

APPENDIX B: AGENCY'S RESPONSE TO THE REPORT

U.S. Department of Labor

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



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

**FROM:** LOREN SWEATT *Loren Sweatt*  
Deputy Assistant Secretary

**SUBJECT:** Response to OIG's Draft Report No. 02-18-203-10-105, "OSHA Needs to Improve the Guidance for its Fatality and Severe Injury Program to Better Protect Workers"

Thank you for the opportunity to provide comment on the draft of the Office of Inspector General (OIG) Audit Report No. 02-18-203-10-105, "OSHA Needs to Improve the Guidance for its Fatality and Severe Injury Program to Better Protect Workers." OSHA appreciates the efforts OIG undertook to develop this report.

OSHA agrees that better case documentation can help to promote consistency in the issuance of citations, as well as the determination of whether to conduct an inspection or pursue a rapid response investigation. However, OSHA is concerned that the OIG's report suggests that the burden to ensure reporting of injuries and illnesses falls on the agency. The Occupational Safety and Health Act of 1970 clearly states that it is the employer's responsibility to "comply with occupational safety and health standards under this Act." (Section 5(a) (2)). The agency encourages employers to comply with illness and injury reporting requirements through a variety of enforcement, outreach, and compliance assistance tools. In reference to Recommendation #3b, there is no legal requirement for employers to provide documentation to show abatement of hazards, only to report the injury or fatality.

The agency appreciates the opportunity for continued improvements to our enforcement efforts. Please see the more detailed responses to the recommendations below.

**RECOMMENDATIONS**

**Recommendation 1: Develop formal guidance and train staff on how to detect and prevent underreporting of fatalities and severe injuries.**

**OSHA's Response:** OSHA's current policy for responding to unreported fatalities and severe injuries is clear and appropriate. Statutorily, the obligation to report certain work-related injuries belongs to the employer. To discourage underreporting, OSHA increased the unadjusted penalty for failing to report injuries involving an inpatient-hospitalization, amputation, or loss of an eye.

from \$1,000 to \$5,000 in March 2016. OSHA also has multiple mechanisms for learning about reportable injuries that employers fail to report. For example, workers may file a complaint with OSHA and include information about a reportable injury as part of their description of a potential hazard. In addition, when OSHA conducts an inspection, the Compliance Safety and Health Officer (CSHO) is required to review the employer's injury and illness records (see Field Operations Manual Chapter 3 Section VI – Review of Records). When OSHA learns about a reportable injury through these other avenues after the reporting timeframe has elapsed, a citation maybe issued for failing to report, if appropriate.

OSHA appreciates that the OIG's report acknowledges that the agency "may not have the tools it needs, such as workers compensation data, to detect underreporting" (p. 5). This is a critical point. OSHA does not have the authority to compel other entities that may have information about severe injuries—including workers compensation carriers, first responders, and hospitals—to provide that information to OSHA. In some cases, depending on state and local laws, particular area offices may have pre-existing partnerships that provide access to additional data on amputations or in-patient hospitalizations. However, it is not clear what additional measures OSHA could take through formal guidance or training to prevent underreporting absent statutory changes to allow the sharing of this information or substantial additional resources devoted specifically to seeking out unreported injuries.

**Recommendation 2: Consistently issue citations for late reporting.**

**OSHA's Response:** OSHA believes that the current policy regarding citation issuance is clear, and that affected field staff have received adequate training to determine when citation issuance is appropriate. Area Directors must be allowed some level of flexibility in making a determination whether to issue, based on the unique circumstances presented in each case. In some cases, OSHA may hear about an incident after the six-month statute of limitations has expired, in which case no citation could be issued. However, the agency recognizes that, where an Area Director determines that a citation is not appropriate despite an apparent failure to report, the case file should contain adequate documentation to support that decision. OSHA will remind staff of the need to improve case file documentation.

**Recommendation 3: Clarify OSHA's guidance related to:**

- a. documentation of essential decisions,
- b. evidence required to demonstrate employers corrected all hazards, and
- c. requirements for monitoring employer-conducted investigations.

**OSHA's Response:** OSHA concurs that the agency can improve case file documentation, to include essential decisions, such as whether to issue citations (see Recommendation #2), and when to deviate from the triage guidance (see Recommendation #4). OSHA also concurs that the monitoring aspect of this program has not been fully implemented, and will take the necessary steps to do so.

The revised reporting requirements under 29 CFR 1904.39 resulted in a significant increase in severe injury reports from employers. OSHA receives an average of approximately 1,000

reports each month, which diverts resources from programmed inspections. . . An employer is only under a legal obligation to report an event, not to conduct an investigation or submit proof of abatement. By encouraging them to do so voluntarily, OSHA is impacting workplaces it otherwise would not have the resources to reach. OSHA believes that the monitoring investigations, when implemented, will help to ensure that rapid response investigations are effective and that abatement has taken place. The agency will also provide additional guidance for field staff to help identify when an employer's abatement plan is sufficient to allow case closure.

**Recommendation 4: Emphasize the necessity to conduct inspections on all Category 1 incidents.**

**OSHA's Response:** On March 4, 2016, OSHA published the *Revised Interim Enforcement Procedures for Reporting Requirements Under 29 CFR 1904.39*, which outlines the criteria for conducting an inspection for Category 1 incidents. The guidance states: "After the Area Director (or his or her designee) determines that an employer report falls within Category 1, an onsite inspection shall be conducted in accordance with the procedures contained in the Field Operations Manual (FOM)." (Section VI.A.). Chapter 9 of the FOM provides those procedures. Specifically, Paragraph I.H.b. states: "The Area Director may determine not to inspect a facility if he/she has a substantial reason to believe that the condition complained of is being or has been abated." OSHA will remind Area Directors of the need to document their justification in the case file when deciding not to conduct an inspection for a Category 1 incident.