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THE INDUSTRIAL COMMISSION OF ARIZONA DIVISION OF OCCUPATIONAL SAFETY & HEALTH



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August 7, 2014

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

RE: ADOSH Response to the FY 2013 FAME

Dear Mr. Atha:

The following is a short statement on behalf of the Arizona Division of Occupational Safety and Health (ADOSH) and in response to OSHA's FY 2013 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 22, 2014, as requested in your July 21, 2014 letter.

With the exception of some areas, I consider the FY 2013 FAME to be a detailed review of ADOSH's FY 2013 activities and I appreciate the efforts made by OSHA's staff to include some positive findings, along with the findings where corrections are recommended. I continue to believe, however, that many of the findings within the FAME represent issues that have little to no impact on the overall effectiveness and quality of Arizona's state plan program. I will take this opportunity to respond to the more substantive issues identified in the FAME.

With respect to the issues identified under Section H, Major New Issues, ADOSH appreciates OSHA's acknowledgement of the significance of its Yarnell Hill Wildland Fire investigation ("Yarnell Hill"). As recognized by OSHA, the Division's Yarnell Hill investigation required a considerable investment of ADOSH resources. ADOSH's commitment of resources to this investigation included the full-time dedication of a compliance supervisor and two IH Compliance Officers. This important investigation, however, placed significant burdens on limited staff and resources, and impacted other aspects of the program, some which were identified as findings by OSHA, but without any acknowledgment that these findings resulted from the commitment of resources to the Yarnell Hill investigation. ADOSH needed to make decisions regarding the priority of its resources, and priority was properly given to this investigation.

Under Section H of the FAME, OSHA identifies “Fall Protection in Residential Construction” as a Major New Issue. Reference to this issue is also found in connection with Finding 13-09, which states that ADOSH’s enforcement of SB1441 does not protect workers in residential construction between six and 15 feet. The characterization and description of this issue in the FAME is simply incomplete and misleading. On page 15 of the FAME, OSHA states that “A State-Initiated Plan Change (Number 133) was submitted and OSHA rejected it.” While OSHA may be telegraphing its ultimate intention in this statement, the fact is that OSHA has not rejected this State-Initiated Plan change. Rather, on March 19, 2014, OSHA informed ADOSH that it will initiate proceedings to reject Arizona’s State Initiated Plan change (“show cause letter”).

There have been other developments with respect to the residential fall protection issue that are also not included in the FAME, but which deserve mention and acknowledgment. First, ADOSH formally responded to the show cause letter on May 1, 2014, and is prepared to demonstrate that its program is “at least as effective” as Subpart M. This formal response is available for public review and has been posted on the Industrial Commission’s website at http://www.ica.state.az.us/PublicNotices/LEGAL_Arizona%20State%20Initiated%20Plan%20Change%20Response%20to%20Show%20Cause%20Letter_5.1.14.pdf

Second, Arizona’s legislature recently passed, and Governor Brewer signed into law new legislation related to residential fall protection in Arizona. On April 15, 2014, an amendment to Article 13, SB 1307, passed the Arizona legislature by unanimous votes of both the Arizona House and Senate. SB 1307 includes a provision that would repeal Arizona’s State-specific fall protection requirements “if the federal occupational safety and health administration publishes in the federal register pursuant to 29 Code of Federal Regulations section 1902.23 a final decision rendered under 29 Code of Federal Regulations section 1902.22 and pursuant to 29 Code of Federal Regulations section 1953 to reject the changes to the states occupational safety and plan prescribed in section 23-492.01, Arizona Revised Statutes, and that results in the exclusion of the changes from this state’s federally approved occupational safety and health plan.” In addition, Amended Article 13 makes further changes to certain allowances in the original legislation that OSHA identified as areas of concern in the show cause letter. This law became effective on July 24, 2014.

The FAME is not the forum to address the ongoing residential fall protection issue as other formal proceedings have been initiated. However, if OSHA is going to continue to identify this issue in FAME reports, then it should describe the issue completely and fairly.

Two other issues that appear in the FAME as unresolved and open findings concern the classification of citations. ADOSH has adopted the OSHA FOM, uses classification procedures from the FOM that are the equivalent of Federal OSHA, and has trained each compliance officer in hazard recognition. ADOSH believes that it is, in fact, classifying citations properly. It should also be noted that while OSHA may initially classify more citations as serious than does ADOSH, it also deletes and reclassifies more citations than ADOSH at the back end. As evidenced by the recent State Indicator Report (SIR), OSHA vacates 7.8% of its citations, as compared to 2.5% by ADOSH. OSHA reclassifies 12.6% of its violations, as compared to 5.3% by ADOSH.

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This continued finding by OSHA does not mean that the ADOSH program is less effective than the OSHA program. OSHA has not provided any data showing that because ADOSH cited a particular hazard as Non-Serious rather than Serious, Arizona employees are at greater risk of injury. To the contrary, all available data indicates that Arizona employees experience fewer injuries and illnesses than the national average.

In closing, I appreciate the opportunity to respond to the FAME and look forward to working collaboratively with you and your staff in achieving our common goal of protecting Arizona's workers. If you should have questions regarding this response, please feel free to contact me at 602-542-1693.

Sincerely,

Bill Warren,
ADOSH Director

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