickest abatement and discourage employers from continuing unsafe or unhealthful working conditions. Recently, OSHA reviewed its penalty policies, and is currently piloting new criteria for calculating penalties.

**RECOMMENDATIONS**

OSHA appreciates the timeliness of this report and provides the following responses to the recommendations.

**Develop and Perform the Following Evaluations:**

**Recommendation 1: Impact of penalty reductions on workplace safety and health.**

**OSHA Response:** While the Agency agrees with this recommendation in principle, this would be a very resource intensive project that would require the expenditure of funds for which the Agency has neither budgeted nor requested. Existing research highlights the complexity of the topic and the difficulty in identifying clear causal relationships between penalties and injury reductions, let alone how penalty reductions might impact injuries. It is clear that OSHA penalties are effective providing an incentive for employers to implement measures that will reduce workplace injuries, although clearly the differential impact of penalties needs to be evaluated for various employer sizes. In addition, while the 1992 GAO report explained that it was difficult to establish a causal relationship between penalty reductions and quicker, or more comprehensive abatement, it also noted that GAO was in agreement with OSHA that because abatement is not required during the contest period, “reducing the penalty could make an employer more willing to accept the citation, and the sooner a citation is resolved, the sooner abatement is required.” As noted in the OIG’s report, the driving factor for reducing penalties is the employer’s right to contest an inspection and the desire to readily obtain abatement for serious hazards to protect workers. Although employers are always responsible for compliance, they may not receive failure-to-abate penalties during the pendency of a contest proceeding. The 1992 GAO report also found that contested cases had a much higher penalty reduction than other cases.

**Recommendation 2: Fully implement the requirements of the Management Accountability Program (MAP) and institute changes based on its results to improve Nationwide OSHA program results.**

**OSHA Response:** The Agency believes that it has already complied with this recommendation. As the OIG reports, the Agency has internal monitoring reports that have identified opportunities for improvements in documenting justifications for penalty reductions. What the OIG report fails to show is that these reports are then presented to the managers of the OSHA office where they occurred and the manager is required to provide a response to the report explaining what actions it will be take to address the findings of the audits. The Agency will continue to improve its auditing program with the introduction of the revised penalty policy and continue to work at ensuring that penalty calculations are consistent across Area Offices.

**Recommendation 3: Determine if the Expedited Informal Settlement Agreement (EISA) and national quick-fix programs should be formalized and expanded, or eliminated.**

**OSHA Response:** The Agency is currently reviewing both policies and will take appropriate steps once these reviews are completed.

**Improve Information Systems**

**Recommendation 4: Develop a module in the management information system to identify, monitor, and limit penalty reductions for employers with prior violations.**

**For these employers consider the following characteristics:**

- a. High-gravity serious and willful violations**
- b. Violations of the same standard, regardless of the “repeat” classification**
- c. Hospitalized injuries and fatalities**
- d. Delinquency of penalty payments**
- e. Parent and subsidiary ownership**

**OSHA Response:** The Agency is in partial agreement with this recommendation and believes it will be in partial compliance with the roll-out of the revised penalty policy and OSHA’s Information System (OIS).

- Under the revised penalty policy, the time frame for considering an employer’s history of violations will expand from three to five years. Employers who have been inspected in the last five years and have not been issued any high gravity serious, willful, repeat or failure-to-abate citations will receive a 10 percent reduction for history.
- Those employers who are issued any high gravity serious, willful, repeat or failure-to-abate citations will receive a 10 percent increase in their penalty up to the statutory maximum.
- The new policy does not allow penalty reductions to be made at an informal conference if the employer is delinquent in paying earlier penalties.
- The OIS will improve the tracking of employer’s history by using Dunn & Bradstreet data to populate the employer fields. This data will allow the Agency to more easily identify parent and subsidiary ownership.

