

## CHAPTER V

### CITATIONS

#### A. Pre-Citation Consultation.

1. General. In order to ensure uniformity, consistency, and the legal adequacy of citations involving new or unusual circumstances, or circumstances that appear to involve complex or controversial issues, there shall be appropriate consultation between branch managers, the administrator, and the attorney general prior to issuance.
2. Procedures. Consultation shall occur when the citation items are expected to be contested and which may involve complex litigation.
  - a. Categories of cases where consultation must occur are:
    - (1) All wilful violations and certain general duty clause citations in accordance with the instructions given in Chapter IV, especially those presenting complex questions of law, such as general duty section health citations;
    - (2) Cases involving questions of jurisdiction;
    - (3) Cases arising under newly promulgated safety and health standards;
    - (4) Cases of public concern such as catastrophes; and
    - (5) Cases, which are likely to result in contest of the division's application of Hawaii OSH Law, or standards.
  - b. Pre-citation consultation shall be conducted at the earliest stage possible of a DOSH investigation in order to assist in developing an investigation strategy, particularly in cases involving fatalities, catastrophes, and cases of significant public concern.

#### B. Writing Citations.

1. General. Section 12-51-14 controls the writing of citations.
  - a. Section 12-51-14(a). "Any citation shall be issued with reasonable promptness after termination of the inspection." The time, which has elapsed from the completion of the inspection or investigation until the issuance of citations, shall be closely monitored and kept as short as possible by the branch manager.
  - b. Reserved.

2. Specific Instructions. The proper writing of citations is an essential part of the enforcement process. Specific instructions on how to complete the Citation and Notification of Penalty, HIOSHL-2 Form, are contained in the IMIS Manual.
  - a. Standards and Rules. After identifying a hazardous condition, the compliance officer shall review existing standards and rules to ensure that the hazardous condition noted is within the scope and application of the standard.
  - b. Reserved.

C. Grouping and Combining of Violations.

1. Definitions. For the purpose of this section the following definitions apply.
  - a. Combining. The gathering of all instances of violation of a specific standard under a single item number.
  - b. Grouping. The joining of two or more highly related, specific standards under an individual citation item during the inspection or investigation.
2. Combining. All violations of the same standard found during the inspection of an establishment or worksite shall be combined into one alleged violation. Each instance of the violation shall be separately set out within that item of the citation. General violations of a standard may be combined with serious violations of the same standard when appropriate.
  - a. Except for standards which deal with many unrelated hazards (e.g., tables 202-1, 202-2, and 202-3 cited under §§12-202-4.02, 7, or 9), the same standard may not be cited more than once on a single citation. However, the same standard may be cited on different citations on the same inspection as on citation 1, serious, and on citation 2, general.
  - b. For the purpose of applying these guidelines in mobile industries an establishment is normally the site of the construction job; e.g., the building site, the drilling site, etc. Where the construction site extends over a large geographical area (e.g., road building) and is under the same general contractor, the entire site shall be considered a single establishment and all instances of the same violation with the same classification discovered during a single inspection shall constitute one alleged violation.

EXAMPLE 1. During the inspection of a single establishment, the compliance officer documents five instances of unguarded open- sided platforms in five different locations throughout the facility in serious violation of §12-72-3(c)(1). These five instances of the violation are combined into one serious citation item containing five subparts (a, b, c, d, e).

EXAMPLE 2. During the inspection of a single establishment, the compliance officer documents three instances of unguarded open-sided platforms and two instances of platforms without required toe-boards in different locations

throughout the facility in serious violation of §12-72-3(c)(1). These five instances of the violation are combined into one serious citation.

EXAMPLE 3. During the inspection of a single establishment, the compliance officer documents five instances of unguarded open-sided platforms in five different locations throughout the facility. Three instances are classified as serious and two as general. The three serious instances shall be combined into one serious item and the two general instances, into one general item.

3. Grouping. When a source of a hazard is identified which involves related violations of different standards, the violations should be grouped into a single item if, as a result of the grouping, the citation more accurately reflects the scope and gravity of the hazardous circumstances.
  - a. When to Group. The following situations normally call for grouping violations.
    - (1) Grouping Related Violations. When the compliance officer believes that violations classified either as serious or as general are so closely related as to constitute a single hazardous condition, the violations should be grouped into one citation item.

