



Protection of life, health, safety and
welfare of Arizona's most valuable assets.

THE INDUSTRIAL COMMISSION OF ARIZONA
DIVISION OF OCCUPATIONAL SAFETY & HEALTH



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August 14, 2013

Mr. Ken Nishiyama Atha
Regional Administrator – OSHA
90 – 7th Street, Suite 18100
San Francisco, CA 94103

RE: Federal FY 2012 FAME response

Dear Mr. Atha:

In response to your letter of July 31, 2012, I am submitting to you the Arizona Division of Occupational Safety and Health's (ADOSH) formal response to OSHA's FY 2012 Federal Annual Monitoring and Evaluation (FAME) report. The required Corrective Action Plan (CAP) response, regarding the findings and recommendations found within the FAME, will be submitted to OSHA by August 30, 2013 as requested in your July 31, 2013 letter.

Overall, we believe the FY 2012 FAME is a fair and balanced review of ADOSH's FY 2012 activities and I appreciate the efforts made by OSHA staff to include both positive findings as well as those areas where corrections are needed. Nevertheless, we continue to feel that some of the findings and recommendations within the FAME represent non-substantive issues that could be better and more easily addressed non-formally rather than as a part of a formal evaluation process.

The way OSHA has designed the process requires substantial time and energy investments that could be better spent in areas with more direct benefit in the bottom result – the protection of life, health, safety and the welfare of Arizona's most valuable assets – its workers.

With respect to findings specific to residential fall protection, ADOSH recognizes the critical importance of this issue and will continue to work with OSHA to address its concerns. As explained, however, in our February 1, 2013, letter to OSHA (which is attached and incorporated by reference), we believe that ADOSH's program is at least as effective as OSHA's. Our focus is the actual prevention of falls through effective outreach, training, and enforcement of the provisions of SB1441. Strict enforcement of all of Arizona's residential fall protection requirements has in the past achieved results surpassing those

of states under protection of OSHA. Our expectation is that it will continue to do so. Therefore, by definition, such results indicate that Arizona's program was, and continues to be, "at least as effective as" Federal OSHA in this regard.

Federal OSHA also continues to take issue with the classification of citations issued by ADOSH. This has been a point of disagreement between our respective programs for some time, and continues to be. On page 5 under "State Progress in Addressing FY 2011 FAME Report Recommendation," the report states that ADOSH has "a problem in classification of violations." This statement is unfair and untrue. ADOSH adopted the OSHA FOM on 6/24/2010 and uses classification procedures from the FOM that are the equivalent of Federal OSHA. In fact, as evidenced by the most recent State Indicator Report (SIR), ADOSH exceeds Federal OSHA in correct violation classification due to the fact that Federal OSHA vacates more violations than ADOSH (7.8% vs. 2.3%); Federal OSHA reclassifies more violations than ADOSH (4.9% vs. .6%); and ADOSH retains significantly more violation penalties than Federal OSHA (Feds: 59.7% vs. AZ: 70.2%).

On page 6 in OSHA's finding 12-02 (formerly 11-07), OSHA misstates ADOSH's position. ADOSH has adopted Federal OSHA's CPL 02-03-003 Whistleblower Investigations Manual with an effective date of March 14, 2012. This action represents a consistent policy on the treatment of third party non-management witnesses for discrimination complaints. This policy is based on OSHA's whistleblower investigation manual up to the extent allowed by Arizona law.

As noted above, I am sending the Corrective Action Plan for the findings noted in the FAME to you by August 30, 2013. I believe you will find that ADOSH has already corrected the majority of the findings and we are currently in the process of ensuring correction of the remaining items.

In closing, I appreciate the opportunity to respond to the FAME. ADOSH welcomes the opportunity to work in partnership and collaboration with OSHA and our community to achieve continued improvement in workplace safety and health. We continue to be dedicated to the improvement of workplace safety and health through active prevention methods and enforcement activities. If you should have questions regarding our response, please feel free to contact me.

Sincerely,

Bill Warren,
ADOSH Director

BW:lg

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February 1, 2013

Mr. T. Zachary Barnett
Area Director, OSHA
230 N. 1st Ave., Ste. 202
Phoenix, AZ 85003

Re: Response to CASPA AZ27

Dear Mr. Barnett:

On December 11, 2012, the Arizona Division of Occupational Safety and Health (ADOSH) received your December 7, 2012, letter with respect to the above-referenced Complaint About State Program Administration (CASPA). In your letter, you summarized three allegations from the CASPA and stated that you found no merit to two of those allegations. You did, however, find merit to the first allegation, which alleged the following:

ADOSH has failed to implement OSHA Directive STD 03-11-002 Compliance Guideline for Residential Construction, resulting in workers being exposed to fall hazards in residential construction. ADOSH is enforcing a new law that does not protect workers in residential construction between 6 and 15 feet, which does not afford the same level of protection as Federal OSHA.