The Agency is hesitant to make changes that would automatically limit penalty adjustments whenever the same standard is cited. Each inspection presents a unique environment and numerous variables that must be taken into consideration. OSHA created the repeat criteria to identify violations that are substantially similar or identical. The Agency is also hesitant to insist that existence of a previous fatality or hospitalization should automatically limit a history adjustment. Once again, the individual circumstances of these types of incidents should determine whether a history adjustment should be denied.

**Recommendation 5: Increase transparency and access by displaying on OSHA’s website the (a) gravity-base penalty amount and (b) amount of penalty reductions by type, including both compliance officer and post-citation reductions.**

**OSHA Response:** The Agency would want to further evaluate this proposal. The rationale to adjust the penalty for each inspection may not be easily categorized and will often vary based on the circumstances of each case. The Agency has concerns that

posting limited information to OSHA’s website associated with penalty adjustments could result in unintended consequences.

**Revise and Implement Policies and Procedures**

**Recommendation 6: Revise directives to consider an employer’s overall character while coordinating reductions as a whole before individually applying the size, good faith, and informal settlement reductions.**

**OSHA Response:** The Agency believes that the revised penalty policy will partially address this recommendation. At the same time, the Agency is limited by the OSH Act which clearly states that due consideration must be given “to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.” At the same time, the revised penalty policy will modify the criteria used to assess these categories. Under the revised penalty policy, the time frame for considering an employer’s history of violations will expand from three to five years. Employers who have been inspected in the last five years and not been issued any serious, willful, repeat, or failure-to-abate citations will receive a 10 percent reduction for history. Those employers who were issued any high gravity serious, willful, repeat or failure-to-abate citations will receive a 10 percent increase in their penalty up to the statutory maximum. Employers who had not been inspected or who were issued serious violations that were not high gravity will not receive a reduction or increase for history.

Under the revised policy, the penalty reduction for size will continue to apply to employers with less than 251 employees. However, employers under 251 will now be eligible for a penalty reduction between 10 and 40 percent instead of between 20 and 60 percent. Current good faith procedures will be retained but OSHA is eliminating the additional 10 percent reduction for employers who participate in a strategic partnership agreement. The minimum penalties for a serious violation will be raised to \$500.

Finally, the revised penalty policy will give the Area Director the authority to determine if a size or history reduction should be granted. Under the revised policy, an Area Director who determines that imposing the full-gravity-based penalty is necessary to achieve the appropriate deterrent effect may do so after fully documenting the rationale in the case file. The Agency believes this policy strikes the appropriate balance, addressing both the intent and requirements of the OSH Act.

**Recommendation 7: Establish clear policy on limiting the size reduction for small employers and ensure this deterrent provision is used. This policy should address factors such as: fatalities/hospitalized injuries, and multiple high-gravity, serious, repeat, or willful violations.**

**OSHA Response:** As with Recommendation 6, the Agency believes that the revised penalty policy partially addresses this recommendation. At the same time, the Agency is

limited by the OSH Act which clearly states that due consideration must be given “to the appropriateness of the penalty with respect to the size of the business of the employer being charged.” The Agency is also hesitant to insist that the existence of a fatality or hospitalization should be automatically linked to a size adjustment. The Agency already has an established policy for limiting the application of a size reduction in certain circumstances. When an employer with 1-25 employees has one or more serious violations of high gravity or a number of serious violations of moderate gravity indicating a lack of concern for employee safety and health, the inspector may recommend that only a partial reduction in penalty shall be permitted for size. As noted earlier, the history adjustment has now been modified and includes a 10 percent increase for an employer that has been cited by OSHA for any high gravity serious, willful, repeat, or failure-to-abate violation within the previous five years, up to the statutory maximum.

**Recommendation 8: Provide formal training to Area Directors on the use and documentation requirements to justify informal settlement reductions according to directives.**

**OSHA Response:** The Agency believes it has already fulfilled this requirement. All Area Directors are provided with training appropriate to their responsibilities. OSHA believes that the majority of its Area Directors are in compliance with the penalty policies and were provided training on the revised penalty policy. Area Directors who are not in compliance have been identified through internal audits and are required to explain what steps they will take to come into compliance. The Agency is planning additional training on the new penalty policy.