EXAMPLE: §12-80-5(a)(2), (a)(4), and (b)(10) pertaining to the same machine should be grouped into one citation item.
    - (2) Grouping General Violations Where Grouping Results in a Serious Violation. When two or more individual violations are found which, if considered individually represent general violations, but if grouped create a substantial probability of death or serious physical harm, the violations may be grouped and alleged as a single serious violation.
    - (3) Where Grouping Results in Higher Gravity General Violation. Where the compliance officer finds during the course of the inspection that a number of general violations are present in the same piece of equipment which, considered in relation to each other affect the overall gravity of possible injury resulting from an accident involving the combined violations, then they may be grouped. The violations may be grouped in a manner similar to that indicated in the preceding paragraph, although the resulting citation will be for a general violation.
    - (4) Violations of Posting and Recordkeeping Requirements. Violations of the posting and recordkeeping requirements which involve the same document (e.g., OSHA 200 Form was not posted or maintained) shall be grouped for penalty purposes. (See Chapter VI for penalty amounts.)
  - b. When Not to Group. There are times when grouping is inappropriate.

- (1) Single Inspection. Only violations discovered in a single inspection of a single establishment or worksite shall be grouped. An inspection in the same establishment or at the same worksite shall be considered a single inspection even if it continues for a period of more than one day or is discontinued with the intention of resuming it after a short period of time if only one HIOSHL-1 is completed.
- (2) Separate Inspection of the Same Establishment. Where inspections of the same establishment of an employer are conducted on two different occasions and instances of the same violation are disclosed during each inspection, the second instance of the violation shall not normally be grouped with the first instance even if a citation for the first has not yet been issued. Depending on the conditions found during the second inspection, however, these second instances may constitute grounds for a repeat or a willful violation. Where a followup inspection is conducted to determine if a violation has been abated, it will normally be appropriate to issue a notice of failure to abate where one instance or more of the cited violation remains uncorrected.
- (3) Separate Establishments of the Same Employer. Where inspections are conducted, either at the same time or different times, at two establishments of the same employer and instances of the same violation are discovered during each inspection, the employer shall be issued separate citations for each establishment.
- (4) General Duty Clause Violations. Because the general duty sections are cited so as to cover all aspects of a serious hazard for which no standard exists, no grouping of separate general duty section violations is permitted. This provision, however, does not prohibit grouping a general duty section violation with a related violation of a specific standard.
- (5) Serious Violation. As noted in C.3.a.(1), a serious violation may be grouped or cited separately as conditions warrant. Serious violations that are not so closely related as to constitute a single violative condition shall not be grouped.

D. Employer/Employee Responsibilities.

1. Section 396-8(a) of the Law. "Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct."
  - a. The Law does not provide for the issuance of citations or the proposal of penalties against employees. Employers are responsible for assuring employee compliance with the standards.

- b. Although the employer is not the absolute guarantor or insurer of all employee actions, reasonable steps must be taken by the employer to protect employees from hazards that may result from failure to comply with the standards; e.g., informing employees of hazards and how to protect themselves, enforcing safety and health rules, and the like.
2. Employee Refusal to Comply. In cases where the compliance officer determines that employees are systematically refusing to comply with a standard applicable to their own actions and conduct, the matter shall be referred to the branch manager who shall consult the administrator. The administrator will make a decision on what action is appropriate. Under no circumstances is the compliance officer to become involved in an onsite discussion involving labor-management disputes or interpretation of collective-bargaining agreements. However, concerted refusals to comply will not bar the issuance of an appropriate citation where the employer has failed to exercise full authority to the maximum extent reasonable, including discipline and discharge, to ensure compliance with the Law. During the course of an inspection, if the compliance officer determines that there has been a failure to comply with a standard, the compliance officer will not cite the employer IF ALL FIVE of these conditions are present:
  - a. The violation was caused by an employee's action;
  - b. An isolated incident not normally anticipated;
  - c. Incident of short duration;
  - d. Incident not participated in, observed by, or performed with the knowledge of any supervisory personnel; and
  - e. If employee action is in conflict with a well established company policy that is generally enforced through disciplinary action or other appropriate procedures. In determining that the employer actually has a "company policy," the compliance officer must find that the employer has a specific program for instructing employees in safe work practices, including periodic checking and, when necessary, disciplining of employees.

