

**ENHANCED FEDERAL ANNUAL MONITORING
EVALUATION (FAME)
REPORT OF THE
TENNESSEE
OCCUPATIONAL SAFETY AND HEALTH PROGRAM**

DESIGNATED STATE AGENCY:

**TENNESSEE
DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT,
DIVISION OF OCCUPATIONAL SAFETY AND HEALTH**

PERIOD COVERED BY THIS REPORT:

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REPORT PREPARED BY:

**U.S. DEPARTMENT OF LABOR
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
REGION IV, ATLANTA**

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I. EXECUTIVE SUMMARY

A. Introduction

The Tennessee Occupational Safety and Health Administration (TOSHA) was created by legislation in 1972 and became operational on July 5, 1973. The program operated as a dual-designee with the health functions housed in the Tennessee Department of Health and the safety functions in the Department of Labor until July 1977. At that time the General Assembly enacted legislation to transfer the health functions to the Department of Labor. The Tennessee Occupational Safety and Health Administration program was certified in May 1978 and received final 18(e) approval on July 22, 1985. The Tennessee program covers all private and public-sector employees within the state, with the exception of railroad employees, federal employees, maritime employees (longshoring, shipbuilding/shipbreaking, and marine terminal operations), private contractors working at Government-owned/contractor-operated (GOCO) facilities, Tennessee Valley Authority (TVA) employees and contractors operating on TVA sites, as well as U.S. Postal Service employees.

The General Assembly enacted legislation giving TOSHA the mission of ensuring that employers furnish a safe and healthful place of employment which is free of recognized hazards. TOSHA is comprised of three sections, the Compliance Section, the Consultative Section, and the Training and Education Section. The Compliance Section is responsible for enforcement of the Tennessee Occupational Safety and Health Act of 1972, with emphasis on employee exposures to chemical and physical hazards. The Consultative Services Section offers a free consulting program to smaller employers who seek safe and healthful working conditions for their employees. The Training and Education Section assists employers, employees, and their representatives in reducing safety and health hazards in their workplaces and in complying with the requirements of TOSHA standards and regulations. At the time of the onsite monitoring visit, there were a total of 83 positions funded under the 23(g) grant. The approved benchmark for TOSHA is 22 safety compliance officers and 14 health compliance officers assigned to field offices throughout the state. At the time of this review TOSHA was meeting the benchmark for health and were two safety compliance officers short, however they were in the process of hiring six safety and two health compliance officers. During this period the TOSHA program did not have any 100% state funded positions.

TOSHA's primary objective is to improve occupational safety and health in workplaces throughout the state. The worker population in Tennessee consists of approximately 3,080,000 people. There are approximately 140,000 employers in the state with a comparatively high percentage of construction work sites. The program services are administered through a central office in Nashville and six field offices located strategically throughout the state in Knoxville, Memphis, Chattanooga, Kingsport, Jackson and Nashville.

Employee protection from discrimination related to occupational safety and health [11(c)] is administered by TOSHA through the central office in Nashville. There are a total of three investigators, including one compliance manager and two compliance supervisors. Discrimination cases found to be meritorious are prosecuted by the state Attorney General.

The Tennessee OSH Review Commission is a quasi-judicial body empowered to hear and rule on appeals regarding citations issued by the State Program. The OSH Review Commission may affirm, modify or revoke a citation, as well as any monetary penalty. The Commission consists of three members appointed by the governor, to serve on the body for three-year terms.

Private sector consultative services are provided through a 21(d) Grant with the Tennessee Department of Labor and Workforce Development to employers, especially smaller employers, to assist them in achieving safe and healthful workplaces for their employees. The Safety and Health Achievement and Recognition Program (SHARP) is administered through consultative services.

B. Summary of the Report

This report represents an evaluation of the state's performance during the first year of the state's current Three-Year Strategic Plan, as well as the overall performance. This report indicates that TOSHA has made significant progress toward the accomplishment of its established goals. In fact, the state has accomplished all but one of its performance goals. Therefore, that section of the report does not contain any formal recommendations for improvement. However, during the comprehensive monitoring review nine recommendations were made to Tennessee to improve the performance of the State Program. These recommendations addressed: procedures to improve case file documentation; the enhanced screening of complaints; procedures to improve communications with the next-of-kin; and the development of an effective internal self-evaluation system, among other issues. Additionally, during this process stakeholder interviews were conducted with several representatives from industry groups, labor unions and professional organizations. Overall these stakeholders voiced confidence in TOSHA's ability to perform its occupational safety and health mandated activities.

C. Special Study Methodology and Other Monitoring

This report was prepared under the direction of Cindy A. Coe, Regional Administrator, Region IV, Atlanta, Georgia, and covers the period of October 1, 2008 through September 30, 2009. The Tennessee Department of Labor and Workforce Development, Division of Occupational Safety and Health (TOSHA) administers the state's OSHA program under the direction of James G. Neeley, Commissioner, and John Winkler, TOSHA Administrator. This is OSHA's report on the operation and performance of the Tennessee Department of Labor and Workforce Development's Occupational Safety and Health Program. The report is based on the results of an onsite monitoring visit, TOSHA's State Office Annual Report (SOAR) for FY 2009, as well as the State Activity Mandated Measures (SAMM) Report and State Indicator Report (SIR) ending September 30, 2009. On site monitoring for this evaluation included case file reviews, formal interviews with TOSHA staff, and interviews with stakeholders. Information obtained during routine monitoring of the Tennessee program by Federal OSHA's Regional and Nashville Area Offices was also used as a basis for this evaluation

D. Recommendations

Recommendation 1: In accordance with the state's Field Operations Manual, all field notes, diagrams, photos, and any other documentation obtained or produced during inspections should be included in the case file.

Recommendation 2: Tennessee's case file should include a diary to document: significant actions; communication between management and the CSHO; communication between TOSHA and the employer.

