

## CHAPTER VII VIOLATIONS AND CITATIONS

### I) **Basis of Violations.**

A) **Elements for a Violation of a Standard or Regulation.** The following elements are necessary to establish a violation of a standard or regulation:

- i) Application of a standard;
- ii) Violation of the standard;
- iii) Employee exposure; and
- iv) Employer knowledge.

### B) **Application of a Standard.**

#### i) Definitions.

(a) *Horizontal Standards.* Horizontal standards are general standards applicable to multiple industries whose coverage is not limited to a special set of circumstances.

**EXAMPLE:** 29 CFR 1910.132 Personal Protective Equipment, 29 CFR 1910.212 General Requirements for all Machines.

(b) *Vertical Standards.* Vertical standards apply to a particular industry or operation, practice, condition, process, method, equipment, or installation. There are three (3) types of vertical standards:

- (1) Standards that apply to particular industries;
- (2) Standards that apply to a particular sub-industry; and
- (3) Standards that establish more detailed requirements for certain types of operations, equipment, or equipment usage than established in another standard.

**EXAMPLE:** 29 CFR 1910.133 Eye and Face Protection and 29 CFR 1910.213 Woodworking Machinery Requirements.

ii) Application. When a CSHO is uncertain whether to cite a horizontal or vertical standard, he or she must consult with the supervisor. The following guidelines apply:

- (a) When a hazard is addressed by a horizontal and a vertical standard, the vertical standard takes precedence even when the horizontal standard is more protective;
- (b) In situations addressed by a horizontal and a vertical standard where the horizontal standard appears to offer greater protection, the CSHO may cite the horizontal standard only when its requirements are not in conflict with the requirements of the vertical standard. If there

- is a conflict between the standards, an analysis of the intent of the standards is required. When the CSHO and supervisor are unsure whether to cite the horizontal and vertical standard, they will consult the Office of General Counsel (“OGC”);
- (c) When a vertical standard does not address the hazard, then the CSHO will use the horizontal standard;
  - (d) When determining if a horizontal or a vertical standard is applicable, the focus is on the particular activity rather than the nature of the employer’s business; and
  - (e) Construction hazards that are not addressed by a specific 29 CFR Part 1926 standard are not normally cited under 29 CFR Part 1910 unless that standard is identified as being applicable to construction.
- C) **Violation of the Standard.** The CSHO must establish the employer is in violation of a standard or regulation and how the employer failed to comply with the terms of the standard.
- D) **Employee Exposure.** A hazardous condition that violates a KY OSH standard, regulation, or general duty clause may be cited only when employee exposure is documented.
- i) Potential Employee Exposure. KY OSH may establish potential exposure to a hazardous condition when evidence exists that employees have access to the hazard, and may include one or more of the following:
    - (a) When a hazard existed and could recur;
    - (b) When a hazard may pose a danger to employees by their reasonably predictable presence in the area; or
    - (c) When a hazard is associated with the use of unsafe machinery, equipment, or the presence of hazardous materials and it is reasonably predictable that an employee may use the equipment or be exposed again.
  - ii) Documenting Employee Exposure. CSHOs must document exposure, both observed and unobserved, for violation(s), including (when applicable):
    - (a) Statements by the exposed employees, the employer (particularly the immediate supervisor of the exposed employee), other witnesses (other employees who have observed exposure to the hazardous condition), union representatives, engineering personnel, management, or members of the exposed employee’s family;
    - (b) Recorded statements, signed written statements, or type-written interviews;
    - (c) Photographs, audio / video recordings, and/or measurements; and
    - (d) Other relevant documents such as, but not limited to, autopsy reports, police reports, job specifications, site plans, OSHA-300/301, equipment manuals, employer work rules,

employer sampling results, employer safety and health programs, employer disciplinary policies, and records of discipline occurring prior to the inspection or incident.

iii) Proximity to the Hazard. The CSHO must document actual and/or potential proximity of the employees to a hazard.

(a) *Observed Exposure.*

- (1) Employee exposure is established when a CSHO observes the proximity or access of an employee to the hazard or potentially hazardous condition.
- (2) The use of personal protective equipment that may not, in itself, adequately prevent employee exposure(s) to a hazardous condition. Such exposure(s) may be cited when the applicable standard or regulation requires the use of engineering and/or administrative (including work practice) controls, or where the personal protective equipment used is inadequate.

(b) *Unobserved Exposure.*

- (1) When the CSHO does not observe employee exposure, the CSHO may establish employee exposure through witness statements or other evidence that exposure to a hazardous condition has occurred or may occur.
- (2) Past Exposure. In fatality or other accident / incident investigations, prior employee exposure(s) may be established when the CSHO establishes through written statements, or other evidence, exposure(s) to a hazardous condition occurred before, after, or at the time of the accident / incident. Prior exposures may serve as the basis for a violation when the hazardous condition continues to exist, or it is reasonably predictable that the same or similar condition could recur. It is reasonably predictable that employee exposure to a hazardous condition could recur when:
  - a. The employee exposure has occurred in the previous six (6) months;
  - b. The hazardous condition is an integral part of an employer's normal operations;  
and
  - c. The employer has not established a policy or program to ensure that exposure to the hazardous condition will not recur.

#### **E) Employer Knowledge.**

i) There are two (2) types of employer knowledge, actual and constructive.

