

**MANAGEMENT RESPONSE TO DRAFT REPORT**

U.S. Department of Labor

Occupational Safety and Health Administration  
Washington, D.C. 20210



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Reply to the attention of:

MEMORANDUM FOR: ELLIOT P. LEWIS  
Assistant Inspector General for Audit

FROM:   
DOROTHY DOUGHERTY  
Deputy Assistant Secretary for OSHA

SUBJECT: Response to OIG's Draft Report No. 02-17-201-10-105, "OSHA Could Do More to Ensure Employers Correct Hazards Identified During Inspections"

Thank you for the opportunity to provide further comment on the most recent draft of the Office of Inspector General (OIG) Audit Report No. 02-17-201-10-105, "OSHA Could Do More to Ensure Employers Correct Hazards Identified During Inspections." Although OSHA appreciates the efforts OIG undertook to develop this report, the agency respectfully disagrees with many of OIG's conclusions and subsequent recommendations. OSHA is particularly concerned with the underlying methodology and data analysis OIG used to reach these conclusions.

The OIG report contends that OSHA did not ensure that employers took adequate and timely abatement action following the issuance of citations. There were three general points, in particular, that OIG emphasized:

1. For an estimated 12,808, or 16 percent of cited safety or health violations, OSHA did not ensure employers took adequate and timely abatement actions.

OIG's conclusions with respect to this issue were drawn from an analysis of 200 citations for violations of OSHA standards from three OSHA regions: III, IV, and IX. OSHA, however, believes this analysis is flawed for several reasons. First, OIG, in its report, noted only 28 instances of non-abatement out of the 200 citations. Of these 28 instances, only seven (3.5 percent) of the 200 citations had no documented abatement, and the remaining 14 had only partial or late abatement documentation. The determination that OSHA did not ensure employers took adequate and timely abatement actions is based primarily on the review of abatement documentation. Incomplete documentation is a serious concern to the agency; however, a lack of proper documentation does not necessarily indicate that the abatement did not occur.

A crucial aspect of OSHA's mission is to ensure quality and lasting abatement. OSHA recognizes that in many instances employers may need additional time to achieve lasting abatement and, when appropriate, the agency will work with employers through mechanisms such as settlement agreements to give employers the time and resources to achieve abatement of

hazards that will ultimately be the most protective for exposed employees. Limiting abatement verification analysis to the narrow data set selected by OIG without taking into account any of the additional factors noted in this reply does not provide an adequate representation of OSHA's efforts to achieve quality abatement that is most beneficial to workers.

In addition, by focusing solely on lack of abatement documentation as opposed to actual conditions at the cited worksite, OIG's analysis presumes continued exposure to hazardous conditions. However, OIG's audit process and methodology did not research the actual outcome of hazardous conditions from the selected violations. For example, in its report OIG references a case that remained open for three months involving a trenching operation. Because the case remained an open investigation during this time frame, OIG concluded that employees were continuously exposed to struck-by hazards from cement, brick, and tools. However, given the typical work operations in the construction industry, the likelihood of a trench remaining open day after day with the same hazardous conditions is extremely low, and it is more likely the cited hazardous conditions were abated well before the receipt of abatement verification. OIG's methodology did not provide evidence of when the hazardous conditions at this worksite were actually abated versus when abatement was received and accepted by the relevant OSHA Area Office. As a result, review of abatement documentation alone is not sufficient to conclusively assess if adequate and timely abatement actions were taken and the real conditions at a worksite. Indeed, in the trenching operation cited in the OIG report, OSHA confirmed with the Area Office that the hazard was actually abated prior to the receipt of abatement verification. In fact, the employer in this example was removed from the jobsite by the general contractor following the inspection.

To assess compliance beyond abatement documentation, the agency routinely conducts post-citation follow-up inspections to verify abatement of hazards. For example, in FY2015, the agency conducted 1,045 follow-up inspections. Of these follow-up inspections, OSHA issued only two failure-to-abate violations, indicating that, for the initial inspection findings, employers are almost universally abating hazards. For cited conditions that require longer periods of abatement, OSHA sometimes conducts monitoring inspections to ensure that hazards are being abated and employees protected. In FY2015, OSHA conducted 123 monitoring inspections. Of these monitoring inspections, the agency did not issue any failure-to-abate violations and only issued two repeat violations.

Moreover, the report presents FY2015 data analysis from data collected in late October 2015. An analysis of the complete set of FY2015 data several months after the completion of FY2015 demonstrates that FY2015 data collected in late October 2015 does not take into account several important factors in hazard abatement. OSHA's abatement data dramatically changes over time as cases are settled, resolved, or decided through both OSHA processes and litigation before the Occupational Safety and Health Review Commission (OSHRC). According to OSHA's analysis of over 70,000 violations from FY2015, over the course of the year following the October 2015 collection of FY2015 data, the percent of unabated hazards is under 0.5 percent. An analysis of FY2014 yielded an almost identical result. OSHA's basis for this analysis is attached to this memorandum as Appendix A.