**Recommendation 9: Revise the policy of good faith reductions for employers with prior violations so that reductions are not granted on violations of the same standard not classified as repeat.**

**OSHA Response:** The agency disagrees with this recommendation. As noted in its response to Recommendation 4, the Agency is hesitant to make changes to insist that penalty adjustments should be automatically limited if the same standard is cited. Each inspection presents a unique environment with a number of variables that must be taken into consideration. OSHA created the repeat criteria to identify violations that are very similar or identical.

**Recommendation 10: Establish clear policy and guidance to determine when CSAs are to be used for employers with prior violations to ensure comprehensive and company-wide abatement hazards.**

**OSHA Response:** OSHA believes it is already in compliance with this recommendation with the CPL 02-00-090 - CPL 2.90 - Guidelines for Administration of Corporate Wide Settlement Agreements. OSHA is in the process of revising its corporate-wide settlement agreement directive and will work to ensure guidance is provided with respect to

assessing the appropriate use of such agreements to address company-wide hazards. In addition, when OIS launched, the Agency will have better access to identifying all the worksites for one employer.

OIG Identified Employers with Serious Violations on Two or More Inspections and Fatalities

ATTACHED TABLES:

Below are the inspections which the OIG reported as having more than a 66 percent reduction in penalties. OSHA has recalculated these penalty reductions using the correct initial penalty amounts, resulting in a much lower penalty reduction.

Small Employers (1-25 Employees)

Establishment Name	Initial Penalty	Current Penalty	OSHA Calculated Rate Reduction	OIG Reported Rate Reduction
1. TJC Construction	\$4,500	\$2,250	50%	85%
2. Gary Lewis Properties	\$1,500	\$900	40%	81%
3. Colony Insulation	\$27,200	\$13,560	50%	80%
4. RPM Recycling	\$8,700	\$6,510	25%	79%
5. Boston Power Crushing	\$24,600	\$18,200	26%	78%
6. Dakota Pump & Control	\$6,500	\$4,375	33%	78%
7. Luis Martinez	\$10,900	\$5,200	52%	78%
8. Building Keeper	\$13,750	\$7,988	42%	77%
9. Execute Projects	\$12,650	\$9,080	28%	76%
10. Markland Welding	\$13,800	\$8,400	39%	75%
11. Gulf Coast Electric	\$5,075	\$4,725	7%	73%
12. Romo Carpentry	\$13,500	\$11,150	17%	72%
13. Vilgar Remodeling	\$8,250	\$4,125	50%	70%
14. Frame To Finish	\$10,550	\$10,550	0%	69%
15. Tesmer Construction	\$7,600	\$5,800	24%	67%
16. Crispin Aguilera	\$6,000	\$5,200	13%	65%
17. L.A. Molina Construction	\$15,550	\$13,750	12%	65%
18. Rene Regalado	\$7,550	\$7,550	0%	65%

