

# What to Do When a Work-Related Accident Occurs

By Susan Kellner

**T**he Occupation Safety & Health Act requires employers to record and report to OSHA within eight hours, the death of any employee from a work-related incident, or any work-related incident that causes the in-patient hospitalization of three or more employees. In addition, employers must report all fatal heart attacks that occur in the workplace. Deaths from motor vehicle incidents on public streets, except those in a work zone, do not have to be reported, nor do deaths as a result of an accident on a public bus, subway, train or commercial airplane.

The employer must inform OSHA in person or by telephone of a fatality or catastrophic incident, meaning that information may not be sent by fax or email and the employer may not leave a telephone message. An employer must call the area office of OSHA closest to the

incident site. If there is no answer, call 1-800-321-OSHA (6742). There is a person available at this number to answer calls 24 hours a day. The caller must be prepared to give the name of a contact person when someone answers. This is the first opportunity to guide and coordinate the investigation. Whoever reports the accident should be ready to respond to requirements of the subsequent process.

## RECORD KEEPING REQUIREMENTS

There are certain forms that need to be completed after an injury or illness. Form 300 (Log of Work Related Injuries and Illnesses) must be kept for five years following the year to which it pertains. Form 301 (Injury & Illness Incident Report) is to be completed within seven calendar days of an incident and kept for five years. Form 300A (Summary of Work Related Injuries & Illnesses) is to be posted by

February 1st through April 30th of each year. It must be kept for five years following the year to which it pertains. An employer should be prepared to produce all three documents. Anytime an OSHA representative inspects a facility and requests said forms, documentation must be produced within four hours. Obviously, in the case of a recent accident that took place within seven days of the inspection, there may not be a completed 301 available. While seven days are given to complete the form 301, it is encouraged to fill one out as soon as possible.

## FATALITY INVESTIGATION

Companies should not expect to be given advance notice of a fatality investigation, thus, they should be prepared for an inspection at their facility at any time. As soon as a facility experiences a fatality or work-related accident, it is incumbent upon the safety director to become proactive. After taking care of the reporting requirement to OSHA, the necessary OSHA forms need to be completed. Then, witnesses to the incident should be identified and contacted. It is advisable to contact the company's attorney and have him/her on board from the very beginning of this process.

The first part of the investigation procedure on a site is the opening conference. An OSHA Compliance Officer (CO) and other personnel will usually respond within one day of a report of a fatality or multiple injury. A CO will present his/her credentials at the site, gather information regarding the company, inform the employer of the scope of an intended walk-around and determine if employees are represented by a union. The employer should request that the CO present their credentials, including photo identification. It is suggested that the attorney representing the company is present at the opening conference. The company's safety director should also be present at this meeting.



The CO is going to ask for the 300 log and 301 report, OSHA required postings and written safety and health programs. These documents should be compiled in advance and be presented in a packet. After the materials have been provided to the CO, the walk-around will commence, which will consist of an on-site investigation of fact gathering, photographing and videotaping. The CO will speak with first responders, emergency medical personnel, employees and witnesses with firsthand knowledge of the incident. The CO will inspect the equipment involved. A company representative and attorney, if possible, should accompany the CO on the walk-around. The CO can deny representatives the opportunity to walk with them if they feel that their conduct will interfere with the CO's orderly investigation. Therefore, the best available company representative should be present for this walk-around. Someone should be chosen that will act responsibly, and not cause the CO to feel it is necessary to stop him/her from going along on the on-site investigation.

Keep in mind that private statements of employees are usually taken by a CO with only the employee present. In some instances, an employee representative may be present, such as a union representative, for this purpose. The employee is not required to inform the employer that they provided a statement. A suggestion is to provide a room with amenities such as coffee, water and snacks, where statements can be taken.