(a) *Actual knowledge.* The employer knew the condition existed. Actual knowledge can be established when:

- (1) The CSHO observes the employer, or employer representative, exposed to the hazardous condition; or

- (2) The employer representative observed the employees exposed to the hazardous condition.
  - (b) *Constructive knowledge*. The employer, with reasonable diligence, could have known the condition existed. What a careful, prudent employer would do is reasonable diligence. Reasonable diligence is fact-specific to each hazardous condition. Factors to consider when evaluating an employer's constructive knowledge of a specific hazardous condition include whether the employer:
    - (1) Inspected the work area;
    - (2) Anticipated hazards;
    - (3) Adequately supervised employees;
    - (4) Implemented a proper training program; and,
    - (5) Implemented work rules.
  - ii) CSHOs must evaluate the employer's awareness of the existence of the hazardous condition, not that the employer knew the requirements of the standard or that the condition was hazardous. The CSHO must evaluate:
    - (a) Employer awareness for each hazardous condition;
    - (b) Steps the employer took to discover the condition(s);
    - (c) Employer statements regarding the condition(s); and
    - (d) Whether the employer exercised reasonable diligence in detecting workplace hazards.
  - iii) The CSHO may draw inferences of the employer's lack of reasonable diligence in detecting workplace hazards from the following:
    - (a) Widespread non-compliance by employees, both in number of employees and duration;
    - (b) Inadequate supervision or enforcement of safety rules by supervisors; and
    - (c) Supervisory involvement in non-compliance with standards.
- NOTE.** The CSHO may draw inferences only from the evidence gathered during the course of the inspection. Stating the employer "knew or could have known" of the violation, without supporting facts, does not support an inference of lack of reasonable diligence.
- iv) When determining employer knowledge, the CSHO must obtain from employees:
    - (a) Exactly how long / frequent the violative condition existed including the date(s) and time(s).

- (b) Names of employees who knew of / were exposed to condition.
  - (c) The employer's awareness of the condition.
  - (d) Whether employees reported the condition to the employer, including the identity of the management representative that the employee reported it to and the date the employee reported it.
  - (e) Whether the employees observed the employer at the site of the violative condition:
    - (1) Document the names of management persons the employees observed inspecting the site; and
    - (2) Document when and how often management is on site including exact dates and times.
- EXAMPLE:** Did the employer inspect the site?
- (f) Whether the employer commented / made any statements regarding the hazard to the employee or others.
  - (g) Whether the location of the condition was visible / accessible to the employer.
- v) When determining employer knowledge, the CSHO must obtain from employer:
- (a) Names of all foremen / supervisors on site at the time the violative condition existed;
  - (b) Exact dates and times all foremen / supervisors on site at the time the violative condition existed;
  - (c) Responsibility for safety or other inspection(s);
  - (d) Identity of individual conducting safety or other inspection(s);
  - (e) Frequency of safety or other inspection(s) conducted including exact dates and times;
  - (f) Employer's documentation of inspection findings;
  - (g) Reasoning for the employer's lack of safety or other inspections; and
- vi) The CSHO must document employer knowledge including what the employer:
- (1) Observed and when;
  - (2) Heard and when;
  - (3) Said to anyone about the violative condition and when; and
  - (4) Did or did not do about the violative condition and why.

vii) The CSHO must not solely use the term “reasonable diligence.” CSHOs must support reasonable diligence using the factors noted above.

**NOTE.** It is imperative the CSHO document what the employer knew and when known!

## II) **Pre-Citation Consultation.**

A) **General.** To ensure uniformity, consistency, and adequacy of the citation(s) that are likely to involve litigation, there must be appropriate consultation between supervisors, program managers (PM), the director, the commissioner, and the OGC prior to the issuance of the citation(s).

i) Types of cases when consultation will occur include:

(a) Fatality investigations;

(b) Willful violations;

(c) General duty violations;

(d) Cases of heightened public concern;

(e) Cases requiring expert assistance; and

(f) Other cases as necessary.

ii) Supervisors, PMs, the director, the commissioner, and the OGC must conduct pre-citation consultation at the earliest stage possible.

iii) When a case involves some citations that warrant pre-citation consultation and others that do not, the PM may issue the routine citation items promptly and delay the issuance of those items that require pre-citation consultation.

B) **Variations.** A variance may modify the employer’s requirement to comply with a standard. In such instances, the CSHO will consult with their supervisor, who will consult with the OSH Federal-State Coordinator (FSC).

## III) **Determining the Employer / Employee Relationship.**

A) Whether or not workers are employees of a particular employer depends on several factors.

B) The extent to which the alleged employer controls the manner and means of the individual’s performance of his or her work is typically the most important factor in determining employer-employee relationship. Factors to consider include but are not limited to:

i) Who has authority to control workers?

ii) Who controls the work environment/worksites?

iii) Who controls the working schedule?

- iv) Who assigns work tasks?
- v) Who has the responsibility to oversee projects/tasks/duties assigned?
- vi) Who has the responsibility for hazard abatement?
- vii) Whom do the workers consider their employer?
- viii) Does the hiring party have the right to assign additional projects to other parties?
- ix) Does the job require specialized skill(s)?
- x) Who provides tools, equipment, etc.?
- xi) Who exercises business judgment/discretion?
- xii) Who is responsible for paying the individual(s)?
- xiii) Who has the ability to hire and fire?
- xiv) Is the work being performed part of the regular business of the employer?
- xv) Does the employee receive any benefit(s)?

IV) **Regulatory Requirements.** Violations of 29 CFR Part 1904 and 803 KAR 2:180 must be documented and cited when an employer does not comply with posting, recordkeeping and reporting requirements contained in these standards and regulations.

**NOTE.** When a CSHO opens an inspection prior to the lapse of the eight (8) or 72-hour reporting period, KY OSH will not issue a citation for failure to report

V) **Employer and Employee Responsibilities.** KRS 338.031(1)(a) states that each employer “[s]hall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” KRS 338.031(1)(b) states each employer “[s]hall comply with occupational safety and health standards promulgated under this chapter.”

- A) KY OSH does not issue citations or propose penalties to employees.
- B) Employers are responsible for employee compliance with the standards.
- C) When the CSHO determines employees are systematically refusing to comply with a standard or regulation, the CSHO must document potential employee misconduct.
- D) The CSHO must obtain information to ascertain if the employer is exercising appropriate oversight to ensure compliance with the standards or regulations.