Recommendation 3: Management should evaluate complaints including formal complaints to determine when an investigation would be more appropriate to allow a more effective use of their resources.

Recommendation 4: At the conclusion of a fatality investigation the state should send the next-of-kin a letter and a copy of any citation(s) issued, or a letter advising them that no violations were found. The next-of-kin should be informed of informal conferences and hearings, as well as any changes in the citations as a result of a settlement or hearing. A copy of the letter should be maintained in the file.

Recommendation 5: Tennessee should assure that each case file includes documentation of the company's injury and illness experiences and that the data is entered into the IMIS.

Recommendation 6: Tennessee should assure that each violation is documented accurately for severity and probability and reviewed for proper classification.

Recommendation 7: Tennessee should require compliance officers to establish and document specific knowledge to support violations.

Recommendation 8: TOSHA should develop and effectively implement an internal self-evaluation program to assess the overall performance of the VPP program and ensure that proper controls are in place.

Recommendation 9: Tennessee should develop and implement a formal internal self-evaluation program. The procedure should assure that internal evaluations possess integrity and independence. The resulting report from these evaluations should be made available to federal OSHA.

II. NEW MAJOR ISSUES

There were no new major issues in Tennessee in fiscal year 2009.

III. Assessment of State Performance

A. Assessment of State Progress in Achieving Annual Performance Goals:

Over the past 10-years TOSHA has implemented two Five-Year Strategic Performance Plans. The program's effectiveness has largely been measured by evaluating their ability to achieve the goals contained in the plans. In the past TOSHA has demonstrated a high degree of success accomplishing its targeted goals. Currently TOSHA is operating under a new Three-Year Strategic Performance Plan and the State once again appears on track to achieve the desired outcome. Although, the State did not achieve all of its goals in FY2008, the program was not offered any formal recommendations. In general, these goals address the effective elimination and control of hazards in several industries, such as construction, health care, metal working and others.

Goal 1.1: Eliminate 7,000 serious violations/hazards in workplaces where interventions take place.

The table below illustrates the State's performance in this area. Through a combination of compliance inspections and consultation visits they eliminated over 8,000 workplace hazards. Therefore, this goal was met by the State.

	Compliance	Consultation	Total
Inspections/Visits	2,380	554	2,926
Serious Violations/Hazards	5,209	2,968	8,177
Non-Serious Violations/Hazards	3,118	359	3,477
Repeated Violations	37	N/A	37
Willful Violations	8	N/A	8
Regulatory Hazards	N/A	237	237
Total Violations/Hazards	8,372	3,564	11,936

Goal 1.2: Reduce carbon monoxide exposures for 300 employees each year.

Carbon Monoxide (CO) levels have been documented and reduced through elimination and engineering controls. TOSHA has a Special Emphasis Program (CPL-TN-04-00-001 – Effective Date 09/16/1999) for Employee Exposure to Carbon Monoxide (CO). Safety compliance officers are cross-trained to identify sources and potential exposures to carbon monoxide so they can make good referrals. Compliance officers are required to address carbon monoxide on every inspection. Activity related to this program is tracked and communicated with the field on a monthly basis. In fiscal year 2009, Compliance and Consultation documented the elimination of 753 hazards impacting 273 employers resulting in reducing the exposure of 6,295 employees. Therefore, this goal was met by the State.

Goal 1.3: Reduce noise exposures for 300 employees each year.

The State OSHA Annual Report (SOAR) indicates that noise levels have been reduced through engineering and hearing protection in 28 workplaces, affecting over 1,017 employees. TOSHA has a

Special Emphasis Program for Employee Exposure to Noise (CPL-TN-04-00-001 – Effective Date 09/16/1999). Safety compliance officers have been cross-trained to identify noise sources in order to make referrals. All safety compliance officers have been provided with sound level meters and are required to screen for noise during inspections. In addition, noise is addressed during outreach and training conducted by the state. During fiscal year 2009, Compliance and Consultation documented the 379 hearing conservation hazards in 118 workplaces and reduced hazardous noise exposure of 1,741 employees. Therefore, this goal was met by the State.

Goal 1.4: Reduce the number of needle-sticks in hospitals and Ambulatory Surgical Centers by 1 percent.

TOSHA has a Targeting Initiative using the Bloodborne Pathogens standard to address needle-stick injuries in hospitals and ambulatory surgical centers. As part of this initiative, Tennessee obtained 2005, 2006, 2007, & 2008 Sharps Injury Logs from Tennessee hospitals and ambulatory surgical centers. TOSHA trainers performed training sessions for these facilities in six areas of Tennessee. Targeted inspections were conducted at 102 workplaces in fiscal year 2009. A total of 644 hazards were identified during these inspections. A comparison of the 2005, 2006, 2007, and 2008 needle-stick logs were made. The results indicate a reduction of 11.7 % in four years. Therefore, this goal was met by the State.

Goal 1.5: Reduce the number of fatalities due to falls by 5 percent.

During this period the State experienced 10 fatalities due to falls. This represents a reduction from the previous year, when the State experienced 11 fatalities due to falls. However, it did not meet the reduction target of 1.7 percent, which is necessary to achieve the five percent in three-years. During this period TOSHA informed employers and employees about the State's Fall Hazard Special Emphasis Program (CPL-TN-04-00-004 – Effective Date 09/24/1999) during each inspection and consultation visit. TOSHA conducted inspections and consultation visits at a total of 544 workplaces where fall hazards were identified.

In FY2009, TOSHA also worked cooperatively with the Associated General Contractors (AGC), Associated Builders & Contractors (ABC), Tennessee Road Builders Association (TRBA), American Society of Safety Engineers (ASSE), Home Builders Association of Tennessee and the Plumbing Heating & Cooling Contractors Association to successfully coordinate a **“Fall Protection Stand- Down.”** Employers participating in this effort stopped work for approximately one-hour and provided workers with a training session focused on fall protection. During our onsite review, TOSHA was encouraged to conduct a trend analysis to better identify the workplaces of industries experiencing the majority of the fall fatalities and the development of a hazard alert letter was discussed.