Statements of managerial/supervisory employees are usually done with counsel present. Statements of witnesses and former employees are done in private without counsel. The CO will also take statements of emergency personnel, law enforcement, fire rescue, hospital workers and family. Statements of all of the above may be videotaped, recorded and transcribed. Witnesses may be asked to sign their statements. Companies should be aware of the informer's privilege. This allows the government to withhold the identity of individuals who provide information about violations of the law. This privilege extends to the contents of statements to the extent that it would identify informers. Informers can authorize the release or waive the privilege.

A CO will request documents from an employer. These documents include those

required to be maintained pursuant to OSHA and also those documents deemed relevant to the investigation. Employers should be aware that OSHA authorizes the use of subpoena power. It is very important not to stonewall. The company's attorney will know how to protect privileged documents such as documents protected by trade secrets. Cooperation is not only beneficial, it is required.

With regard to family members of the injured or deceased employee, a standard information letter is sent from OSHA to the family. The family will be kept apprised of the investigation. Ultimately, the family will be provided copies of the citations and the settlement agreement.

### THE CLOSING CONFERENCE

There is a closing conference conducted at the conclusion of OSHA's investigation just prior to the issuance of citations. It may be conducted in person or by telephone. This is the opportunity for the company to negotiate any possible fines. Again, demonstrating cooperation, professionalism, forthrightness and having a strategy ready from the inception will serve a company well. Citations are issued within six months following the identification of violations. Fines are levied by the Occupational Safety and Health Review Commission. An employer has 15 days to challenge any part of OSHA's findings after citations are issued.

### CITATIONS

There are several types of violations. The most serious violation is a willful violation wherein an employer knew that a hazardous condition existed but made no reasonable effort to eliminate it and the condition violated a standard or regulation. Penalties range from \$5,000 to \$70,000 per willful violation. A serious violation is when a workplace hazard could have caused an injury or an illness that would most likely result in death or serious physical harm, and the employer did not know or could not know of the violation. A penalty of \$7,000 per violation can be imposed. An "other than serious" violation is one in which the most serious injury or illness that is likely to result cannot be reasonably predicted to cause death or serious physical harm, but it does have a direct relationship to safety and health. A penalty of up to \$7,000 can be imposed. A "de minimis," as the name

suggests, has no direct or immediate relationship to safety or health and does not result in citations or penalties. A failure to abate is when an employer has not corrected a violation for which OSHA has issued a citation and the abatement date has passed. This penalty can be up to \$7,000 per day. A repeated violation is seen as one if it occurs within three years of an earlier citation. Repeated violations can incur a penalty of \$70,000 per violation. It should be noted that a matter can also be referred to the Justice Department for criminal prosecution in cases where a willful violation caused the death of a worker. Penalties itemized on the citation are payable within 15 days.

Before deciding whether to file a Notice of Intent to Contest a citation, the employer can request an informal conference with the OSHA area director to discuss the citation and notification of penalty. However, an informal conference must be held within the 15 working day Notice of Intent to Contest and will neither extend the 15 day contest, nor take the place of the filing of a written notice if the employer desires to contest. A Notice of Intent to Contest must clearly state what is being contested, the citation, the penalty, abatement date or all three or any combination thereof. Once a Notice of Intent to Contest is filed, the case is officially in litigation and is assigned to an administrative law judge. A citation and notification of penalty must be posted at or near the place where each violation occurred. If an employer has any questions regarding OSHA investigations, compliance assistance specialists who are former COs can answer any questions from the local area office. OSHA also provides various seminars and presentations to small companies, as well as large, concerning the information contained in this article, as well as many other safety issues.

*A member of the Florida Bar since 1981, Susan J. Kellner now concentrates her practice in insurance defense. She joined Adams, Coogler, Watson, Merkel, Barry & Kellner, P.A. in 2004, based in West Palm Beach, Florida. Ms. Kellner's associate, Robert Merkel, will give a presentation on the subject of post-accident investigations at the CSDA 2011 Convention and Tech Fair in Bonita Springs, Florida, in March of next year. For more information, call 561-478-4500 or email [skellner@acwmlaw.com](mailto:skellner@acwmlaw.com).*