- E) Refusal(s) by an employee(s) to comply will not ordinarily bar the issuance of a citation when the employer fails to exercise its authority to adequately supervise an employee(s), including taking appropriate disciplinary action.

VI) **Affirmative Defenses.** See Chapter XI.

VII) **Types of Violations.**

A) **Overview.** Violations may be classified as:

- i) Serious;
- ii) Other than Serious;
- iii) Repeat;
- iv) Willful;
- v) Failure to Abate; and
- vi) De minimis.

B) **Serious and Other Than Serious Violations.**

- i) **Serious Violation.** KRS 338.991(11) states “a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one (1) or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.”
- ii) **Other than Serious Violation.** The injury or illness that would most likely result from a hazardous condition would probably not cause death or serious physical harm, but would have a direct and immediate relationship to the safety and health of employees.
- iii) **Establishing Violations.**
  - (a) CSHOs and supervisors must consider four (4) factors when classifying a violation. The first three (3) factors address whether a substantial probability exists that death or serious physical harm could result from an exposure to the violative condition. The fourth factor addresses employer knowledge.
  - (b) The CSHO does not classify each instance of a violation. The CSHO classifies once for each citation or, when violation items are grouped in a citation, once for the group.
  - (c) When the citation consists of multiple instances or grouped violations, the CSHO must base the classification on the most serious item.
  - (d) The CSHO and supervisor must follow the four (4) factor analysis below when

determining if the violation is serious.

iv) Four (4) Factor Analysis.

(a) *Factor 1: Type of Hazardous Exposure(s).* The first factor to consider is the type of potential exposure(s) to a hazard.

(1) CSHOs do not need to establish the exact manner in which exposure to a hazard could occur. However, CSHOs must document all facts that could affect the probability of an injury or illness resulting from an exposure.

(2) When more than one (1) type of hazardous exposure exists, CSHOs determine the most reasonably predictable hazard that could result in the most severe injury or illness and base the classification of the violation on that hazard.

(3) The following are examples of some types of hazardous exposures that a standard is designed to prevent.

**EXAMPLE:** Employees on a construction site are observed working at the unguarded edge of an open-sided floor 30 feet above the ground in apparent violation of 1926.501(b)(1). The hazard this standard prevents is a fall.

**EXAMPLE:** An eight (8) hour time-weighted average (TWA) reveals employee overexposure to 105 dBA. The hazard this standard prevents is hearing loss.

(b) *Factor 2: Type of Injury or Illness.* The second factor to consider is the most reasonably predictable injury or illness that could result from the exposure(s) identified in Factor 1.

(1) CSHOs must consider all factors that would affect the severity of the injury or illness that could reasonably result from the exposure to the hazard. This factor is not the probability that an injury or illness will occur.

(2) For conditions involving exposure to air contaminants or harmful physical agents, CSHOs must consider the concentration levels of the contaminant or physical agent in determining the types of illness that could reasonably result from the exposure. CSHOs may use chemical sampling information on OSHA's website to determine toxicological properties of listed substances listed and a health effects code.

(3) CSHOs must determine if exposure(s) at the sampled level could lead to illness. CSHOs must document all evidence demonstrating the sampled exposure(s) is representative of employee exposure(s) under normal working conditions, including identifying and recording the frequency and duration of exposure(s).

(c) *Factor 3: Potential for Death or Serious Physical Harm.* The third factor to consider is whether the type of injury or illness identified in Factor 2 could result in death or serious physical harm.

(1) Serious physical harm means a part of the body is functionally useless or

substantially reduced in efficiency. The impairment may be permanent, temporary, chronic, or acute, usually requiring treatment by a licensed health care professional.

- a. Injuries that constitute serious physical harm include, but are not limited to:
  1. Amputation;
  2. Concussion;
  3. Crushing (including internal, even though skin surface may be intact);
  4. Fractures;
  5. Burns or scalds, including electrical and chemical burns;
  6. Cuts, lacerations, or punctures involving significant bleeding and/or requiring suturing; and
  7. Back.
- b. Illnesses that constitute serious physical harm include, but are not limited to:
  1. Cancer;
  2. Respiratory (silicosis, asbestosis, byssinosis, etc.);
  3. Hearing loss;
  4. Central nervous system;
  5. Vision;
  6. Poisoning; and
  7. Musculoskeletal.
- c. The following are examples of injuries or illnesses that could reasonably result from an incident or exposure and lead to death or serious physical harm.

**EXAMPLE:** An employee falls 15 feet to the ground, suffers broken bones and experiences substantial impairment of a part of the body that requires treatment by a medical doctor. These injuries are serious.

**EXAMPLE:** An employee trips on debris and because of the presence of sharp objects suffer a deep cut to the hand requiring sutures and substantially reduces the use of the hand. This injury is serious.

**EXAMPLE:** An employee overexposed to an eight (8) hour TWA of 105 dBA develops permanent hearing loss. This illness is serious.

(d) *Factor 4: Employer Knowledge of Hazardous Condition.* The fourth factor to consider is whether the employer knew, or with the exercise of reasonable diligence could have known, of the presence of the hazardous condition.

(1) Actual knowledge is established when an employer knew the hazardous condition existed. CSHOs must document all evidence establishing employer knowledge.

**EXAMPLE:** If the employer witnessed the condition, an employee or employee representative reported the condition to the employer, or the condition previously injured an employee and the employer knew of the injury.

(2) When CSHOs cannot document actual knowledge of a hazardous condition, CSHOs may establish constructive employer knowledge. When the employer could have known of the condition through the exercise of reasonable diligence, CSHOs must document all evidence that substantiates the employer could have known of the hazardous condition. Examples include, but are not limited to, the hazard was in plain view and obvious, the hazardous condition was not brief, the employer failed to inspect the workplace for hazards, and the employer failed to train or supervise employees regarding the particular hazard.