Goal 1.6: Reduce the DART in Construction by 5 percent.

Tennessee continued to place emphasis on construction hazards by conducting 731 inspections documenting 1,955 hazards. Program inspections are conducted from the University of Tennessee's Dodge Construction Scheduling System and from Special Emphasis Programs including Fall

Protection, Trenching, and Carbon Monoxide. The Construction industry DART rate was 2.0 in 2008, compared to the 2007 DART of 2.8.

Goal 1.7: Reduce amputations injuries in the workplace by 5 percent.

Tennessee has a Special Emphasis Program for Amputations (CPL-TN-03-00-003 – Effective Date 10/27/06) which is identical to the National Emphasis Program for Amputations. In addition, TOSHA uses the state Worker Compensation data to identify accidents involving amputations. The data is reviewed monthly to identify and conduct investigations of these accidents. TOSHA has achieved this goal. TOSHA conducted inspections at 334 worksites and identified 681 hazards related to amputations during fiscal year 2009. During this period amputations decreased to 132 which is a 69.7% decrease from 2004. According to Tennessee Worker’s Compensation Data, Tennessee has experienced a 23.7% decrease in amputations from 2008.

Goal 2.1: Train 27,000 people in occupational safety and health.

TOSHA personnel performed over 800 training sessions during this period, which reached over 12,000 workers. These safety and health training seminars addressed a wide range of topics, including the following:

- | | |
|-------------------------------|-------------------------------|
| Accident Investigations | Basic Safety |
| Bloodborne Pathogens | 10-hour Construction Course |
| Electrical Safety | Fall Protection |
| Fire Protection & Life Safety | Powered Industrial Trucks |
| Hazard Communication | Maintenance Related Standards |
| Noise | Laboratory Safety and Health |
| Lockout/Tagout | Machine Guarding |
| Respirator Requirements | Office Safety |
| Public Sector Update | Safer Needle Devices |
| TOSHA Overviews | Train the Trainer |
| Trenching | Walking and Working Surfaces |

Goal 2.2: Intervene and assist in the improvement of 2,550 occupational safety and health programs.

TOSHA consultation performed 493 visits with program assistance. These program assistance visits provide the company with evaluation of their safety and health program and provide recommendations on how those companies can improve their programs. Additionally, safety and health program violations were cited on 4,760 occasions during 1,303 inspections. These program violations included: emergency action plans, noise, emergency response, personal protective equipment assessment, respirators, confined space, lockout/tagout, fire prevention, bloodborne pathogens, hazard communication, excavations, process safety management and construction training.

Goal 2.3: Provide the Volunteer Star Award to 3 employers with exceptional safety and health programs.

TOSHA accomplished this goal by approving four new companies for participation in the Volunteer Star Program during FY 2009.

Goal 2.4: Provide the SHARP Award to two employers with exceptional safety and health programs.

Tennessee OSHA Consultation Services accomplished this goal by approving three new companies during FY 2009.

B. Assessment of State Performance on Mandated and Other Related Activities:

Enforcement Program

For this evaluation, a total of 152 inspection case files, plus 16 complaint investigation files were reviewed. All fatality investigation files for fiscal year 2009 were reviewed and, in addition, a random selection of files were selected from the following categories: programmed general industry safety, programmed general industry health, programmed construction safety, programmed construction health, referrals, complaint inspections and complaint investigations. This was a small percentage of the 2,375 inspections conducted in 2009 but is believed to provide an accurate picture of the enforcement program throughout the state, when coupled with interviews and a review of procedures and data. Data associated with the case files reviewed was representative of data for all inspections. A comparison of IMIS data for fiscal years 2006 through 2009 did not indicate any notable variations.

Overall, case files that were reviewed contained sufficient documentation. According to officials and compliance officers, field notes are destroyed at the instruction of the state's attorney when the compliance officer completes the violation form (1B) and violation worksheet (1B Worksheet). Field notes need to be maintained to support and provide further evidence of the violation during settlement and legal proceedings. In addition, field notes are critical to the case file review and audit process. The states guidance regarding field notes is contained in Chapter 5 Section XII –“Inspection Records. A. Generally. 1. Inspection records are any record made by a CSHO that concern, relate to, or are part of, any inspection, or are a part of the performance of any official duty and 2. All official forms and notes constituting the basic documentation of a case must be part of the case file. Original field notes, if retained by the CSHO, are part of the inspection record and shall be maintained in the file. Inspection records also include photographs (including digital photographs), negatives of photographs, videotapes, DVDs and audiotapes. Inspection records are the property of the State of Tennessee and not the property of the CSHO and are not to be retained or used for any private purpose.”

It is the state's contention that information contained in the field notes are transferred to the violation (1B Worksheet) and the notes are no longer necessary at that point. In addition, the state's attorney

feels certain information contained in field notes could potentially have a negative impact in litigation. Only photos and documents that the CSHO includes in the final case file are maintained in the official file when it is scanned. The compliance officers are required to maintain all inspection photos until the case becomes a final order. The state's directive (Chapter III.G.2 – Photographs and Videotapes) requires that all photographs and videotape be maintained in the case file. Except for the fatality files, many of the case files reviewed did not contain witness or management statements. Interviews and photographs were referenced in the file, but federal reviewers were not able to see the documentation along with field notes that had been in the file during the course of the inspection and while it was open. In addition, most files did not contain a case file diary sheet or log to document significant actions associated with that particular file such as calls or correspondence between TOSHA and the employer, updates in the case, informal conference and contest information, and anything else of significance. This is addressed in Chapter 5 of the state's Field Operations Manual. Section X - Case File Activity Diary Sheet states "All case files shall contain an activity diary sheet, which is designed to provide a ready record and summary of all actions relating to a case".

