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August 8, 2014

Mr. Kurt Petermeyer
Regional Administrator
United States Department of Labor
Occupational Safety and Health Administration
61 Forsyth Street, Southwest
Room 6T50
Atlanta, Georgia 30303

Dear Mr. Petermeyer:

Kentucky received OSHA's FY 2013 Federal Annual Monitoring and Evaluation (FAME) Report and appreciates OSHA's efforts.

Considerable time and effort was spent reviewing, analyzing, and addressing OSHA's report. Kentucky's formal response is enclosed. Although we disagree with some of the FY 2013 FAME findings and recommendations, the occupational safety and health program strives to improve. Kentucky does not address OSHA's FY 2013 FAME observations but is available to discuss the observations with OSHA at OSHA's convenience.

Kentucky welcomes OSHA's continued monitoring of Kentucky's efforts. Please contact me at (502) 564-0977 if you have any questions or need additional information.

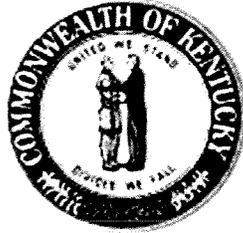
Sincerely,

Anthony Russell
Commissioner

Kurt Petermeyer
August 8, 2014
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Enclosure

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**Kentucky Labor Cabinet
Occupational Safety and Health Program**

RESPONSE

to

FEDERAL ANNUAL MONITORING EVALUATION

for

FEDERAL FISCAL YEAR 2013

Finding 13-01 (formerly 09-13, 11-02, and 12-01)

“A significant number of the 603 open cases in IMIS, that are not in contest or currently active, including 149 cases with open abatements can be closed.”

Recommendation

“KYOSH should implement a process to determine which cases in the IMIS have completed litigation and/or have the abatement and penalty satisfied.”

Response

Kentucky has spent considerable time analyzing the data and addressing this issue. The overwhelming majority of the cases open in IMIS are open for legitimate reasons, such as cases open due to litigation, filing of liens, or in debt collection. All of those cases were open in accord with Kentucky OSH Program policy.

Since OSHA’s on-site review, Kentucky implemented a new case closure policy. Pursuant to KRS 45.239(4) and 45.241, the Kentucky OSH Program entered into an agreement with the Kentucky Revenue Cabinet to collect delinquent debts. Employers who have outstanding OSH debts are reported to the Revenue Cabinet for collection and further action. The new policy will significantly reduce the number of future cases that remain open for an extended period.

Open abatement cases have been identified, reviewed, and a concerted effort made to close out every case that is ripe for closure.

Finding 13-02 (formerly 11-04 and 9-05)

“Complainants are not provided the findings regarding each complaint item and they are not afforded a way of disputing or appealing the findings of a complaint inspection.”

Recommendation

“KYOSH should fully implement the augmented procedure addressed in former Commissioner Dixon’s response following the FY 2011 FAME which states “Kentucky indicated in the 2010 follow-up report that it augmented its procedure by addressing each complaint item individually and advising the complainant’s appeal rights in the letter to complainants.” Appropriate personnel should be trained in the augmented procedure and supervisors should review case files more carefully to ensure this procedure is fully implemented and this information is included all case files.”

Response

Kentucky is confident that all complainants were provided the findings regarding each complaint item and afforded a way of disputing or appealing the findings of a complaint inspection. Kentucky notes that OSHA’s recommendation is based on a very small sample size, five (5) files. Kentucky does not believe the sample size represents a program-wide problem. Kentucky implemented the augmented procedure addressed in former Commissioner Dixon’s response following the FY 2011 FAME and appropriate personnel were trained in the augmented procedure. Kentucky notes that OSHA’s finding and recommendation does not assert the Kentucky OSH Program is not providing the information to the complainants. OSHA’s concern

is the case file documentation of the information provided to the complainants. Kentucky notes that on page thirteen (13) of the FAME, OSHA states “Managers stated that they send a copy of the narrative with the letter as an attachment.....” Kentucky will increase attention to memorializing the findings of each complaint item in its database.

Kentucky takes exception to OSHA’s assertion that complainants “... are not afforded a way of disputing or appealing the findings of a complaint inspection.” This is wholly incorrect. The findings letter provided to complainants specifically addresses a complainant’s right to request a review in accordance with Kentucky law, Kentucky Administrative Regulations 803 2:090 and 803 2:120.

Finding 13-03

“In three instances, KYOSH assigned personnel to conduct fatality investigations without the proper training.”

Recommendation 13-03

KYOSH should ensure that all compliance officers assigned to conduct accident and fatality investigations have the appropriate training.