(3) Actual or constructive knowledge of a supervisor who is aware of a violative condition or practice can be imputed to the employer for purposes of establishing knowledge. In cases when the employer contends the supervisor's conduct constituted an isolated event of employee misconduct, the CSHO must document whether the supervisor violated an established rule, the supervisor's training on that rule, and how the employer supervised the supervisor on the rule.

C) **Repeated Violations.** An employer may be cited for a repeated violation when the employer was previously cited for the same or a substantially similar condition or hazard, and the citation has become a final order of the Kentucky Occupational Safety and Health Review Commission (Commission). The underlying citation, on which the repeated violation is based, must have become a final order *before* the occurrence or observation of the second violation.

i) Final Order.

(a) *Uncontested Citation.* The final order date is the 15<sup>th</sup> working day after the employer's receipt of the Citation and Notification of Penalty.

(b) *Contested Citation.* The final order date depends on the outcome of that citation.

(1) *Hearing Officer Decision.* The 40<sup>th</sup> day after the date the Commission issues the recommended order unless a member of the Commission has called the case for review.

(2) *Review by Commission.* Where review has been directed, the date on which the Commission issues its decision or order disposing of all or pertinent parts of the case unless appealed to Franklin Circuit Court.

(3) Appeal. The date on which a court issues a decision affirming the violation in a case.

ii) Substantially Similar Hazard or Condition.

(a) *Identical Standards.* CSHOs can document similar workplace conditions or hazards by showing the employer violated the identical standard in both situations, but there are exceptions.

**EXAMPLE:** A citation was previously issued for a violation of 1910.132(a) for not requiring the use of protective footwear (steel-toe boots). A recent inspection of the same establishment revealed a violation of 1910.132(a) for not requiring the use of head protection (hard hats). Although the same standard was involved, the hazardous conditions in each case are not substantially similar; therefore, a repeated citation would not be appropriate.

(b) *Different Standards.* In some circumstances, CSHOs can document similar conditions or hazards even when the employer violates different standards.

**EXAMPLE:** A citation was previously issued for a violation of 1926.501(b)(10) for not utilizing fall protection while working on a low-slope roof. A recent inspection of the same employer reveals a violation of 1926.501(b)(11) for not utilizing fall protection while working on a steep-slope roof. Although different standards are involved, the conditions and hazards (falls) present during both inspections were substantially similar; therefore, a repeated citation is appropriate.

iii) Same Employer. To cite a repeated violation, the employer of the current citation must be the same employer as the prior citation. A change in corporate ownership, a change in name, a different facility under the same corporate umbrella, or the lack of a fixed worksite does not preclude the finding of a prior employer being the same employer for purposes of a repeated citation. When questions arise regarding this element, the CSHO will consult his or her supervisor, and may consult the OGC.

iv) Timeframe. KY OSH may issue a citation as a repeat violation:

(a) Within five (5) years of the final order of the previous citation, or within five (5) years of the final abatement date of that citation, whichever is later.

(b) When CSHOs find a violation during an inspection and a repeat citation is a final order for a substantially similar condition meeting the timeframe above, KY OSH may classify the violation as a second instance repeat violation.

**NOTE.** For additional subsequent repetition, CSHOs, supervisors, and PMs must consult with the OGC.

v) Inspection History. The following criteria apply for purposes of determining whether a repeat violation exists.

(a) CSHOs must obtain a history of citations issued to the employer at all of its identified

establishments in Kentucky within the same three (3) digit North American Industry Classification System (NAICS) code.

- (b) KY OSH may issue a repeat citation when violations previously cited within the timeframe established above.
- (c) Citations from previous inspections that serve as the basis for a repeat must be final orders before initiation of the second inspection.
- (d) Repeat violations may be on different timeframes within the same inspection depending on the final order or abatement dates.
- (e) The director, in consultation with the OGC, may issue repeat citations without regard to the NAICS code.

vi) Supervisor Responsibilities.

- (a) Ensure the violation meets the criteria outlined in the preceding subparagraphs of this section.
- (b) Ensure the casefile includes a copy of the prior citation serving as the basis for the repeat citation.
- (c) Ensure the casefile includes all documents demonstrating the citation is a final order, such as, but not limited to, the certified mail card; signed informal settlement; formal settlement agreements; employer-submitted abatement forms; judge's decision; Commission decision; and appellate decisions. OSHA.gov and OSH Express information are not the sole means to establish the issuance of a prior citation.
- (d) Fully inform the cited employer of the previous violations serving as a basis for the repeat citation by notation in the Alleged Violation Description (AVD) portion of the citation. For example, following the AVD state appropriate language such as:

*[Employer Name or Establishment Name]* was previously cited for a violation of this Occupational Safety and Health Standard *[insert previously cited standard]* or its equivalent, which was contained in OSHA inspection number \_\_\_\_\_, citation number \_\_\_\_\_, item number \_\_\_\_\_ and was affirmed as a final order on *[insert date]*, with respect to a workplace located at \_\_\_\_\_.

**D) Willful Violation.**

- i) A willful violation exists under KRS 338 when an employer has demonstrated either an intentional disregard for the requirements of the law or a plain indifference to employee safety and health.
- ii) CSHOs, supervisors, and PMs are encouraged to consult with the OGC when developing willful citations.

(a) Intentional Disregard of Violations. An employer commits an intentional and knowing violation when:

- (1) An employer representative was aware of the requirements of the law or an applicable standard or regulation and was also aware of a workplace condition or practice in violation of those requirements, but did not abate the hazard; or
- (2) An employer representative was not aware of the requirements of the law or standards, but had knowledge of a comparable legal requirement (e.g., state or local law) and was also aware of a workplace condition or practice in violation of that requirement.