Recommendation 1: In accordance with the state's Field Operations Manual, all field notes, diagrams, photos, and any other documentation obtained or produced during inspections should be included in the case file.

Recommendation 2: Tennessee should include a diary in the case file to document: significant actions; communication between management and the CSHO; communication between OSHA and the employer, and any other pertinent information.

Complaints

Tennessee's procedures for handling complaints alleging unsafe or unhealthful working conditions are very similar to those of Federal OSHA. These procedures are covered in TOSHA Instruction CPL-TN 02-00-140 (2006, December) – Complaint Policies and Procedures. Inspection data indicates that Tennessee handled 559 complaints in 2009, and conducted 303 complaint inspections. According to the State Activity Mandated Measures (SAMM) report, Tennessee responds timely to complaints. Complaint investigations were initiated within an average of 4.3 days with a goal of 5 days, and complaint inspections were initiated within an average of 9.37 days with a goal of 30 days.

Tennessee has an established complaint intake procedure, with complaints transferred to an available safety or health manager or supervisor depending on the nature of the complaint. The state places a great deal of emphasis on customer service and assuring that each complaint is given attention consistent with the complaint directive. Current employees are always provided the opportunity and encouraged to formalize their complaint. As a result, Tennessee inspects a relatively high percentage of complaints that have been formalized with the signature of a current employee as well as complaints alleging very serious hazards. Inspections are always conducted for formalized complaints regardless of the nature of the alleged hazard. In fact, 30% of the 31 complaint inspection case files reviewed were in-compliance inspections. It has also resulted in multiple complaints being

held due to the lack of available resources to conduct the inspections. The state has effective processes in place for assuring that each complaint is entered in IMIS, evaluated by a supervisor, and responded to timely. Complainants are also notified of the status of their complaints timely. However, management interviews indicated that they are reluctant to deviate from the directive which provides that a signed complaint from an employee is justification for an inspection. However the directive also allows for management review and discretion for determining if a complaint will be handled by inspection or investigation. It is recommended that management evaluate complaints including formal complaints to determine when an investigation would be more appropriate to allow a more effective use of their resources.

This evaluation included reviews of 16 complaint investigation files (those complaints handled by letter, or Tennessee's phone, fax and fix procedure) and 29 complaint inspection files. Several standard IMIS reports of complaint activity were reviewed. Even though the state's timeliness of responding to complaints was well within the benchmark, 11 additional complaint files that were showing late on the IMIS, were reviewed. A review of the IMIS reports showed that approximately 92 of the 303 (30.4%) complaint inspections conducted by TOSHA, were in-compliance. It was determined that the state was conducting inspections of signed formal complaints where it was questionable if a serious hazard existed or in many instances there was no standard to enforce. The states use of their resources could be more efficient conducting investigations of these complaints.

A review of the complaint inspection files revealed that, with the exception of an isolated instance, each allegation was thoroughly investigated, and response letters provided clear and thorough information to the complainants. Written responses to the complainant were provided timely and procedures for updating the IMIS with complaint activity were being followed, however established procedures for tracking the status of complaints were not being followed consistently.

During fiscal year 2009, all complaint investigations addressed by letters were handled appropriately, in accordance with the state's directive. Complainants were kept informed during the course of the investigations and were provided with timely responses to the findings. There were several instances where the employer did not respond to a complaint, as required, and the state was late in following up with the employer to get a response and/or conducting an inspection. This issue came to the attention of Federal OSHA in the course of a Complaint About State Program Administration (CASPA) investigation in fiscal year 2009. It was determined that due dates for complaint responses should be more thoroughly tracked to ensure that contact is made with the employer in a timely manner when responses are not received. During this CASPA investigation, Tennessee agreed that due dates for complaint responses needed to be tracked to assure timely follow-up. Shortly before this evaluation began, the final CASPA response was provided to the state, with the following recommendation:

“Due dates for complaints responses should be thoroughly tracked to ensure that contact is made with the employer in a timely manner when responses are not received. TOSHA should ensure that the requirements and procedures contained in TOSHA Instruction CPL-TN 02-00-140 (2006, December) – Complaint Policies and Procedures are followed. “

Prior to the completion of this evaluation, Tennessee completed the review of the CASPA recommendation and provided a response on February 8, 2010. The state agreed with the finding and determined that the complaint should have been handled in a more timely manner. The state's response to this recommendation was implemented during this evaluation. The IMIS reports for complaint tracking are being used on a weekly basis to identify complaints requiring follow-up to assure they are handled timely.

Recommendation 3: Management should evaluate complaints including formal complaints to determine when an investigation would be more appropriate to allow a more effective use of their resources.

Fatalities

In fiscal year 2009, Tennessee investigated 49 accidents of which 33 were workplace fatalities. The number of construction deaths decreased from 17 in 2008 to 14 in 2009, while the number of fatalities in general industry increased from 13 in 2008 to 17 in 2009 (4 of those fatalities occurred in two incidents). In addition, there were 2 public sector fatalities in fiscal year 2009 compared to 3 in fiscal year 2008. Tennessee's procedures for investigation of occupational fatalities are essentially the same as those of Federal OSHA. Investigations are normally initiated within one day of notification of the fatality. During this evaluation all FY 2009 fatality investigation files were reviewed. Tennessee has implemented procedures to assure the quality of fatality investigations. A supervisor works closely with the compliance officer when the case file is being prepared to assure that the case documentation is legally sufficient. Fatality investigations are reviewed by at least four levels of management including the Supervisor, Compliance Manager, Assistant Administrator, and Administrator. Depending on the circumstances, an additional review may be conducted by the staff attorney. The determination must be signed off on by the TOSHA Administrator. The TOSHA Administrator signs all citations including fatality related citations. Informal settlement agreements related to fatality cases also receive a higher level of review and approval.