2. For cited violations that were not abated immediately, OSHA took an average of 81 [calendar] days from the inspection date to issue a citation, with an even lengthier amount of time to issue citations with willful and repeat classifications. Workers were exposed to hazardous conditions during these interim time periods.

Under authority given to OSHA by Congress through the OSH Act, OSHA must issue a citation within six months of the occurrence of a hazard. In FY2015, OSHA took an average of only 48 working days to issue citations following the opening of an inspection—far below the audit report’s claim of 81 calendar days. For the purposes of documenting time for citation issuance, OSHA only counts working days, not calendar days to more accurately represent the actual time a case is in review prior to issuance. Pursuant to OSHA’s established procedures, each citation and supporting violation documentation is reviewed by Area Office managers and signed by the Area Director.

As noted in the report by the OIG, certain actions such as willful citations can take longer to be issued due to the complexity of the investigation. Additionally, significant resources are often necessary in more complex cases. For example, in inspections involving complex standards such as OSHA’s Process Safety Management (PSM) standard or significant events involving fatalities and catastrophes, agency Compliance Safety and Health Officers (CSHOs) must conduct extensive document review and interview witnesses, as well as perform an extensive site investigation. In those cases, the six-month statutory deadline is difficult to meet. In addition, these cases require review by the Office of the Solicitor as well as the Regional and National OSHA offices for policy, legal, and technical considerations. Such review is critical to develop legally defensible citations that, if challenged, can withstand judicial scrutiny and ultimately lead to abatement of workplace hazards.

It should be noted that even if OSHA were to issue citations at any point within the six-month statutory period, once an employer contests a violation before the OSHRC, they are not under any legal obligation to abate the hazard until the contest and any related litigation concludes with a final order from the OSHRC. OSHA does, however, actively encourage employers to correct hazards during inspections and notes that in FY2015, the year under review by the OIG, more than 50 percent of abated hazardous conditions—including 55 percent of high gravity hazardous conditions—were abated prior to citation issuance. In addition, 68 percent of the cited hazardous conditions were corrected prior to the abatement due date, excluding hazardous conditions that were corrected via Quick Fix and during inspections.

3. The OIG report states that 16 percent of the citations related to safety hazards issued at construction sites were abated due to project completion and suggest that these hazards could be transferred to other worksites.

OSHA understands OIG’s concern that in construction and other mobile work industries employers may create the same or similar hazards at different worksites. OSHA, however, respectfully disagrees with this assumption. First and foremost, OSHA is concerned that this audit finding misconstrues the legal authorities governing OSHA inspections. Under the OSH Act, OSHA can only issue citations for circumstances where a hazard to which employees are

exposed actually exists. For instance, if an OSHA CSHO documents the existence of a fall hazard at a given time and place on a jobsite, a citation may be issued for that hazard. However, once the project is completed, no fall hazards can legally exist as no employees are exposed to fall hazards at that particular jobsite.

In addition, unless OSHA has specific evidence demonstrating the potential existence of a hazard, OSHA is precluded by law from opening an inspection at another worksite solely on the basis of the issuance of a prior citation or the mere presence of a previously cited employer. Furthermore, OSHA may not open an inspection simply because of the similarity of work at a particular jobsite is the same or similar to work at another jobsite of that employer. Although OSHA has issued citations to the same employer for similar hazards at multiple worksites, such repeated non-compliance is only one basis for initiating a legally valid inspection, and contributes to agency consideration of either a repeat or willful classification of any resulting citations.

Finally, OIG's data does not accurately depict the level of construction inspection activity by the agency. Of the 200 citations analyzed by OIG, only 76 were from construction worksites. OSHA, however, conducts approximately 50 percent of its inspections at construction worksites. As a result, OSHA believes that this audit report finding is misleading because it is not based on a valid representative sample of OSHA inspections.

## RECOMMENDATIONS

### **Recommendation 1: Reinforce OSHA's policies to its staff regarding the documentation OSHA requires employers to submit as evidence they have abated a cited hazard.**

**OSHA's Response:** Chapter 7 of the OSHA Field Operations Manual already provides clear guidance on the types of documentation required and that guidance is delivered in OSHA Compliance Safety and Health Officer (CSHO) training courses. As noted above, OSHA does not believe documentation is the only indicator of abatement, and, as a result, OSHA does not believe that the manner in which the data presented by OIG demonstrates any deficiencies in OSHA's current processes. OSHA accepts the recommendation and will further emphasize this requirement in future CSHO and management training.