**NOTE.** Good faith efforts made by the employer to minimize or abate a hazard may preclude the issuance of a willful violation. In such cases, CSHOs should consult the supervisors, PMs, and OGC when a willful classification is under consideration.

- (3) KY OSH may issue a willful citation when an employer knows that the employer should take specific steps to address a hazard, but substitutes his or her judgment for the requirements of the standard.

**EXAMPLE:** KY OSH issued repeat citations addressing the same or similar conditions, but the employer did not maintain abatement.

(4) Plain Indifference. An employer commits a violation with plain indifference to employee safety and health when:

- a. Higher management officials were aware of a KY OSH requirement applicable to the employer's business but made little or no effort to communicate the requirement to supervisors and employees; or
- b. The employer was aware of a plainly obvious hazardous condition but made little or no effort to prevent violations from occurring; or

**EXAMPLE:** Repeated issuance of citations addressing the same or similar conditions.

**EXAMPLE:** The employer is aware of the existence of an unguarded machine that has caused injuries with progressive severity (near misses, then lacerations, then amputations) and has done nothing to correct the hazard.

- c. An employer was not aware of any legal requirement, but knew a workplace condition or practice posed a serious hazard to the safety or health of employees and made little or no effort to determine the extent of the problem or take corrective action.
- d. Knowledge of a hazard may be gained from means such as, but not limited to, insurance company reports, safety committee or other internal reports such as self-audits, the occurrence of illnesses or injuries, or complaints by employees or

their representatives; or

- e. KY OSH may establish willfulness despite lack of knowledge of a legal requirement when circumstances show the employer would have placed no importance on such knowledge.

**EXAMPLE:** An employer sends employees into a deep, unprotected excavation containing a hazardous atmosphere without inspecting for potential hazards.

- (5) The violation does not have to be committed with a bad purpose or malicious intent to be willful. It is sufficient the violation was deliberate, voluntary, or intentional.

- (6) CSHOs must document all evidence that indicates employer knowledge of the requirements of a standard, and any reason(s) it disregarded statutory or other legal obligations to protect employees against a hazardous condition. Additional factors to consider in determining whether to characterize a violation as willful include:

- a. The nature of the employer's business and the knowledge of safety and health matters that are present, or expected, in the industry;
- b. Any precautions the employer took to limit the hazardous workplace conditions or practices;
- c. The employer's awareness of the law and of its responsibility to provide a safe and healthful workplace; and
- d. Whether prior citations, accidents, warnings from KY OSH, officials from other government agencies, employee(s), or an employee safety committee have brought attention to the employer regarding the requirements of a standard, of similar violations, and/or hazardous workplace conditions and practice.
- e. Facts demonstrating the employer was not consciously violating the law, but was aware the violative condition or practice existed, and made no reasonable effort to eliminate it.

- (7) KY OSH will not issue a willful citation without consultation with the OGC.

iii) Criminal Willful Violations. KRS 338.191 assigns the duty to prosecute criminal actions for violations of occupational safety and health law to the Attorney General.

E) **Failure to Abate Penalties.** The failure to abate classification is not a type of violation but rather an additional penalty. A failure to abate exists when a previously cited hazardous condition or practice has become a Commission final order and the employer has not brought the condition into compliance since the prior inspection, discovered in a later inspection.

F) **Repeat vs. Other Types of Violations or Penalties.**

- i) Repeat vs. Willful. Repeat violations differ from willful violations in that they may result

from an inadvertent, accidental or ordinarily negligent act.

- ii) Repeat vs. Failure to Abate. When an employer corrects a violation, but later the violation reoccurs, the subsequent occurrence is a repeat violation. When an employer has not corrected a violation, a failure to abate exists.

G) **De Minimis.** The Commission has rejected the de minimis violation classification. KY OSH issues other than serious violations instead of de minimis. *Ladish Co. Inc. – Kentucky Division*, KOSHRC No. 2697-95 (Nov. 13, 1996); *Genesco, Incorporated*, KOSHRC No. 352 (January 16, 1978).

## VIII) **General Duty Requirements.**

A) **Authority.** KRS 338.031(1)(a) states, “Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”

### B) **Evaluation of General Duty Requirements.**

- i) CSHOs use the general duty provision when no standard applies to the particular hazard involved.
  - (a) The general duty clause applies when an employer creates a recognized hazard in whole or in part by conditions not covered by a standard.
  - (b) Employers must take the necessary steps to eliminate or minimize employee exposure to all recognized hazards likely to cause death or serious physical harm. These steps include anticipation of hazards its employees may encounter, provision of appropriate protective equipment, and prior provision of training, instruction, and necessary equipment.

C) **Elements of a General Duty Requirement Violation.** Commission and court precedent have established the following four (4) elements as necessary to prove a violation of the general duty clause: (i) The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed; (ii) The hazard must be recognized; (iii) The hazard was causing or was likely to cause death or serious physical harm; and (iv) The hazard may be corrected by a feasible and useful method.

- i) The Employer Failed to Keep the Workplace Free of a Hazard. As used in KRS 338.031(1)(a), a “hazard” is a workplace condition or practice to which employees are exposed, creating the potential for death or serious physical harm to employees.
  - (a) *The AVD Must Clearly State the Hazard.* The AVD must clearly state such a condition or practice to inform employers of their obligations regarding the hazard. The AVD must define the hazard in terms of the presence of a condition or practice that presents a particular danger.
  - (b) *The Hazard is not the Lack of a Particular Abatement Method.* General duty citations do not allege the employer failed to implement certain precautions, corrective actions, or

other abatement measures, but rather addresses the failure to prevent or remove a particular hazard. KRS 338.031(1)(a) does not mandate a particular abatement measure but only requires an employer to render the workplace free of recognized hazards by any feasible and effective means the employer wishes to use. When it is difficult to distinguish between a dangerous condition and the lack of an abatement method, the CSHO and supervisor will consult with the program manager and the OGC to identify and articulate the hazard properly.