No major problems were noted in the fatality investigation files reviewed. Files included statements and other documentation that supported the violations cited, and the cause of the accident was clearly explained. All of the fatality files contained very detailed narratives explaining the accident, the investigation, and the findings. A total of nine cases or 27% were in-compliance or did not have fatality related violations including four (12.1%) that were in-compliance and five (15.2%) that did not have fatality related violations. This review only identified one case where there appeared to be a violation that may be related to the fatality, however field notes and possibly photos and other documents may not have been included in the final case file. The factors leading to the decision not to issue a fatality related violation on these cases were well documented in the fatality narrative. The files resulted in a total of 55 serious violations, and 21 non-serious violations. For citations that were resolved by means of an informal settlement agreement, the percent of penalty reduction was very low and no violations were deleted or reclassified. All of the fatality investigations involved only partial inspections. The need and potential benefit of expanding the investigation, into a comprehensive inspection, was discussed with the state.

Tennessee has a longstanding procedure for communication with family members of deceased workers. Letters are sent to the next-of-kin at the beginning of the investigation informing them of the investigation and that “the results will be made available upon their request without charge”. According to the state’s procedures, the investigating compliance officer prepares the correspondence and sends it to the TOSHA Administrator for signature. At the conclusion of the investigation, there is no contact with the next-of-kin unless it is initiated by them. It is the contention of the state that many of the next-of-kin may not want to be contacted. It is recommended that at the conclusion of the investigation the state should send the next-of-kin a letter and a copy of any citation(s) issued, or a letter advising them that no violations were found. The next-of-kin should be informed of informal conferences and hearings, as well as any changes in the citations as a result a settlement or hearing. A copy of the letters should be maintained in the file.

Recommendation 4: At the conclusion of the investigation the state should send the next-of-kin a letter and a copy of any citation(s) issued, or a letter advising them that no violations were found. The next-of-kin should be informed of informal conferences and hearings, as well as any changes in the citations as a result a settlement or hearing. A copy of the letter should be maintained in the file.

Targeting Inspections

According to inspection statistics run for this report, Tennessee conducted 2,375 inspections in fiscal year 2009, 1,829 of which were programmed. This includes many of the 786 inspections conducted in the construction sector. According to the State Indicator Report, 74.1% of programmed safety inspections and 76.5% of programmed health inspections had violations. Additional data indicates that an average of 3.1 violations were cited per inspection, and that 62.0% (safety) and 46.4% (health) of the violations were classified as Serious, 0.25% Repeat, and 0.12% Willful (5 grouped willful violations were a result of a programmed planned health inspection.)

Tennessee has a variety of special emphasis programs, some of which are associated with their strategic goals, and some of which are National Emphasis Programs. The state also has safety and health general industry targeting procedures, and has adopted the Federal Site-Specific Targeting (SST) procedures. In addition, the state adopted and continues to utilize Federal OSHA’s previous targeting and selection system (CCP) to supplement the SST. The state has an additional targeting system to address amputation hazards that uses workers compensation data to identify employers who have experienced accidents involving amputations. These inspections have lower priority than SST inspections.

Tennessee conducts a high number of programmed inspections in the construction sector, particularly under their Special Emphasis Program for fall hazards and trenching and excavation as well as the Dodge system. These are associated with their strategic goal to reduce construction fatalities due to falls each year and to reduce the DART rate in construction each year. Many programmed construction inspections are partial in scope due to the local emphasis programs for

construction activities. In fiscal year 2009, Tennessee identified 1,955 construction hazards impacting 731 companies.

Tennessee also has a public sector inspection procedure. By state law, all public sector entities are required to be inspected at least every two years. According to the SAMM report, 23.9 percent of inspections were conducted in the public sector in 2009.

During the review of general industry programmed inspections, it was noted that a number of case files did not include injury or illness data from the OSHA 300 logs or an explanation for the lack of data. Tennessee's Field Operations Manual requires that injury and illness records be examined and verified on all inspections where the employer is required to keep records. It is important to document the number and type of any recordable injuries or illnesses, particularly in cases where the company was targeted for inspection due to high industry rates. When this matter was brought to the state's attention during the evaluation, each case where the 300 data was missing was reviewed. It was determined that, where the employer was required to keep records, the compliance officers had actually reviewed the records but had not entered the data into IMIS or documented it in the case file. Chapter VI.A.1.a. - Review of Records of the state's Field Operations Manual states "at the start of each inspection, the CSHO shall review the employer's injury and illness records for three prior calendar years and record the information. During the documentation preparation phase of the inspection the CSHO will enter the employer's data using the IMIS Application on the NCR (micro). This shall be done for all general industry, construction, and agriculture inspections and investigations."

Recommendation 5: Tennessee should assure that each case file includes documentation of the company's injury and illness experiences and that the data is entered into the IMIS.

Employee and Union Involvement

Tennessee's procedures for employee and union involvement are identical to those of Federal OSHA. Case files reviewed disclosed that unions are included during inspections as well as post inspection activities such as informal conferences. Unions are provided with correspondence regarding complaints and fatalities, and copies of citations. Reviews also revealed that employees were included during fatality investigations and other inspections.

Citations and Penalties

In fiscal year 2009, the 2,375 inspections conducted resulted in an average of 2.9 violations per inspection, with 40.7% of safety violations and 40.9% of health violations classified as Serious. The average initial penalty per serious violation for private sector inspections was \$1322, compared to an average of \$1335 for national data. Tennessee routinely places an emphasis on keeping citation lapse times low. In 2009, the average lapse time from opening conference to citation issuance was 38.2 days for safety and 49.3 days for health, well below the national average of 43.8 days for safety and 57.4 days for health.