Response

Kentucky does not agree with OSHA’s finding. Kentucky is unaware of any requirement that compliance officers must complete any particular course or courses prior to conducting accident or fatality investigations. Kentucky is in the best position to determine the capabilities of its staff and was supremely confident the officers were capable, as well as qualified, to conduct the investigations. Kentucky notes that OSHA did not indicate the investigations, documentation, or findings were lacking in any way. The case files clearly demonstrate that to be true. Kentucky also notes that two (2) of the instances were “no inspections” for lack of an employer/employee relationship.

At the time of the assignments, the compliance officers had not completed two (2) OTI courses mentioned in the FAME narrative. Kentucky reports the officers have completed the OTI coursework.

Finding 13-04 (formerly 11-05 and 9-07)

“More than half of the fatality files reviewed did not provide evidence that one or more of the required calls were made and/or letters sent to the next-of-kin.”

Recommendation

“Implement a process to ensure full implementation of CPL 02-00-153 - Communicating OSHA Fatality Inspection Procedures to a Victim’s Family to ensure that all communications with the NOK are completed.”

Response

Kentucky is confident that all next-of-kin communications are completed. Kentucky notes that OSHA's finding and recommendation does not assert the Kentucky OSH Program is not providing the next-of-kin with the appropriate notification. OSHA's concern is the case file documentation of the communication. Kentucky will emphasize improved documentation of the communication with next-of-kin to all staff. Kentucky will institute a process to include a record of all next-of-kin communications in its database.

Finding 13-05 (formerly 11-06)

"KYOSH conducted a total of 15 programmed planned health inspections during this evaluation period."

Recommendation

"KYOSH should develop and implement a strategy to ensure a more representative number of programmed planned health inspections are conducted to adequately address the scope and seriousness of the hazards found in high hazard health industries."

Response

Health inspections were, and continue to be, assigned and conducted in accordance with the inspection priority order established in Kentucky's Field Operations Manual. Kentucky has a strategy to ensure programmed planned health inspections are conducted to adequately address the scope and seriousness of hazards found in high hazard health industries. Health hazards in high hazard industries were identified, cited, and abated during all types of health inspections conducted in FY 2013.

OSHA advised that under current state practice, many inspections that are not coded as programmed planned inspections could be coded as such. A change in policy would instantly increase the number of programmed planned health inspections. Kentucky is considering OSHA's suggestion.

Progress in this area will continue to be measured due to staff turnover. Nevertheless, Kentucky notes progress in this area and continues to work towards additional improvement.

Finding 13-06 (formerly 11-07 and 9-11)

"KYOSH has significantly high average citation issuance lapse times for safety and health."

Recommendation

"KYOSH should develop and implement a process to reduce the average lapse time for non-incompliance safety and health inspections to the national average."

Response

Kentucky does not accept, or reject, this finding and recommendation. Kentucky is aware of significant differences in several of the State Activity Mandated Measures (SAMM) utilized by OSHA to calculate performance data. One of the erroneous measures is the SAMM utilized to

calculate lapse times. Kentucky awaits modifications to its database to compute and reflect accurate data for this SAMM, as well as others. Kentucky reserves response to this finding and recommendation until the modifications are implemented and the data is verified.

Finding 13-07

“Several of KYOSH’s Special Emphasis Programs (SEP) do not target specific hazards or industries to prevent injuries and/or illnesses.”

Recommendation

“KYOSH should implement a process for the development SEPs for the proactive targeting of hazards, industries, etc. to prevent injuries and illnesses.”

Response

Kentucky takes strong exception to OSHA’s finding and recommendation. OSHA’s assertion that “Several of KYOSH’s Special Emphasis Programs (SEP) do not target specific hazards or industries to prevent injuries and/or illnesses” and its recommendation that Kentucky “should implement a process for the development SEPs for the proactive targeting of hazards, industries, etc. to prevent injuries and illnesses” is preposterous.

On page eighteen (18) of the FAME, OSHA states:

“KYOSH developed the Safety and Health Outreach for Target Shooting initiative (SHOT) due to serious concerns regarding employee **exposure to lead** during clean-up operations **at indoor shooting ranges**. Specifically, concerns were raised by evidence of extremely high lead exposure during removal and recycling of catch materials. To address the concern, the Division of OSH Education and Training initiated the Safety and Health Outreach for Target Shooting (SHOTS) initiative. The initiative was an opportunity for employers to take advantage of the consultative services to address employee lead exposure without the risk of monetary penalties. Although SHOTS was primarily concerned with lead clean-up operations at shooting ranges, employers were notified of all hazards encountered during consultative visits to the facilities. The Division of OSH Education and Training sent written correspondence to indoor shooting ranges in Kentucky explaining the nature of SHOTS and offered employers an opportunity to participate. Facilities that declined were referred to the Division of OSH Compliance. Eight (8) facilities received full service industrial hygiene surveys focusing on employee and contractor exposure to lead. These surveys resulted in fifty-two (52) serious Notice of Violations identifying hazards that were subsequently fully abated.”
[Emphasis added.]