**EXAMPLE:** Employees are conducting sanding operations that create sparks near magnesium dust, exposing them to the serious injury of burns from a fire. One proposed method of abatement may be engineering controls such as adequate ventilation. The hazard is sanding that creates sparks in the presence of magnesium that may result in a fire capable of seriously injuring employees, not the lack of adequate ventilation.

- (c) *The Hazard is Not a Particular Incident.* Occurrence of an incident does not mean the employer violated KRS 338.031(1)(a), although the incident may be evidence of a hazard. A general duty citation may be unrelated to the cause of the incident. Although incident facts may be relevant and the CSHO must document those facts, the citation must address the hazard in the workplace that existed prior to the incident, not the particular facts that led to the occurrence of the incident.
- (d) *The Hazard Must be Reasonably Foreseeable.* Not all factors contributing to a hazard need be present in the same place or at the same time to prove foreseeability of the hazard.

**EXAMPLE:** The CSHO confirms water leakage in a steel-making process via the employer's water level monitoring system. The employer monitors water leakage to prevent explosions. Although any water leakage into molten metal can lead to steam explosions, no such explosion had occurred at the time of the inspection. While no such incidents have occurred, water leaking into molten steel is a recognized hazard and is reasonably foreseeable after reviewing the data from the monitoring system.

- (e) *The Hazard Must Affect the Cited Employer's Employees.*
  - (1) Only an employer who exposes its own employees to a hazard may be cited for a violation of KRS 338.031(1)(a).
  - (2) On a multi-employer worksite, the controlling, creating, and/or correcting employer may not be cited for a KRS 338.031(1)(a) violation when its own employees are not exposed to the hazard.
  - (3) In complex situations when it may be difficult to identify the employment relationship between the employer and the exposed employees, the CSHO and supervisor will consult with the OGC to determine the employment relationship.

- ii) The Hazard Must Be Recognized. To establish a general duty violation, the agency must document that the employer recognized or should have recognized the hazard. Employer recognition, industry recognition, or common sense recognition establishes recognition of a

hazard. The use of common sense as the basis for establishing recognition is limited to special circumstances. Recognition of the hazard is supported by the following:

(a) *Employer Recognition.*

- (1) The CSHO documents a recognized hazard by establishing the employer's actual knowledge of a hazardous condition or practice. Evidence of employer recognition may consist of written or oral statements made by the employer or other management or supervisory personnel.
- (2) The CSHO may demonstrate employer awareness of a hazard by a review of company memorandums, internal safety and/or health audits, safety work rules that specifically identify a hazard, operations manuals, standard operating procedures, and collective bargaining agreements. Prior accidents and/or incidents, near misses known to the employer, injury and illness reports, or workers' compensation data may demonstrate employer knowledge of a hazard.
- (3) The CSHO may also demonstrate employer awareness of a hazard by inspection history involving the same hazard.
- (4) Employee complaints, grievances, and safety committee reports to supervisory personnel may establish recognition of the hazard, but the evidence should show the complaints were not infrequent, off-hand comments.
- (5) An employer's corrective action(s) may establish employer recognition of the hazard when the employer did not adequately continue or maintain the corrective action or when the corrective action did not afford effective protection to the employees.

**NOTE.** CSHOs must gather as many of these facts as possible to support establishing a general duty violation.

(b) *Industry Recognition.*

- (1) The CSHO can demonstrate a recognized hazard when the employer's industry is aware of its existence. Recognition by an industry other than the employer's industry is generally insufficient. Although evidence of similar operations within an industry is preferred, evidence the employer's overall industry recognizes the hazard may be sufficient. Industry recognition of a hazard can be established in several ways:
  - a. Statements by safety or health experts who are familiar with the relevant conditions regardless of whether they work in the employer's industry;
  - b. Evidence of abatement measures implemented by other members of the employer's industry to deal with the particular hazard;
  - c. Manufacturers' warnings on equipment or in literature relevant to the hazard;
  - d. Statistical or empirical studies conducted by the employer's industry

demonstrating awareness of the hazard, including industry publications. Evidence such as studies conducted by employee representatives, unions or other employees are considered when the employer or the industry has been made aware of them;

- e. Government and insurance industry studies when the employer or the employer's industry is familiar with the studies and recognizes their validity;
- f. State and local laws or regulations applicable in the jurisdiction where the violation occurred and which are enforced against the industry in question. In such cases, however, corroborating evidence of recognition is recommended;

**NOTE.** In cases where state and local government agencies have codes or regulations covering hazards not addressed by KY OSH standards, the director, in consultation with the OGC, determines whether to cite the hazard under the general duty clause or refer it to the appropriate agency for enforcement.

**EXAMPLE:** The CSHO documents a safety hazard on a factory personnel elevator during an inspection. It is determined that the hazard may not be cited under KRS 338.031(1)(a), but there is a local code that addresses this hazard and a local agency actively enforces the code. The situation normally will be referred to the local enforcement agency instead of citing KRS 338.031(1)(a).

- g. When the industry participated in drafting national consensus standards such as the American National Standards Institute (ANSI), the National Fire Protection Association (NFPA), and other private standard-setting organizations, this can constitute industry recognition. Normally, the CSHO will use private standards only as corroborating evidence of recognition. Preambles to these standards that discuss the hazards involved may show hazard recognition as much as, or more than, the actual standards. KY OSH cannot enforce these private standards as KY OSH standards, but the CSHO may use these private standards to provide evidence of industry recognition, seriousness of the hazard, or feasibility of abatement methods.
  - h. NIOSH criteria documents, EPA publications, the National Cancer Institute and other agencies, OSHA hazard alerts, the OSHA Technical Manual, and articles in medical or scientific journals by persons other than those in the industry, when used only to supplement other evidence that more clearly establishes recognition. The CSHO can rely upon such publications when it is a widely distributed publication.
- (c) *Common Sense Recognition.* When industry or employer recognition of the hazard cannot be established, hazard recognition can be established when a hazardous condition is so obvious that any reasonable person would have recognized it. The CSHO will use common sense recognition only in flagrant or obvious cases.