The case files reviewed included adequate documentation to support the violations with minor exceptions. Only documentation that the CSHO includes in the case file is included in the official file. Field notes and interview notes are lacking in the files. Only photographs supporting the violations are placed in the files. No other photos are maintained in the files. Supervisors indicated that they do review each case file before citations are issued, or prior to closing for in-compliance cases, and they look at the photographs during their review. Additionally, many case files did not establish adequate knowledge, noting only reasonable diligence and/or in plain view. Some of these case files had supporting documentation in the narratives that supported employer knowledge. Chapter 4.G.4 - Knowledge of Hazardous Condition provides the knowledge requirement is met if it is established that the employer actually knew of the hazardous condition constituting the apparent violation. For example the employer saw the condition, an employee or employee representative reported it to the employer, or an employee was previously injured by the condition and the employer knew of the injury. CSHOs shall record any/all evidence that establishes employer knowledge of the condition or practice. In addition, if it cannot be determined that the employer has actual knowledge of a hazardous condition, the knowledge requirement may be established if there is evidence that the employer could have known of it through the exercise of reasonable diligence. CSHOs shall record any evidence that substantiates that the employer could have known of the hazardous condition. Examples of such evidence include: the violation/hazard was in plain view and obvious; the duration of the hazardous condition was not brief; the employer failed to regularly inspect the workplace for readily identifiable hazards; and the employer failed to train and supervise employees regarding the particular hazard. Interviews with compliance officers and discussions with management disclosed that their legal department instructed them to document knowledge only as reasonable diligence or in plain view. In addition, knowledge has never been an issue for litigation in Tennessee therefore they do not feel this is a significant problem. This may however be contributing to the relatively low number of willful violations in that compliance officers do not pursue knowledge to an extent that lead to a willful determination. This is discussed further later on in this section.

Although the state's procedures for determining the classification of violations are the same as those of Federal OSHA, Tennessee classifies a lower percentage of violations as Serious. Serious violations are categorized as high, medium or low severity serious, for penalty calculation purposes. The State Indicator Report (SIR) and case file reviews found that 40.7% of the safety violations and 40.9% of the health violations were classified as serious, significantly lower than the national average of 80% for safety and 69.7% for health. The SIR also shows that the state reclassified 1.0% of their violations which is lower than the national average of 4.8%. It was noted that some violations that would most likely have been classified as serious by Federal OSHA were classified as non-serious by the state, and some violations categorized as low or medium severity would have categorized as high severity by Federal OSHA. It is recommended that Tennessee should assure that each violation is documented accurately for severity and probability and reviewed for proper classification.

In 2009, Tennessee's penalty calculation procedures differed in several aspects from Federal OSHA. Both Federal OSHA and Tennessee consider severity first, then probability for determining the

gravity based penalty. To promote consistency in determining probability and severity, the state's procedures include a probability and severity quotient (formula). Probability is determined by averaging the number of employees exposed (1-10), the frequency of exposure (1-10) the duration (1-10 depending on how long), and stress and other environmental factors (1-10). All of the factors are defined to determine the appropriate value. Severity is determined by the severity of the potential injury. These two factors are averaged together to determine probability/severity quotient. The penalty associated with this value is applied to the violation in accordance with the table provided in the directive. Another difference from federal penalty procedures is that Tennessee's penalty chart begins at \$7,000, whereas Federal OSHA's begins at \$5,000.

The adjustment factors that reduce the gravity based penalty also differ from federal OSHA as follows: Size reductions of 50% (<25 employees), 40% (26-75 employees), 30% (76-125 employees), 20% (126-200 employees), and 10% (201-300 employees); and Good faith reductions of 10%, 30%, and 50%. History reductions applied are the same as federal OSHA. In no case is the penalty permitted to be reduced by more than 90%. The state did not adopt Federal OSHA's "quick fix" penalty reduction for some violations corrected during the inspection. The average penalties do not differ significantly from those of Federal OSHA. Interviews with all of the staff indicated that the directive is being strictly and consistently followed. They all referenced Field Operations Manual procedures and appeared to be very familiar with the state's policies and procedures in this area. In addition, the state maintains a high percentage of the penalty that is issued providing minimal penalty reductions during informal conferences.

An additional factor that was a focus of the review regarding citations and penalty was the grouping of violations. Tennessee's policy for grouping is very similar to that of Federal OSHA in that items that are related hazards, items in which one abatement action would correct both violations/hazards, and items that grouped together would create a serious hazard, can be grouped. Case file reviews identified that in many cases violation groupings were not appropriate. For example, in one case six to eight scaffold violations consisting of fall, collapse, and struck-by hazards were all grouped together into one single violation. In another case, 19 serious violations were grouped together for a total of \$2400. TOSHA officials stated that they had identified areas where groupings were not appropriate. Officials identified this issue midway through fiscal year 2009 and they were concerned that compliance officers did not fully understand how to properly group violations. They have since made changes by re-training the compliance officers and reviewing groupings more thoroughly and placing a greater emphasis on following guidelines when grouping violations. Data will be reviewed in 2010 to determine how the change impacted violations per inspection as well as penalty.

Tennessee issued five grouped willful violations for a total of 14 willful items in the groupings, in 2009. The average penalty for the willful violations was \$19,350 compared to an average penalty of \$32,000 for willful violations issued by Federal OSHA. A review of procedures and discussions with state compliance personnel found that procedures for determining willfulness are the same as those for Federal OSHA. Management indicated that they are more than willing to pursue willful violations when a compliance officer brings one to them. The legal department is also willing to support them. Of the case files reviewed, one or two appeared to have circumstances that would

have possibly met the qualifications for a willful violation, if the compliance officer and supervisor had identified it at an early stage of the inspection. Discussions with supervisors and higher level management determined that willful violations are neither encouraged nor discouraged, but that a very high level of employer knowledge would be required in order to sustain willful violations. The Technical Writing and Legal Aspects classes do include discussions of what constitutes a willful violation. Another issue that was identified was the impact that the lack of documentation with regards to employer knowledge (reasonable diligence and plain view) was having on their ability to identify and pursue potential willful violations. Establishing specific knowledge of the violation will enable supervisors and managers to identify violations that have the potential to be developed as willful violations.