Attachment - 1



## OIG Identified Employers with Serious Violations on Two or More Inspections and Fatalities

## Mid-Size Employers (26-100 Employees)

Establishment Name	Initial Penalty	Current Penalty	OSHA Calculated Rate Reduction	OIG Reported Rate Reduction
1. Liberty Building Products	\$1,050	\$1,050	0%	93%
2. Armstrong Steel Erectors	\$14,750	\$4,525	69%	87%
3. Rockwell American Mfg. Co.	\$10,750	\$2,750	74%	87%
4. System Services Broadband	\$10,900	\$10,900	0%	87%
5. Maggio Roofing	\$7,275	\$3,425	53%	83%
6. R-Hive Holding	\$64,750	\$14,765	77%	82%
7. North East Linen	\$135,250	\$36,625	73%	81%
8. Southwest Sealants	\$10,900	\$3,400	69%	79%
9. Campanella & Sons	\$29,225	\$14,600	50%	76%
10. Charles Gluth & Son Roofers	\$27,600	\$11,300	59%	75%
11. Dan D. Drilling	\$8,050	\$5,050	37%	75%
12. Hoogendorn Construction	\$8,700	\$4,980	43%	71%
13. Tec-Cast	\$14,075	\$9,155	35%	68%
14. Boomer Well Service	\$7,250	\$4,750	34%	67%
15. Mercer Well Service	\$4,125	\$2,475	40%	67%
16. Penn Builders	\$7,900	\$4,930	38%	67%
17. Faulkner USA	\$20,400	\$10,900	47%	66%
18. Monarch	\$11,188	\$2,750	75%	66%
19. Venture Chemicals	\$37,446	\$25,844	31%	66%

Attachment - 2

OIG Identified Employers with Serious Violations on Two or More Inspections and Fatalities

Large Employers (100-250 Employees)

Establishment Name	Initial Penalty	Current Penalty	OSHA Calculated Rate Reduction	OIG Reported Rate Reduction
1. Florida Transportation Service	\$101,803	\$10,550	90%	91%
2. HJD Capital Electric	\$34,925	\$21,825	48%	88%
3. C.N. Construction	\$16,500	\$6,600	60%	78%
4. A-1 Systems	\$14,000	\$5,200	63%	74%
5. D.W. White Construction	\$10,500	\$5,600	47%	71%
6. U S Utility Contractor Co.	\$17,500	\$8,700	50%	71%
7. Balfour Lumber	\$24,550	\$10,375	58%	67%
8. Pyco Industries	\$32,475	\$12,325	62%	67%
9. Superior Rigging & Erecting	\$14,450	\$6,538	55%	66%
10. Marine Express	\$15,650	\$10,787	31%	65%

Attachment - 3

## OIG Identified Employers with Serious Violations on Two or More Inspections and Fatalities

## Very Large Employers (Over 250 Employees)

Establishment Name	Initial Penalty	Current Penalty	OSHA Calculated Rate Reduction	OIG Reported Rate Reduction
1. G.A. West & Company	\$20,800	\$1,000	95%	100%
2. Quanta Utility Services	\$21,500	\$0	100%	100%
3. Miller & Long Concrete Const.	\$14,000	\$4,594	67%	88%
4. Brasfield & Gorrie	\$34,500	\$4,500	87%	87%
5. Garco Construction	\$22,125	\$4,750	79%	83%
6. Rheem Heating & Cooling	\$9,450	\$1,500	84%	82%
7. Wireco Worldgroup	\$30,475	\$6,500	79%	82%
8. Blommer Chocolate Company	\$91,000	\$17,500	81%	81%
9. Lewis Tree Service	\$16,750	\$6,750	60%	79%
10. Milwaukee Valve Company	\$44,050	\$10,950	75%	75%
11. Nabors Drilling USA	\$19,275	\$5,000	74%	74%
12. Propex	\$26,800	\$6,375	76%	74%
13. United Forming	\$45,500	\$12,000	74%	74%
14. Verizon	\$48,300	\$14,250	70%	71%
15. Alton Steel	\$18,800	\$5,910	69%	70%
16. American Electric Power	\$12,125	\$3,987	67%	70%
17. Ceres Marine Terminals	\$5,625	\$2,844	49%	70%
18. Clarkwestern Building Systems	\$16,050	\$4,850	70%	68%
19. Oscar Renda Contracting	\$67,800	\$15,300	77%	68%
20. KMA Manufacturing	\$119,400	\$65,000	46%	67%
21. West Virginia Paving	\$7,100	\$4,450	37%	67%
22. Swan Oil Field Services	\$18,950	\$4,075	78%	66%

Attachment - 4