E. Affirmative Defenses.

1. Definition. An affirmative defense is any matter which, if established by the employer, will excuse the employer from a violation which has otherwise been proved by the compliance officer.
2. Burden of Proof. Although affirmative defenses initially must be established by the employer at the time of contest, the burden of proof shifts to DOSH when the employer successfully makes a prima facie argument supporting the defense. The compliance officer, therefore, shall keep in mind the potential affirmative

defenses that the employer may make and, when appropriate, attempt to gather contrary evidence.

3. Explanations. The following are explanations of the more common affirmative defenses with which the compliance officer shall become familiar. There are other affirmative defenses besides these, but they are less frequently raised or are such that the facts which can be gathered during the inspection are minimal.

- a. Unpreventable Employee Misconduct or "Isolated Event." The violative conduct was:

- (1) Unknown to the employer; and
- (2) In violation of an adequate workrule which was effectively communicated and uniformly enforced.

EXAMPLE: An unguarded table saw is observed. The saw, however, has a guard which is reattached while the compliance officer watches. Facts which the compliance officer shall document may include: Who removed the guard and why? Did the employer know that the guard had been removed? How long or how often had the saw been used without guards? Did the employer have a workrule that the saw guards not be removed? How was the workrule communicated? Was the workrule enforced?

6. Impossibility. Compliance with the requirements of a standard is:

- (1) Functionally impossible or would prevent performances of required work; and
- (2) There are no alternative means of employee protection.

EXAMPLE: During the course of the inspection an unguarded table saw is observed. The employer states that the nature of its work makes a guard unworkable. Facts which the compliance officer shall document may include: Would a guard make performance of the work impossible or merely more difficult? Could a guard be used part of the time? Has the employer attempted to use guards? Has the employer considered alternative means or methods of avoiding or reducing the hazard?

- c. Greater Hazard. Compliance with a standard would result in greater hazards to employees than noncompliance and:

- (1) There are no alternative means of employee protection; and
- (2) An application of a variance would be inappropriate

EXAMPLE: The employer indicates that a saw guard had been removed because it caused particles to be thrown into the operator's face. Facts, which the compliance officer shall consider may include: Was the guard used properly? Would a different type of guard eliminate the problem? How often was the operator struck by particles and what kind of injuries resulted? Would safety glasses, a face mask, or a transparent shelf attached to the saw prevent injury? Was operator technique at fault and did the employer attempt to correct it? Was a variance sought?

- d. Documentation Requirements. Where it becomes evident, either from statements made during the inspection by the employer or other persons or from the circumstances surrounding the apparent violation that one or more of the above affirmative defenses may be an issue, the compliance officer shall make reasonable efforts to gather and record facts relevant to the defense. The compliance officer shall bring the documentation of the hazards and facts related to possible affirmative defenses to the attention of the supervisor. When all conditions under D.2.a. are met, no citation will be issued. Where it appears that each and every element of an affirmative defense is present, the branch manager may decide, after consultation with the administrator, that a citation shall not be issued.

F. Multi-Employer Worksites.

1. Issuance of Citation. On multi-employer worksites, citations shall normally be issued only to employers whose employees are exposed to hazards (the exposing employer).
  - a. Additionally, the following employers normally shall be cited, whether or not their own employees are exposed:
    - (1) The employer who actually creates the hazard (the creating employer);
    - (2) The employer who is responsible, by contract or through actual practice, for safety and health conditions on the worksite; i.e. the employer who has the authority for ensuring that the hazardous condition is corrected (the controlling employer);
    - (3) The employer who has the responsibility for actually correcting the hazard (the correcting employer).
  - b. It must be shown that each employer to be cited has knowledge of the hazardous condition or could have had such knowledge with the exercise of reasonable diligence. (See Chapter IV, B.1.b.(4).)

2. Legitimate Defense. Prior to issuing citations to an exposing employer, it must first be determined if the exposing employer has a legitimate defense to the citation as set forth below:
  - a. The employer did not create the hazard;
  - b. The employer did not have the responsibility or the authority to correct the hazardous condition:
  - c. The employer did not have the ability to correct or remove the hazard;
  - d. The employer can demonstrate that the creating, the controlling, and/or the correcting employers, as appropriate, have been specifically notified of the hazards to which their employees are exposed;
  - e. The employer has instructed and, where necessary, informed employees how to avoid the dangers associated with it when the hazard was known, or with the exercise of reasonable diligence, could have known.
    - (1) Where feasible, an exposing employer must have taken appropriate alternative means of protecting employees from the hazard.
    - (2) When extreme circumstances justify it, the exposing employer shall have removed their employees from the job to avoid citation.