It was also noted that 1.94 percent of inspections were follow ups, with a ratio of failure-to-abate violations to follow ups of 45.7 percent. Compliance officers may recommend a follow up when they are unable to obtain adequate abatement information. In addition, follow-ups are conducted for all over-exposures. A discussion was held with the state regarding the need to conduct follow-up inspections for all fatalities, where a fatality related item is cited. Tennessee management stated that they are currently conducting a higher percentage of follow up inspections and they liked the idea of conducting follow-ups on the fatalities.

Recommendation 6: Tennessee should assure that each violation is documented accurately for severity and probability and reviewed for proper classification.

Recommendation 7: Tennessee should require compliance officers to establish and document specific knowledge to support violations.

Abatement

Case file reviews, available procedures, and inspection data indicate that Tennessee obtains adequate and timely abatement information and has processes in place to track employers who are late in providing abatement information. Managers, supervisors, and compliance officers are responsible for following up on the abatement of violations for their inspections. Employers are contacted, dunning letters are sent to employers, and follow-up inspections are conducted when needed. Managers and supervisors review local database and IMIS reports weekly to track the status of abatement.

Enforcement Program Management

Tennessee uses available IMIS reports and other data for effective program management. Each supervisor, compliance manager, the Assistant Administrator, and Administrator is familiar with standard IMIS reports and uses them on a frequent and regular basis (weekly) for tracking and understanding the status of enforcement activity. Each supervisor reviews IMIS reports for compliance officers who currently report to them. A review of current IMIS reports revealed that Tennessee is using the reports effectively. There were no instances of old cases that should be closed. All rejects are corrected daily and all forms that are in draft are current forms that are being

worked on. The open inspection reports contained a large number of open inspections that are currently in debt collection, but did not indicate a serious problem with the state's management of their program. The analysis of standard IMIS tracking reports and interviews indicated that supervisors are reviewing these reports frequently.

Senior management staff uses a variety of tracking mechanisms and reports so that all staff can readily determine the current status of program goals and other enforcement activities. Monthly reports are produced to track and communicate progress. This report is shared with the federal monitoring office in Nashville. The TOSHA Administrator is required by Commissioner Neeley to report on progress of the TOSHA program on a monthly basis. The report addresses specific measures gives a green (Meeting Goal), yellow (Not Meeting Goal), or red (Not Meeting Goal Corrective Action Required) score. Areas addressed in this report include fatalities investigated, penalties paid timely, lapse time, hazard identification training and program activity, and awards and recognition. In addition, the Administrator is required to give a briefing to the Commissioner for all fatalities.

Debt Collection

Tennessee has procedures for receipt of payments and handling past due penalties. TOSHA processes payments and collections and sends past due penalties to the Attorney General for collection as part of the process. TOSHA uses Departmental reports to track the status of penalty collections daily. A report provided during this review indicated there were 790 citations with overdue penalties. When payments are not received, TOSHA sends a monthly statement with penalties and interest to the employer for a total of six months. The penalties and interest are much more significant than the federal penalties and interest. After 180 days, the cases are sent to the Attorney General for collection. The penalty collection rate for the 2008-2009 state fiscal year was 72% paid timely and 11.4% paid late, and all others were referred for collection. Due to the limitations of the Attorney General's office, collection of the penalty is often a very lengthy process. By state law, the penalties can only be written off in accordance with Tennessee Department of Finance and Administration Policy. Only small amounts can be written off resulting in these cases remaining open indefinitely until payment is received. The debt collection status of inspections is entered into IMIS. However an internal process for collections is used to track debt collection. Although TOSHA does not use standard IMIS debt collection reports to regularly track overdue penalties, the penalty collection status appears on the IMIS open inspections report which is reviewed regularly by supervisors.

BLS Rates

Bureau of Labor Statistics (BLS) injury and illness rates for Tennessee have shown a steady decline. The 2008 Total Case Incidence Rate (TCIR) for the private sector was 4.2, a 12.5% reduction over the 2006 rate. The national TCIR in 2008 was 3.9. The 2008 Days Away Restricted and Transferred (DART) rate was 2.1, a 12.5% reduction over the 2006 rate. The national DART rate for 2008 was 2.0. Tennessee uses injury and illness rates and fatality rates in their strategic planning

process to decide where their resources should be focused. Where possible, reductions in rates are used to measure outcome results.

Standard Adoption and Federal Program Changes

In accordance with 29 CFR 1902, States are required to adopt standards and federal program changes within the 6-months. States must set job safety and health standards that are "at least as effective as" comparable federal standards. (Most States adopt standards identical to federal ones.) States have the option to promulgate standards covering hazards not addressed by federal standards. During the evaluation period OSHA initiated the following standards and federal directives, which required action by the State:

Federal Standards

Standard requiring Action	Federal Register Date	Adopted Identical	Date Promulgated
Clarification of Employer Duty To Provide Personal Protective Equipment and Train Each Employee	December 12, 2008	Yes	07/29/2009
Longshoring and Marine Terminals; Vertical Tandem Lifts; Final Rule	December 10, 2008	N/A	N/A

Federal Program Changes (excluding Standards)

Federal Program Changes Requiring Action	Federal Directive Number	Date of Directive	Adopted Identical	Date Adopted
Voluntary Protection Programs (VPP) Policies and Procedures Manual	CSP 03-01-003 2008 314	April 18, 2008	Yes	07/01/2008
Site-Specific Targeting 2008 (SST-08)	CPL 02 (08-07) Update	May 19, 2008	Yes	12/01/2008
Training Program for OSHA Compliance Personnel	TED 01-00-018	August 8, 2008	Yes	01/01/2009
National Emphasis Program – Lead	CPL 03-00-0009	August 14, 2008	Yes	11/01/2008
Tree Care and Tree Removal	CPL 02-01-045	August 21, 2008	Yes	11/01/2008