The aforementioned Information contradicts OSHA’s finding and recommendation. It is very clear the SHOT initiative was developed **for a specific hazard** (exposure to lead) in **a specific industry** (indoor shooting ranges).

On page thirty (30) of the FAME, OSHA continues:

“KYOSH is also working with several organizations to address combustible dust and health hazards associated with asbestos and poisonings from chemical exposures. **First**, the Kentucky Labor Cabinet has an agreement with the Office of Housing, Building and Construction, Division of Fire Prevention (State Fire Marshal). Under the agreement, during the inspection of industrial facilities by the State Fire Marshal in which the potential for combustible dust hazards may exist, the State Fire Marshal informs employer representatives of the availability of education and technical assistance services that are available from the Kentucky OSH Program’s Division of OSH Education and Training. If there are safety and health issues, the State Fire Marshal will make a referral to the Division of OSH Compliance. If the Kentucky OSH program becomes aware of the existence of fire and safety issues, it will notify the State Fire Marshal. Both the State Fire Marshal and the Division of OSH Compliance will cooperate in the investigation of all fires and explosions involving combustible dust. The Kentucky Labor Cabinet and State Fire Marshal are cooperating to identify facilities and conduct joint investigations, when possible, where combustible dust hazards exist. The Division of OSH Compliance conducted ten (10) combustible dust inspections in FY 2013 resulting in six (6) serious violations, seven (7) other than serious violations, and one (1) repeat violation. **Second**, the Division of OSH Compliance has an agreement with the Division of Air Quality in the Department for Environmental Protection of the Energy and Environment Cabinet in which the Division of OSH Compliance is alerted of any or all asbestos removals conducted in the Commonwealth. Employers are required to notify the Division of Air Quality ten (10) days in advance of any job involving asbestos removal. The Division of OSH Compliance conducted sixteen (16) inspections relating to asbestos in FY 2013 resulting in eight (8) serious violations and seven (7) other than serious violations. **Finally**, the Division of OSH Compliance receives notices of incidents involving occupational exposure to toxins and poisons from The Kentucky Regional Poison Center of Kosair Children’s Hospital. These notices made the Division of OSH Compliance aware of events that may have otherwise been overlooked. Many have resulted in citations and penalties. This informal arrangement and notice provides a mechanism to protect employees from future exposures.” [Emphasis added.]

Again, information in the FAME contradicts OSHA’s finding and recommendation. The aforementioned language clearly demonstrates KY OSH Program activity that targets specific hazards.

Page thirty (30) of the FAME continues:

“The targeting program special study conducted by Federal OSHA focused on two specific programs: Targeted Outreach Program (TOP) for safety and health and Residential Construction. During the onsite evaluation, 48 TOPs case files including 33 safety and 15 health and 20 residential construction files were reviewed.

The State has implemented safety and health general industry targeting procedures however they have not adopted the Federal Site-Specific Targeting (SST) procedures. KYOSH established a state site-specific targeting program known as the Targeted Outreach Program (TOP), which utilizes the OSHA Data Initiative survey results to

generate lists of **employers from the top high hazard industries that are identified.** During FY 2013, the Division of Education and Training targeted employers at specific facilities using 2011 OSHA Data Initiative information. Letters were sent to 190 employers, encouraging them to request consultation services. A total of 101 employers responded to the outreach letters with survey requests. The Division of Education and Training is working with these employers to improve their safety and health program and eliminate hazards in their workplace. Employers who did not respond or chose not to use the voluntary consultation services are referred to the Division of OSH Compliance for inspection.

The Kentucky OSH Program's focus on the highest hazard industries and specific facilities is a direct and effective approach to lowering incident rates. Kentucky has performance goals for the five (5) year strategic plan that strives to reduce Kentucky's total case rate for injuries and illnesses, address the reduction of Kentucky's lost time case rate for injuries and illnesses, and reduce the total case rate in five (5) of the fifteen (15) most hazardous industries in Kentucky. This performance goal combines efforts for both the Division of OSH Compliance and the Division of OSH Education and Training. FY 2011 was the first year of the new five (5) year strategic plan and is considered a baseline year. The 2011 baseline incident rate for all industries was 4.5. The total recordable incidence rate in 2012 for all industries in Kentucky was 4.2, which is an improvement from the baseline rate. Both divisions of the KY OSH Program strive for continuing improvement in the total case rate for Kentucky. The 2011 baseline lost time rate for Kentucky was 2.1. For 2012, the incident rate for lost time events was 2.0, which is a small improvement from the baseline rate. **Efforts of the Targeted Outreach Program (TOP) among other programs are producing positive results."**

Yet again, information in the FAME contradicts OSHA's finding and recommendation. The aforementioned language clearly demonstrates the highest hazard industries and specific facilities are targeted.