**EXAMPLE:** In a general industry situation, courts have held that any reasonable person would recognize it is hazardous to use an unenclosed chute to dump bricks into an alleyway 26 feet below where unwarned employees work. In construction, KRS 338.031(1)(a) is not cited in this situation because 1926.252 or 1926.852 applies.

iii) The Hazard Was Causing or Likely to Cause Death or Serious Physical Harm.

- (a) Serious physical harm as defined in this chapter.
- (b) This element of a general duty violation is established where:
  - (1) An actual death or serious injury resulted from the recognized hazard; or
  - (2) In the event an accident/incident occurs, the likely result would be death or serious physical harm.

iv) The Hazard May be Corrected by a Feasible and Useful Method.

- (a) To establish a general duty violation, the agency must identify feasible measure(s) to correct the hazard. Evidence of feasible abatement measures must indicate that the recognized hazard, rather than a particular accident and/or incident, is preventable.
- (b) When the proposed abatement method would eliminate or significantly reduce the hazard beyond whatever measures the employer may be taking, a KRS 338.031(1)(a) citation may be issued. When only a series of abatement methods will materially reduce a hazard, the CSHO must list all potential abatement methods.
- (c) Examples of feasible and acceptable abatement(s) include, but are not limited to:
  - (1) The employer's recognized abatement method which existed prior to the inspection, but was not implemented;
  - (2) The employer's implementation of feasible abatement measures after an incident and/or inspection;
  - (3) The abatement measures by other companies;
  - (4) Manufacturer's recommendations addressing safety measures for the hazardous equipment involved;
  - (5) Abatement methods contained in trade journals, national consensus standards, and individual employer work rules. National consensus standards cannot solely be relied upon to mandate specific abatement methods; and/or
  - (6) Abatement methods recommended by expert witnesses.

D) **Limitations.** The general duty clause:

- i) Cannot be used when a standard or regulation applies to a hazard;

- ii) Will normally not be used to impose a stricter requirement than that imposed by the OSHA standard; or
- iii) Will normally not be used to require additional abatement methods not set forth in an existing standard.
- iv) **Procedures for Implementation of KRS 338.031(1)(a) Enforcement.** When a standard does not apply and the criteria is not met for issuing a general duty citation, but the director determines the hazard warrants notification, the director may issue a general duty letter describing the hazard and corrective action.

## IX) Writing Citations.

A) **General.** The supervisor must closely monitor the time elapsed from the completion of the inspection or investigation until the issuance of citation(s) and ensure it is kept as short as possible. The commissioner must issue citations as soon as practicable.

### B) **Specific Instructions.**

- i) Standards and Regulations. CSHOs must review standards and regulations to ensure the standards and regulations cover the hazardous condition. The commissioner cannot issue citations unless the citation is based on mandatory language in KY OSH standards, regulations, and, when applicable, referenced standards.
- ii) Standard Alleged Violation Elements (SAVEs). The SAVE is the violated standard or regulation and must appear in the citation as written on OSHA's website, with exception of those that the CSHO may need to edit for clarity due to the way the standard or regulation is written.
- iii) Alleged Violation Description (AVD).
  - (a) AVDs must contain:
    - (1) The date the CSHO observed the violation, or date the alleged violation occurred;
    - (2) The specific action or inaction constituting the violation;
    - (3) Equipment manufacturer, if applicable;
    - (4) Area or location where the hazard occurred;
    - (5) If applicable, any triggers in the standard (such as but not limited to height, slope, and permissible exposure limit);
    - (6) If applicable, the designation of controlling, creating, or correcting for multi-employer; and
    - (7) Feasible means of abatement for general duty violations.

- (b) AVDs generally do not include:
  - (1) A reference to an injury, illness, amputation, death, etc.;
  - (2) Employer knowledge;
  - (3) Hazard;
  - (4) Probability;
  - (5) Severity;
  - (6) Site address; and
  - (7) Specific measurements and/or sampling results.
- iv) Alternative standards. In rare cases, the same factual situation may present a possible violation of more than one (1) standard.
  - (a) When it appears that more than one (1) standard is applicable to a given factual situation and compliance with any of the standards would effectively eliminate the hazard, it is permissible to cite alternative standards using the words "in the alternative." The CSHO must include a reference in the citation to each of the standards involved, accompanied by a separate AVD, which clearly alleges all of the necessary elements of the violation.
  - (b) In situations when it is not clear whether a specific standard or the general duty clause applies, it is appropriate to cite both violations "in the alternative."
  - (c) When CSHOs allege violations in the alternative, only one (1) penalty is proposed.
- v) Order of Classification. Violations will be written in the following order:
  - (a) Willful Serious;
  - (b) Willful Other;
  - (c) Repeat Serious;
  - (d) Repeat Other;
  - (e) Serious; and
  - (f) Other than Serious.
- vi) Order of Violations on the Citation. The CSHO should write violations and grouped violations in the numerical order in which they appear in the standards. When grouped violations are assessed a penalty, the penalty is assessed to the first violation.

**EXAMPLE:** When serious violations of 1910.1030(g)(2)(i), 1910.147(c)(1), and

1910.212(a)(1) are issued, 1910.147(c)(i) is Citation 1, Item 1, 1910.212(a)(1) is Citation 1, Item 2, and 1910.1030(g)(2)(i) is Citation 1, Item 3.