### **Recommendation 2: Reevaluate OSHA's policy on timeframes for issuing citations, and determine if there is a need to develop different timeframes for different types of citations.**

**OSHA's Response:** OSHA respectfully disagrees with this recommendation. As noted above, the OSH Act grants OSHA six months to conduct an inspection and issue a citation. While some citations are less complex than others and require less time to complete, all proposed citations are subject to a review process to ensure that OSHA issues accurate citations that can be legally supported, which in the end, will lead to more robust and comprehensive abatement.

**Recommendation 3: Evaluate methods for smaller and transient construction employers to timely verify abatement when abatement cannot be obtained during the inspection.**

**OSHA’s Response:** OSHA respectfully disagrees with this recommendation. Pursuant to well established law, OSHA is generally prohibited from opening inspections at a worksite based solely on a cited hazard from a previous worksite. Furthermore, long-standing case law recognizes closing a worksite as an acceptable form of abatement. Once the worksite is closed and no employees are working there, an employer has met its legal obligation to abate a hazard. In situations where OSHA lawfully initiates an inspection at a subsequent workplace, the agency has several options to deter continued non-compliance through the use of repeat and willful classifications, which lead to higher proposed penalties. Moreover, even in cases where employers have demonstrated indifference to their OSH Act obligations by committing willful, repeated, or failure-to-abate violations, OSHA may not initiate an inspection based solely upon previous enforcement history.

**Recommendation 4: Revise OSHA’s policies to provide clearer guidance on how to obtain abatement verification at smaller construction sites where contractors become inactive in a very short period of time.**

**OSHA’s Response:** OSHA respectfully disagrees with this recommendation. We believe our existing guidance is acceptable and addresses the dynamic conditions that exist on construction sites. For instance, as an incentive for construction employers to abate hazards during an inspection, OSHA offers a penalty reduction for “Quick Fix” abatement where an employer abates hazards, such as repairing a broken guardrail that creates a fall hazard, before the CSHO leaves the jobsite.

**Recommendation 5: Require CSHOs to document if they conducted a pre-inspection history search on employers to help determine if a repeat or willful citation should be issued.**

**OSHA’s Response:** The audit report does not support this recommendation, as a history search is already a fundamental part of every OSHA inspection. OSHA is statutorily required to evaluate history as one of the factors in determining penalty. In fact, OSHA cannot legally issue a citation with a repeat classification without documenting that the classification is based on a citation for the same standard or a substantially similar hazard that has become a final order of the OSHRC. In addition, an employer’s citation history is only one of many factors in determining whether a willful classification of a citation is valid; other factors, such as any good faith efforts to comply with the cited standard, can mitigate willful classification.

Thank you for the opportunity to comment on this report. In summary, I want to reiterate the findings of the data analysis included in Appendix A. As a basis for its recommendations, OIG analyzed a narrow set of 200 citations, from which it concluded that 16 percent of all OSHA citations were not adequately and timely abated. In addition, in FY2015, the year under review by the OIG, more than 50 percent of abated hazardous conditions were abated prior to citation issuance. This conclusion is wholly inconsistent with OSHA’s analysis of over 140,000 citations over two fiscal years, which shows that less than one percent of all citations were not abated.



Appendix A

OSHA Analysis of Violation Abatement Data, by Report Run Date

Abatement Status	FY 2015 Violation Report as of October 2015 to OIG		FY 2015 Violation Report as of December 2016		FY 2014 Violation Report as of March 2017	
	% of Violations	# Violations	% of Violations	# Violations	% of Violations	# Violations
Abatement Completed	58.33%	40,836	64.62%	46,334	66.81%	50,291
Corrected During Inspection	23.44%	16,410	22.96%	16,464	21.57%	16,234
HAL, Abatement not Requested	0.01%	4	0.01%	6	0.00%	1
Closed - AD Discretion	2.55%	1,788	3.33%	2,384	2.77%	2,087
Closed - Employer Out of Business	0.38%	268	0.63%	452	0.56%	424
Closed - Solicitor Advised	0.01%	7	0.03%	23	0.06%	42
Closed - Worksite Changed	4.54%	3,177	5.53%	3,964	5.48%	4,122
Quick Fix	2.49%	1,744	2.44%	1,751	2.64%	1,986
Pending abatement	8.24%	5,769	0.45%	321	0.12%	91
<b>Total<sup>1</sup></b>	<b>100%</b>	<b>70,003</b>	<b>100%</b>	<b>71,699</b>	<b>100%</b>	<b>75,278</b>

<sup>1</sup> Total excludes Hazard Alert Letters, violations that had been deleted or were contested, violations with a Petition to Modify Abatement, and violations where the abatement due date had not yet passed as of the date that the report was run.