With respect to that allegation, you issued the following findings:

A new law, SB 1441, signed into legislation on March 27, 2012, requires fall protection in residential construction whenever the 'eave height exceeds fifteen feet,' whenever a roof slope is steeper than 7:12, or if implementation of conventional fall protection is 'infeasible or creates a greater hazard.' This does not provide the same protection as the Federal OSHA standard contained in Subpart M at 29 CFR 1926.501(b)(13), which requires conventional fall protection for all work 6 feet or more above lower levels, except where employers can demonstrate that such fall protection systems are infeasible or would create a greater hazard.

You further concluded that during the first half of 2012, ADOSH had not issued any citations for failing to use fall protection between six and 15 feet and that for exposures within this range, ADOSH had only issued citations for deficiencies in fall protection plans. Furthermore, you concluded that SB 1441 prevents ADOSH from citing an employer who allows employees to be exposed to fall hazards between six and 15 feet unless the employees are working at a pitch greater than 7:12.

In light of these findings, you requested that ADOSH "require conventional fall protection for all residential construction work performed at six feet or more above lower levels, except where employers can demonstrate that such fall protection systems are infeasible or would create a greater hazard."

ADOSH believes that Federal OSHA ("OSHA") has a fundamental misunderstanding of the protections afforded under SB 1441 and of ADOSH's ability to address residential construction fall hazards through the requirements of SB 1441. Contrary to your findings, ADOSH can cite an employer who permits an employee to be exposed to fall hazards between six and 15 feet, and ADOSH's enforcement of residential fall protection is as effective as OSHA's enforcement of 29 CFR 1926.501(b)(13).

Arizona's new residential construction fall protection requirements, which became effective on May 25, 2012, mandate fall protection for all exposures at or above six feet in height. While these new requirements are not identical to 29 CFR 1926.501(b)(13) they do protect employees against fall hazards, including those hazards that employees are exposed to between six and fifteen feet. In some instances, this protection is provided through covers or guardrails (such as when an employee is exposed to a fall of six feet or more through a floor or roof opening, or exposed to a fall of four feet or more through a wall opening). In some instances, conventional fall protection is required, regardless of the fall distance (such as when an employee is working on a roof with a pitch greater than 7:12). In all instances, however, when an employee is exposed to fall hazard of six feet or more, an employer is required to prepare and implement a written fall protection plan that reduces or eliminates the fall hazards to which the employee is exposed. When an employer fails to implement the measures identified in their fall protection plan, then ADOSH can, and in fact has, issued serious citations with monetary penalties. SB 1441, and the enforcement of that law by ADOSH, does not permit an employer to simply ignore the fall hazards to which employees may be exposed below fifteen feet.

As OSHA is aware, Arizona has significant experience with written fall protection plans. Written plans were the foundation of Arizona's fall protection efforts for many years (essentially that extensive period of time between 1995 and 2010 when OSHA did not enforce the conventional fall protection requirements of 29 CFR 1926.501(b)(13)). Then, as now under SB 1441, Arizona required employers to develop and implement written fall protection plans that specify how employees will be protected from fall hazards at or above six feet.

There is no question that Arizona's past history of successful use of written fall protection plans by residential contractors was an important consideration for the Arizona Legislature in implementing SB 1441. This is evident through the language found in SB 1441 that not only requires a written fall protection plan, but requires the plan to address "*all of the measures that will be taken to reduce or eliminate the fall hazard for workers exposed to fall hazards six feet or more above lower levels.*" See A.R.S. § 23-492.A.6. The Arizona Legislature understood its obligation to protect Arizona

employees from fall hazards. The Arizona Legislature also understood that it could meet this obligation by enacting legislation that, while not identical to 29 CFR 1926.501(b)(13), was as effective as 29 CFR 1926.501(b)(13).

With respect to the issue of effectiveness, OSHA has historically measured the effectiveness of a state enforcement program through evaluation of specific, objective criteria (which were recently revised in response to the work of a joint OSHA/OSHSPA task force). Benchmarked to OSHA's performance, the criteria used to determine whether a state program is "at least as effective as" focus more on the administration of the program (as opposed to effectiveness of a particular state standard). Under these criteria, ADOSH's program is (and historically has been) considered at least as, if not more, effective as the federal program.

