



South Carolina
Department of Labor, Licensing and Regulation



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Mark Sanford
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Adrienne Riggins Youmans
Director

October 18, 2010

Ms. Cindy Coe, Regional Administrator
Atlanta Federal Center
U.S. Department of Labor/OSHA
61 Forsyth Street, SW, Room 6T50
Atlanta, Georgia 30303

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Dear Ms. Coe:

The South Carolina Department of Labor, Licensing and Regulation was disappointed both in the nature and tone of the South Carolina FY 2009 Enhanced FAME report. This state has operated a comprehensive OSHA state plan since 1973 and is proud of its record of providing the workers of this state with safe and healthy workplaces. We measure ourselves by the state's injury and illness rates, which are among the lowest in the country. We are also proud that we continue to reduce fatalities at workplaces under our jurisdiction. Nevertheless we are aware that our job will not be complete so long as any worker in this state suffers a preventable injury or illness.

As a long time state plan, SCOSH has welcomed the views of our peers, whether they are outside auditors of our financial records or state or federal monitors of our programs or management. Over the years, these reviews have strengthened our organization in many ways. Review of the 2003-2008 FAME reports on the SCOSH program have consistently informed us that we have met our basic program requirements and performed effectively on mandated activities. Each year there have been recommendations to address minor deficiencies and each year we have responded with renewed efforts to protect the state's workers. With this background, it is difficult to comprehend how a program that supports some of the most consistently low injury and illness rates in the country and which for many years has been considered effective can suddenly be described as "needing significant modification."

The list of "problems" described in the executive summary to the FY 2009 Enhanced FAME report for South Carolina are noticeably different from those documented in the report itself. It is therefore, impossible to provide a meaningful response to both. LLR has chosen to address the formal recommendations since the report makes some attempt to provide a factual underpinning for them. It is more difficult to identify the factual basis for the list of "problems."

Ms. Cindy Coe, Regional Administrator
October 18, 2010
Page Two

In response to the specific recommendations, the South Carolina Department of Labor, Licensing and Regulation offers the attached comments and assurances. The State of South Carolina looks forward to continuing the on-going dialog with the United States Department of Labor, Occupational Safety and Health Administration, concerning our mutual efforts to reduce preventable occupational injuries and illnesses in South Carolina. We point out that there will be a change in administration in South Carolina in January 2011, which will result in a new individual being named as state designee. The FY 2009 Baseline Special Evaluation Report and this Response will be included in the transition package prepared for the new designee.

With kindest regards, I am

Very truly yours,

/Signed/

Adrienne R. Youmans

ARY:pf

Attachment

ATTACHMENT

Recommendation 1: Because the South Carolina Department of Labor, Licensing and Regulation does not independently promulgate extensive safety and health standards, it has few uses for detailed findings of causation for workplace fatalities. State investigation is focused on determining the factual conditions at the time of the incident. Based upon those conditions, the state also focuses on whether the employer complied with safety and health standards and adequately addressed all recognized hazards on the job site. Compliance with the standards and the general duty clause are imperatives, whether or not the failure to do so resulted in a particular injury. The state will continue this focus. We point out that each fatality inspection file does include a narrative description of the incident in addition to the report filed by the employer and that no enforcement action in South Carolina has ever failed due to a lack of detailed findings of causation in a file.

Recommendation 2: Improving the quality of case file documentation is an on-going focus of the South Carolina program. SCOSH does use checklists and fill-in-the-blank forms to assure that each compliance officer is reminded to address each aspect of a report necessary to support litigation on the file. SCOSH files also contain extensive photographs and diagrams, as well as appropriate copies of workplace operating procedures and other documents used to promote safety or health. Since our FY 09 review, the issue of deficient documentation in the inspection case file has been addressed through several training sessions and routine staff meetings. Compliance Officers regularly question workers during inspections and record their comments. Language barriers do present problems on some inspections. While the South Carolina Department of Labor, Licensing and Regulation can provide in-house translation for Hispanic workers, we must often rely upon company officials to translate Vietnamese, Thai, and eastern European languages. Because LLR employs fewer than forty persons trained in OSHA compliance, we cannot translate the wide variety of languages that are used on worksites in the state. We would be interested in an MOU with the USDOL to access their in-house translators in these languages.

Recommendation 3: The South Carolina FOM and the federal FOM give the same instructions to compliance officers concerning classification of violations in terms of severity. Because the S.C. Administrative Procedures Act also requires that the state be able to demonstrate that its decisions are not characterized by abuse of discretion or unwarranted exercise of discretion (S.C. Code § 1-23-380), South Carolina has established guidelines for consistency among compliance officers when addressing common hazards. The discussion in support of this recommendation does not identify any fact situation where South Carolina Compliance Officers failed to follow the instructions of the FOM in classification of a violation in terms of severity.