NOTE: All of these elements must be documented in the case file.

3. Citing Non-exposing Controlling Employer. If all the conditions in F.2. are met, the exposing employer will not be cited. If all employers on a worksite with employees exposed to a hazard meet these conditions, then, the citation shall be issued to only the employers who are responsible for creating the hazard and/or who are in the best position to correct the hazard or to ensure its correction (the controlling employer). In these circumstances the controlling employer and/or the hazard-creating employer shall be cited even though no employees of that employer are exposed to the violative condition. Penalties for these citations shall be calculated as indicated in Chapter VI, using the exposed employees of all exposing employers as the number of employees for probability assessment.
4. Notice Required. In most situations the exposing employer will not be able to establish a defense to a citation unless the controlling employer has been specifically requested to correct the hazard to which the employees are exposed. When this has not been done, the exposing employer and the controlling employer will be cited referencing both the specific standard and the appropriate paragraph of §12-110-2(f).
5. Guidelines for Issuing Citations. The following analysis is provided as guidance for citation issuance on multi-employer sites.



- a. Did the exposing employer fail to meet any of the elements outlined in F.2? If so, cite the exposing employer.
  - b. In particular, did the exposing employer have the opportunity to notify the employer having authority to correct the hazard and did that employer do so? If the exposing employer had the opportunity, but did not notify the controlling employer, cite the exposing employer.
  - c. If the employer having authority to correct was notified but did not correct the hazard (or order its correction), cite that employer.
  - d. In all cases of multi-employer worksites, the notice referred to in F.5.b. and c. must have been related to the specific hazard involved. Generalized notices of hazards given by one contractor to another are considered inadequate to avoid citations under this instruction.
6. Reserved.
7. Citing More Than One Employer. In a very limited number of situations it may be impossible, on the basis of the facts available, to determine if the exposing employer meets the elements outlined in F.2; and, consequently, in these doubtful situations the branch manager, after consulting with the administrator, may issue citations to both the exposing employer and the controlling employer, as appropriate.
8. General Duty Clause Violations. In the case of general duty clause violations, only employer(s) whose own employees are exposed to the violation may be cited.
- G. Amending or Withdrawing Citation and Notification of Proposed Penalty in Part or In Its Entirety.
1. Citation Revision Justified. Amendments to or withdrawal of a citation shall be made when information is presented to the branch manager which indicates a need for that revision under certain conditions, which may include:
    - a. Administrative or technical error.
      - (1) Citation of an incorrect standard.
      - (2) Incorrect or incomplete description of the alleged violation.
    - b. Additional facts establish a valid affirmative defense.
    - c. Additional facts that establish that there was no employee exposure to the hazard;
    - d. Additional facts that establish a need for modification of correction date, penalty, or reclassification of citation items; or

- e. Any other sufficient and justifiable reasons.
2. Citation Revision Not Justified. Amendments to or withdrawal of a citation shall not be made by the branch manager under certain conditions, which include:
- a. Valid notice of contest received (See, however, H.3.);
  - b. If the 20 days for filing a notice of contest has expired and the citation has become a final order;
  - c. Employee representatives have not been given the opportunity to present their views unless the revision involves only an administrative or technical error; or
  - d. Editorial or stylistic modifications.
3. Procedures for Amending or Withdrawing Citations. The following procedures are to be followed in amending or withdrawing citations.
- a. Withdrawal of, or modifications to, the citation and notification of penalty shall normally be accomplished by means of an informal settlement agreement and shall follow the guidelines in H. Examples of exceptions are changes initiated by the administrator without an informal conference (e.g., changes of the type referred to in G.1.a.). In these cases, the procedures given below shall be used.
  - b. If proposed amendments to citation items change the classification of the items (e.g., serious to general), the original citation items shall be withdrawn and new, appropriate citation items issued.
  - c. The amended Citation and Notification of Penalty Form (HIOSHL-2) shall clearly indicate that:
    - (1) The employer is obligated under the Law to post the amendment to the citation along with the original citation until the amended violation has been corrected or for 3 working days;
    - (2) The period of contest of the amended portions of the HIOSHL-2 will begin on the day of receipt of the amended Citation and Notification of Penalty; and
    - (3) The contest period is not extended as to the unamended portions of the original citation.
  - d. A copy of the original citation shall be attached to the amended Citation and Notification of Penalty Form when the amended form is forwarded to the employer.