With regard to the residential construction focus of OSHA's special study, page thirty-one (31) of the FAME states:

"Kentucky also has a performance goal to address the recidivism rate for repeat, serious, and willful violations in residential construction. The FY 2013 Annual Performance Goal is to reduce the rate for repeat, serious, and willful violations in residential construction. The baseline set in FY 2011 was four (4) willful serious, ten (10) repeat serious and ninety-six (96) serious violations in residential construction. In FY 2013, the Division of OSH Compliance conducted fifty-seven (57) residential construction inspections resulting in four (4) repeat serious violations, seventy-three (73) serious violations, and three (3) other than serious violations. Inspections are conducted in response to complaints, referrals from outside sources, and self-referrals made by compliance officers. There is no written emphasis program or guidance to establish the purpose of the program, scope of the program, expiration of the program, background for the necessity of the program, program procedures, actions, recording of inspections, outreach if necessary, and the evaluation of the program. Most of the inspections are

coded as referrals when many of them could be coded as programmed planned inspections if they are being conducted under an emphasis program. It was recommended that the State develop and implement a written emphasis program document to establish the criteria mentioned above. The Division of OSH Education and Training offers training, upon request, to employers engaged in residential and non-residential, construction.”

Kentucky concurs with OSHA’s statement that “There is no written emphasis program or guidance to establish the purpose of the program, scope of the program, expiration of the program, background for the necessity of the program, program procedures, actions, recording of inspections, outreach if necessary, and the evaluation of the program.” There is no “program.” Kentucky has a state specific fall protection regulation that addresses residential construction. Kentucky’s “program” is neither an SEP nor an LEP; it is a state regulation. OSHA is sorely mistaken characterizing Kentucky’s enforcement activity in residential construction a “program”. OSHA’s mistaken is also evident on page eighteen of the FAME. It states:

“KYOSH conducts programmed inspections in the construction sector, particularly under their local emphasis program (LEP) for residential construction fall protection and the Construction Targeting Program formerly the Dodge system.”

Again, Kentucky has a state specific fall protection regulation that addresses residential construction; it is **not** an LEP. Since 2006, Kentucky has placed an emphasis in residential construction fall protection in response to its specific regulatory requirements, not in response to an LEP. Kentucky questions why OSHA characterizes the state’s inspection activity in residential construction fall protection as an LEP. It has never been an LEP; it is a state specific regulatory requirement. It is also important to note that Kentucky conducted extensive outreach in the area as well.

It appears OSHA has an understanding of the distinction between Kentucky state specific regulations and emphasis programs. Page eighteen (18) of the FAME states:

“KYOSH has a variety of special emphasis program (SEP), some of which are associated with their strategic goals, and some of which are National Emphasis Programs (NEP). However, it was discovered that the special emphasis programs **are actually state standards for which they place emphasis and are not programs.**” [Emphasis added.]

Kentucky’s efforts in other areas OSHA cites in the FAME, specifically amputations, hospitalizations, and residential construction inspections, are founded on state specific regulatory requirements. Kentucky’s efforts are **not** based on an SEP or LEP, they are based on state-specific regulations. Although OSHA acknowledges the distinction between a state standard and an emphasis program in the highlighted language above, OSHA chose to evaluate Kentucky’s efforts in residential construction fall protection as an SEP and issue a SEP related finding and recommendation. OSHA’s Finding and Recommendation 13-07 is misguided, at best, and clearly incorrect. As OSHA acknowledged on page twenty-nine (29) of the FAME, Kentucky “...**has several emphasis programs for general industry and construction.**” Kentucky seeks

clarification from OSHA why a state specific requirement that is not an SEP or LEP was evaluated as an emphasis program.

Kentucky seeks another clarification; on page twenty-nine (29) of the FAME, OSHA states:

“In addition, KYOSH has adopted numerous National Emphasis Programs (NEP) including but not limited to trenching and excavations, lead, hexavalent chromium, and isocyanates. Hazards addressed by NEPs are identified during other inspection activities and are coded accordingly. The State has not developed any State specific emphasis programs related to NEPs.”