**EXAMPLE:** When serious violations of 1910.1030(g)(2)(i), 1910.147(c)(1), and 1910.212(a)(1) and other than serious violations 1910.132(d)(2) and 1910.146(g)(4) are issued, 1910.147(c)(i) is Citation 1, Item 1, 1910.212(a)(1) is Citation 1, Item 2, and 1910.1030(g)(2)(i) is Citation 1, Item 3, 1910.132(d)(2) is Citation 2, Item 1 and 1910.146(g)(4) is Citation 2, Item 2.

## X) **Combining and Grouping Violations.**

A) **Combining.** Generally, the CSHO should combine separate violations of a single standard having the same classification into one (1) alleged citation item. The CSHO notes each instance of the violation separately within that citation item.

B) **Grouping.** When a hazard involves interrelated violations of different standards, the CSHO may group the violations into a single violation. The following situations normally call for grouping violations.

### i) Grouping Related Violations.

(a) When closely related violations are serious or other than serious and may constitute a single hazardous workplace condition or practice, the CSHO may group the violations and the classification will be the most serious item.

(b) The CSHO groups functionally related violations when a single abatement corrects all hazards.

ii) Grouping Serious Violations. The CSHO may group or cite separately serious violations as conditions warrant. The CSHO will not group serious violations that are not closely related.

iii) Grouping Other than Serious Violations. When two (2) or more violations are found which, when considered individually, represent other than serious violations but together create a substantial probability of death or serious physical harm, the violations may be grouped as a serious violation.

iv) When Grouping Results in a High Gravity Other than Serious Violation. When CSHOs find a number of related other than serious violations, the CSHO can group the violations to determine the overall gravity.

v) Penalties for Grouped Violations. When a CSHO proposes a penalty for grouped violations, the first violation item appearing on the Citation and Notification of Penalty is assessed the penalty.

## C) **When Not to Group or Combine.**

i) Multiple Inspections. The CSHO will not group violations discovered during multiple inspections of a single establishment or worksite. An inspection at the same establishment

or worksite is considered a single inspection even when it continues for more than one (1) day, or the CSHO discontinues it with the intention of later resuming it.

- ii) Separate Establishments of the Same Employer. KY OSH issues separate citations for each establishment or worksite where a CSHO has conducted an inspection, either simultaneously or at different times. When CSHOs conduct inspections at two (2) establishments belonging to the same employer and discovers instances of the same violation during each inspection, the CSHO will not group the violations.
- iii) General Duty Clause. Because a general duty citation covers all aspects of a serious hazard where no standard exists, there is normally no grouping of separate KRS 338.031(1)(a) violations. This does not prohibit a CSHO from grouping a general duty violation with a related violation of a specific standard.
- iv) Egregious Violations. Violations proposed as instance-by-instance citations are not normally combined or grouped.

## XI) Citations.

A) **Limitations.** 803 KAR 2:120 Section 1 requires the commissioner to issue any citation with reasonable promptness after termination of the inspection. KY OSH endeavors to issue a citation(s) within six (6) months of the documented employee exposure to the hazard. The OGC must be consulted when the employer has concealed a violative condition or misled KY OSH.

### B) **Issuing Citations.**

- i) KY OSH generally sends citations to the employer by certified mail. However, KY OSH may utilize hand delivery of citations to the employer or an appropriate agent of the employer, or use of a mail delivery service other than the United States Postal Service. KY OSH must obtain a signed receipt when possible. KY OSH must document the delivery in the casefile.
- ii) KY OSH may send copies of citations to the employee representative and complainant without charge or need to make a written request.
- iii) In the case of a fatality, KY OSH must provide the next of kin a copy of the citation(s) without charge or the need to make a written request.

### C) **Amending / Withdrawing Citations and Notification of Penalties.**

i) Justification. Appropriate amendments to, or withdrawal of, a citation(s) are made when information is presented, which indicates a need for such action and may include administrative or technical errors such as:

- (a) Incorrect standard;
- (b) Incorrect or incomplete description of the alleged violation;

- (c) Additional facts not available to the CSHO at the time of the inspection establish a valid affirmative defense;
  - (d) No employee exposure; or
  - (e) Additional facts establish a need for modification of the abatement date or penalty; or
  - (f) Reclassification.
- ii) When Amendments / Withdrawal is not Appropriate. The commissioner or designee does not make amendments to or withdraw a citation for:
- (a) The 15 working days for filing a Notice of Contest expired and the citation is a final order; or
  - (b) Failing to give employee representatives the opportunity to present their views (unless the revision involves only an administrative or technical error).
- iii) Procedures for Amending or Withdrawing Citations.
- (a) Withdrawal of, or modifications to the Citation and Notification of Penalty, is normally accomplished by letter. Changes made in a Citation and Notification of Penalty after the employer has received it, are normally through letter signed by the program manager outlining the specific changes.
  - (b) The commissioner or designee may initiate a change to a Citation and Notification of Penalty. When proposed amendments to citation items (individual violations) change the original classification, such as willful to repeat, KY OSH amends the original items through letter and does not withdraw the citation. The letter informing the employer of the amended citation(s) and/or penalty(ies) must clearly indicate the employer is obligated to post the letter amending the citation along with the original citation, until the employer corrects the amended violation, or for three (3) working days, whichever is longer.
  - (c) The commissioner or designee may withdraw a Citation and Notification of Penalty. The commissioner or designee must document the justification for the withdrawal in the casefile. KY OSH must send a letter withdrawing the Citation and Notification of Penalty to the employer. The letter, signed by the commissioner or designee, must refer to the original Citation and Notification of Penalty, state they are withdrawn, and direct the employer to post the letter for three (3) working days in the same location(s) the original citation was posted. When applicable, KY OSH will send a copy of the letter to the employee representative(s) and/or complainant.