Federal OSHA has not, however, identified objective criteria to measure whether standards adopted by a state are considered as effective as standards adopted by OSHA. State plans are not, and never have been required to adopt safety standards that are identical to those adopted by OSHA. Rather, OSHA has acknowledged that a state may adopt a different occupational safety and health standard if the standard is as effective as the standard adopted by OSHA. This acknowledgment reflects an understanding that protection against an identified hazard can be achieved in different ways. In this context, "effectiveness" must be measured by whether the standard adopted by the state protects against the identified hazard as effectively as the standard adopted by OSHA. Stated another way, and in the context of this CASPA, does SB 1441 protect against residential fall hazards as effectively as 29 CFR 1926.501(b)(13)? If the answer is yes, then the state is meeting its obligation to be "as effective as."

Unfortunately, Federal OSHA has not identified any criteria, objective or otherwise, for states to consider when determine the effectiveness of a state standard. As a result, states are left to determine for themselves whether their state standards are as effective the federal standards.

Specific to SB 1441, the issue is not really about the trigger height for the use of conventional fall protection. The issue is whether the requirements of SB 1441, and ADOSH's enforcement of those requirements, reduce fall-related injuries, illnesses, and fatalities. A reasonable approach to measure effectiveness in this context is to focus upon outcomes and results, which are more objective than forecasts, presumptions, or speculation.

ADOSH believes that one such measure can be found in a state's injury, illness and fatality rates, which if low, demonstrate that a state is effective at addressing the hazard in question. The undeniable fact is that Arizona employees are experiencing fall-related fatalities at rates far less than those of most other states, including those under OSHA's jurisdiction. In 2008, Arizona had the 4th lowest construction fatality rate of the 39 states that reported this rate. In 2009, Arizona had the lowest construction fatality rate of all reporting states. In 2010, Arizona was the fourth lowest of the 44 states that reported this rate. Of significance is that the residential fall protection requirements enforced by ADOSH during these years are much like they are in SB 1441. This measurement alone demonstrates that Arizona's enforcement of fall protection is, if anything, more effective, not less effective than OSHA's.

Another measure of effectiveness can be found in the overall effort by a jurisdiction to address a hazard within a particular industry. A recent study highlighted on OSHA's website establishes that random inspections improve workplace safety and reduce the overall cost of injuries in those

workplaces that are the subject of the inspections.¹ In other words, there is greater compliance with requirements and fewer injuries and illnesses result where a jurisdiction has a greater presence (by conducting more inspections in an industry).

According to OSHA IMIS data, during calendar years 2011 and 2012, ADOSH conducted 59 inspections of general contractors in the residential construction industry. This information, when considered and compared to the number of residential general contractor inspections conducted by OSHA, demonstrates that the ADOSH program is at least as effective as the federal program. ADOSH is conducting residential construction inspections in greater numbers than OSHA and, as a result, is ensuring that residential contractors are utilizing fall protection (both conventional and non-conventional methods).² This effort is likely a key link as to why Arizona has one of the lowest fall injury and fatality rates.

Arizona's interest in promoting safe worksites is the same as OSHA's. In enacting SB 1441, the Arizona Legislature determined that Arizona can accomplish this goal for residential construction as effectively as OSHA by following a path that has proven effective. The differences between SB 1441 and 29 CFR 1926.501(b)(13), standing alone, do not mean SB 1441 is less protective. Nor does it mean that Arizona's enforcement program is less effective than OSHA's. OSHA has not provided any objective evidence that Arizona's standard is or will be any less effective other than it did not adopt a specific path to safety that OSHA did not enforce for 15 years. In view of the foregoing, ADOSH does not anticipate taking further action at this time.

Very Truly Yours,

Laura L. McGlory
Director

¹ David I. Levine, et al., Randomized Government Safety Inspections Reduce Worker Injuries with No Detectable Job Loss, May 18, 2012. Science

² The OSHA IMIS database shows that during this same time period, Arizona has conducted more inspections than 75% of those states over which federal OSHA exercises exclusive jurisdiction. Additionally, OSHA did not conduct *any* inspections of general contractors in the residential construction industry in Arizona or Nevada, and only conducted *one* inspection of a general contractor in that industry in California. While ADOSH recognizes that most work conducted in those three states falls within the jurisdiction of the state programs, federal OSHA certainly has a presence in each state and there is some work (i.e., on Indian lands) that is in the residential construction industry and which falls within OSHA's jurisdiction. Unfortunately, unlike general contractors, there is no unique SIC code to distinguish the work performed by residential subcontractors from that performed on commercial projects. As a result, we are unable to take a similar look at the number of inspections conducted of residential subcontractors.