Regarding OSHA’s statement, “The State has not developed any State specific emphasis programs related to NEPs,” is OSHA suggesting Kentucky develop state specific emphasis programs for NEPs?

Page twenty-nine (29) of the FAME states:

“Kentucky did not adopt CPL 04-00-001 nor did they develop a state specific directive or guidance for the development of Special Emphasis Programs (SEPs).”

Kentucky concurs and notes that adoption of CPL 04-00-001, Procedures for Approval of Local Emphasis Programs, is not required. Section VI. “Federal Program Change” of the CPL states:

“This instruction describes a Federal program change for which State adoption is not required. States are asked to keep their Regional Administrators informed of State-developed local emphasis programs, experimental programs, local problem solving projects, etc., including any that relate to State Strategic Plan goals; and to coordinate with their Regional Administrator to request assignment of appropriate IMIS identifier code.”

Additionally, the “Purpose” for CPL 04-00-001 states:

“This instruction establishes procedures for the approval of Local Emphasis Programs.”

OSHA’s reference to the CPL with regard to Finding and Recommendation 13-07 is erroneous. The CPL is not for SEP, it is for the approval of local emphasis programs.

Finally, on page twenty-nine (29) of the FAME, OSHA states:

“There is no written emphasis program or guidance for the targeting of amputations. The state should identify trends with amputations such as NAICS codes where amputations are predominant and develop and implement an emphasis program to target specific industries sectors to prevent amputations.”

Kentucky is considering OSHA’s suggestion.

Finding 13-08

“Compliance officers are not provided progressive training opportunities as outlined by the KYOSH training guidelines.”

Recommendation

“KYOSH should implement a process to ensure compliance officer training is compliant with TED 01-00-018 “Training Program for OSHA Compliance Personnel,” as adopted by KYOSH.”

Response

Kentucky is implementing a process to ensure compliance officer training is compliant with TED 01-00-018. Kentucky notes that TED 01-00-019, Mandatory Training Program for OSHA Compliance Personnel, now supersedes TED 01-00-018. Kentucky is evaluating TED 01-00-019.

Kentucky takes exception to OSHA’s assertion that “compliance officers are not provided progressive training opportunities.” It is grossly incorrect. Page forty (40) of the FAME states:

“Additionally, the KYOSH Program remains supportive of the career development and advancement of compliance and consultation personnel. The State pays for employees to take the certification preparation course and reimburses employees that successfully complete the certification exam. Employees that achieve professional certifications also receive a salary increase, range from 10 to 15 percent. In FY 2013, a total of 33 employees had certifications. These certifications include the following: Associate Safety Professional (ASP); Certified Safety Professional (CSP); Certified Industrial Hygienist (CIH); Occupational Health Safety Technologist (OHST); and Construction Certified Health Safety Technician (CCHST). The State also rewards employees that obtain advance degrees. During this period, KYOSH employed a total of two employees with masters or advance degrees however one is no longer with KYOSH. Additionally, the State promotes the Certified Fundamentals Manager, as well as the Certified Public Manager (CPM) degree, which is offered by Kentucky State University in Frankfort, Kentucky. During this period, there were five employees with the CPM certification. Employees that successfully complete the two-year CPM Program receive a five percent pay incentive.”

Furthermore, page forty-eight (48) of the FAME states:

“Goal 3.4: Encourage and aid advanced degrees for OSH Program employees.

During this period, two (2) staff members obtained master’s degrees and two (2) other staffs members enrolled in the program. Since 209 [sic], the Division of OSH Compliance has supported seven (7) compliance officers in attaining Masters of Science degrees. This goal was effectively accomplished during FY 2013.”

Kentucky clearly supports progressive training opportunities for compliance officers.

Finding 13-09 (formerly 10-8 and 9-20)

“KYOSH’s Division of OSH Compliance does not have an internal self-evaluation program as required by the State Plan-Policies and Procedures Manual.”

Recommendation

“KYOSH should implement a process to ensure that an internal self-evaluation program possessing integrity and independence is developed and implemented. Kentucky should ensure that periodic evaluations of all areas of the program are evaluated and documentation of the evaluations is made available to federal OSHA.”

Response

The Division of OSH Compliance has always approached and conducted internal evaluations on several fronts, such as internal fiscal checks and balances, employee on the job evaluations, review of employee work product, and a host of other internal policies and procedures. Kentucky’s internal evaluation process had been in place for decades.

For some time now, the Division of OSH Compliance has worked toward consolidation of its internal self-evaluation practices into a single written document. Kentucky is near completion of the document.