- e. A citation may be withdrawn in its entirety by the branch manager. If that is to be done, these procedures apply:
  - (1) A letter withdrawing the Citation and Notification of Penalty shall be sent to the employer. The letter shall refer to the original citation and penalty, state that they are withdrawn and direct that the letter be posted by the employer for 3 working days in those locations where the original citation was posted.
  - (2) When applicable to the specific situation (e.g., an employee representative participated in the walkaround inspection, the inspection was in response to a complaint signed by an employee representative, or the withdrawal resulted from an informal conference or settlement agreement in which an employee representative exercised the right to participate), a copy of the letter shall also be sent to the employee representative.
- f. The instructions contained in this section, with appropriate notification, are also applicable to the amendment of the Notification of Failure to Abate Alleged Violation and of Proposed Additional Penalty, HIOSHL-2B Form, and to citations for repeated or willful violations. The assistance of the administrator shall be sought when amendments cause complicated drafting problems.

#### H. Informal Conference Review of Cases By the Administrator.

- 1. General. In order to make the informal conference a more significant and uniformly used element of the enforcement process, to expedite the correction of hazards by avoiding the delays involved in unnecessary litigation, and to give employers an opportunity to resolve citations without engaging in protracted litigation, the administrator exercises full authority to evaluate possible administrative remedy for all contested issues. The following policy guidelines shall be adhered to when attempting to negotiate settlement agreements.
  - a. Branch managers shall send to employers with each set of citations information that notifies them of the opportunity to obtain a complete administrative review of the case, including consideration of new information. They shall be notified that, for good cause, citations and proposed penalties may be amended or withdrawn.
  - b. The informal conference normally shall be scheduled promptly, usually before the expiration of the 20-day contest period. However, scheduling an informal conference does not stay the running of the contest period, but the outcome of the conference may influence the decision to contest.
  - c. Upon filing a notice to contest, jurisdiction of the case is transferred from the administrator to the Labor and Industrial Relations Appeals Board, who must decide all contested issues or approve settlement of negotiated issues. The administrator may continue to negotiate possible settlement

of issues with the employer or employee, or their representative, within the policies and procedures approved by the appeals board and in close cooperation with the deputy attorney general.

- d. Appeals procedures will be initiated by endorsing the written notice of contest to the deputy attorney general along with a copy of all case file documents, over the administrator's signature. The deputy attorney general will select and copy the necessary case file information and forward the notice of contest and the case file documents to the chairman of the labor and industrial relations appeals board in appropriate form.
- e. The deputy attorney general will request timely scheduling of all contested cases, but will give special emphasis to prompt scheduling of cases involving unabated serious hazards. The administrator will coordinate division participation in the appeal procedures with the deputy attorney general. Generally, the administrator or designated representative will represent the division at pre-trial conferences. In complex cases, the inspecting officer and branch manager may be required. Division participation at the trial will be at the discretion of the deputy attorney general. Division personnel participating in the pretrial or trial shall study the case file, become familiar with the issues, and, if appropriate, conduct research to recall events and refresh their minds regarding any anticipated issues.
- f. Employee representatives shall be afforded the opportunity to participate in the informal conference and attendant negotiations. The employer has the option of having the informal conference conducted jointly or separately with employee representatives. Separate discussions shall also be conducted if the employee representative so requests.

2. Reserved

3. Post-Contest Settlement (Formal Settlement Agreement). Post-contest settlements will occur after the complaint is filed with the Appeals Board.

- a. Reserved.
- b. Reserved.
- c. Reserved.
- d. Reserved.
- e. If a settlement is reached, the administrator will communicate the terms of the settlement to the attorney general, who will then draft the settlement agreement.
- f. The procedure for preparing the Formal Settlement Agreement during the post-contest stage shall conform to the procedures established by the

Appeals Board. The procedures may vary somewhat with each case, depending upon the complexity of the agreement and the time available for preparation of the documents. When an agreement is signed by all parties, the attorney general will submit it to the Appeals Board.

- g. Reserved.