Recommendation 4: The goal of OSHA enforcement is straightforward: to ensure compliance with safety and health regulations and thus, to reduce the number of workplace deaths, injuries and illnesses. OSHA resources have always been limited. At the recent National Safety Conference, Assistant Secretary Michaels acknowledged that OSHA cannot police every work force. He stated that the agency must instead "think of creative ways to have a bigger impact. The key to worker safety and health is focusing on prevention." Choices must be made between increasing the number of inspections and increasing the time spent on a single inspection. South

Carolina has consistently chosen to increase the number of inspections. Other states and the USDOL have made a different decision. South Carolina does not ignore the safety or health of workers when addressing other-than-serious hazards. However, citations are not issued to employers who correct other-than-serious violations in the presence of the compliance officer during the inspection. This practice allows South Carolina to reduce the time to write and process reports and, in that way, to inspect a higher percentage of employers in the state. The effectiveness of this approach should be judged on the basis of the injury and illness rates in the state, which are some of the lowest in the nation.

Recommendation 5: SC OSHA established a policy for reviewing abatement submitted by a company many years ago. Currently the South Carolina Code of Regulation outlines procedures for reviewing and documenting violation abatement. According to your report, you identified a couple of files where abatement had been reviewed during the Informal Conference, but the hearing office failed to document this in the file. This was brought to the attention of the hearing officer and steps were taken to make this a part of the Informal Conference policy. There was one case file where a follow up inspection was not assigned according to the policy. In this case, a health file was reviewed by a safety supervisor who was unaware of the mandatory policy for assigning certain health cases for follow-up inspections. The policy has now been updated to require all health cases to be reviewed by a health supervisor or health manager.

Recommendation 6: The E-FAME report recognizes that only a very small percentage of citations in South Carolina are contested. The low contest rate is valuable in assuring prompt abatement and the ability to schedule appropriate follow-up inspections. The EPO procedure is one of the enforcement tools long used by SCOSH to achieve rapid abatement of identified violations. The EPO procedure has been regularly revised over the last twenty years, always seeking a way to use citations to improve workplace safety. The USDOL has monitored the state program since 1973 and has generally supported the goals of the EPO procedure. The state plan will review the frequency with which individual employers use the program and the guidelines for negotiating workplace safety and health enhancements which are not required by current standards.

Recommendation 7: South Carolina does provide state plan changes, adoption documents, and state procedures for comparison purposes to federal OSHA on a timely basis. The example cited in the discussion (FOM) involves a state decision not to adopt a federal management document. The comparable state procedures have always been available to federal OSHA for comparison purposes. Neither Section 18 of the Act nor the indices of effectiveness enumerated in 29 CFR 1902.4(C) require that the state have procedures which are equivalent to those utilized by USDOL. Rather, the policy of the USDOL has been to “encourage the assumption by the States of the fullest responsibility for the development and enforcement of their own occupational safety and health standards.” 29 CFR 1902.1

Recommendations 8-A through 8E: The State of South Carolina has repeatedly informed the USDOL that in the context of mixed jurisdiction whistleblower and in the context of cross-border employment cases, the best solution may be for the South Carolina Department of Labor, Licensing and Regulation and the United States Department of Labor to recognize that the conditions of employment in 2010 are often more sophisticated than they were in 1973 and that for the efficiency of the administration of a national whistleblower program, it is appropriate for the state to return this jurisdiction to the federal government.

Each year both state and federal OSHA programs must deal with complaints that implicate more than one whistleblower statute and which often cannot be properly characterized until some investigation is complete. It is inefficient for USDOL to begin an investigation under one of the non-OSHA statutes and to refer it to the state midway. Similarly, it is inefficient for the state to begin an OSHA based investigation and to discover that the facts implicate one of the other whistleblower protections. In addition, each year the state receives employee complaints based upon management actions taken at a work site in South Carolina by employers who are not located in this state and who are not subject to the state's administrative subpoena authority after they leave the state. When the employer and employees have returned to their home state, investigations by a state agency are greatly impeded. While recent evaluations by the GAO and the IG involving the federal whistleblower programs make clear why the USDOL has not reacted positively to this proposal, the South Carolina Department of Labor, Licensing and Regulation continues to believe that it is appropriate for the state to return this jurisdiction to the federal government.

Recommendation 9: South Carolina is very proud of our VPP program. State eligibility requirements for becoming a SC Palmetto Star site are more stringent than those of the federal voluntary protection program. According to your recommendations, SCOSH was actually using the two procedures you identified; they had just not incorporated them into the policy manual. This was an oversight on our part and that has now been corrected.

Recommendation 10: Several years ago, SCOSH developed a formal Internal Monitoring program in addition to the Strategic Plan. The work of maintaining both programs, which required quarterly and annual reports became very time consuming and took time away from inspections and report reviews. Upon the recommendation of a past federal area director, the reports were incorporated into a more inclusive SOAR report. The South Carolina OSHA program is not a large program, having fewer than 75 inspection and staff employees. Monitoring has always been an integral part of our program and now, with the deployment of our new database system, data can be tracked and reports run instantly. Through this new resource, SCOSH will identify the activities that need to be closely monitored and tracked for performance. These goals will be outlined in an annual policy and the process will be discussed with Federal Area Director during our review period.