The Tennessee Occupational Safety and Health Program properly adopted the Personal Protective Equipment standards within the 6-month time frame. The State does not have jurisdiction for maritime activities in Tennessee. Therefore, the Longshoring and Marine Terminals; Vertical Tandem Lifts; Final Rule was not adopted. All of the federal program changes initiated during this period were adopted identically and in a timely manner. In the case of the Voluntary Protection Programs (VPP) Policies and Procedures Manual, and the Training Program for OSHA Compliance Personnel both documents mirror the federal policies, with only a few minor differences. Examples

of the differences include the deletion of Merit and Demonstration Programs from the VPP directive and the deletion of the construction specialist training track in the Training directive. Tennessee does not offer the Merit and Demonstration Program and due to the State's limited number of compliance officers it does not employ construction specialists. During this period TOSHA also indicated that it has developed several state specific directives which are equivalent to the federal policies.

Variances

Tennessee currently has two permanent variances. Neither of them are multi-state variances approved by Federal OSHA. There are currently no temporary variances. The state shares variance requests with federal monitors and requests input prior to approval. The Manager of Standards and Procedures maintains a log of variances to track the status of each variance. TOSHA received one variance request from an employer in fiscal year 2009. In response to the request, the State requested additional information from the applicant to clarify the request. The additional information was never provided by the applicant and the variance was not granted. No issues related to variances were identified.

Review Procedures

Tennessee has procedures in place for conducting informal conferences and proposing informal settlement agreements, and these procedures appear to be followed consistently by all managers and supervisors. According to the State Indicator Report, 1.9% of violations were vacated and 1.0% of violations were reclassified as a result of informal settlement agreements. The penalty retention rate was 88.5%. Case file reviews verified that very few violations are vacated or reclassified, and most cases were resolved with minimal or no penalty reduction. Where there were vacated or reclassified violations, or a larger penalty reduction, the files normally included the rationale for the changes. Supervisors are required to prepare an informal conference memo explaining the informal conference and justifying any penalty reduction that is provided following an informal conference. The memo is submitted to the compliance manager. Supervisors are allowed to provide a 25% penalty reduction for the settlement of cases. The Compliance Manager is required to get any changes, modifications, or deletions to citations approved by the Administrator. Additionally, supervisors are required to get employer to agree to concessions in exchange for penalty reductions.

In fiscal year 2009, 1.7% of inspections were contested. The Tennessee Occupational Safety and Health Review Commission holds hearings and issues decisions on contested citations. The three members of the Review Commission are appointed to the part-time positions by the Governor and generally serve a three-year term. The Tennessee Department of Labor and Workforce Development has taken steps to reduce the lapse time between receipt of contest and first level decision. A staff attorney and paralegal assigned to the office provides legal representation for TOSHA. Both work within the office and are readily available. It is common for an attorney to work closely with the compliance staff during the preparation of fatalities and other high profile inspections. Compliance officers and supervisors stated that they have a very good working relationship with the attorneys

assigned to them, and they are very knowledgeable of OSHA requirements and what is needed for a case to be legally sufficient. SIR data indicates that, for violations that were contested, 5.7 % were vacated, and 9.4 % were reclassified. 84.5 % of penalties were retained. No negative trends or problems with citation documentation have been noted.

Discrimination Program

Overview

The Tennessee Department of Labor and Workforce Development – Tennessee Occupational Safety and Health Administration (TOSHA) is responsible for enforcing the 11(c) discrimination provisions under the State Act. The Act prohibits discrimination against employees who engage in protected activities as defined by the Tennessee Occupational Safety and Health Act of 1972 (T.C.A. 50-3-409). This is comparable to Federal OSHA protection from discrimination under Section 11(c) of the OSHA Act. This evaluation included a thorough review of Tennessee’s discrimination program including an analysis of data, review of case files, interviews, and a review of Tennessee’s laws and procedures related to safety and health discrimination protection. There is no record of any previous audit of TOSHA’s 11(c) program. The Assistant Administrator and three Investigators (who happen to be one compliance manager and two compliance supervisors) were interviewed onsite and via phone. The Assistant Administrator and one of the investigators (safety compliance manager) are located in the central office in Nashville. The other two investigators (compliance supervisors) are located in field offices in Knoxville and Memphis. The program is supervised by TOSHA’s Assistant Administrator.

Findings

During fiscal year 2009 TOSHA docketed 43 discrimination complaints. The status of these cases and the percentages of total cases they represent are presented below.

Dismissed Non-Merit	Dismissed – Lack of Cooperation	Withdrawal	Settlement	Referred for Litigation	Pending
18	12	4	9	2	2
32.6%	27.9%	9.3%	20.9%	4.7%	4.7%

According to the State Activity Mandated Measures (SAMM) report, which uses cases closed during the fiscal year, 38.46 percent of complaints were meritorious and 100 percent of the merit cases were settled. Eighteen cases from the above 43 cases were selected for review. All nine of the settled cases were reviewed, two of the five withdrawals were reviewed, two of the twelve dismissed for lack of cooperation were reviewed, and five of the eighteen cases dismissed for lack of merit were reviewed. The one case that was referred for litigation was not reviewed because it is currently at the attorney general’s office going through litigation.

The average amount of time to complete investigations was 56 days and 14 (77%) investigations were timely completed. The four over age cases were only 11 to 26 days beyond the 90 day period and were the result of detailed investigations which culminated in two settlements, one withdrawal and one dismissal. In addition, TOSHA collected \$12,382.42 back pay for eight Complainants.

The Assistant Administrator screens all complaints and sends a questionnaire to each Complainant, asking for additional information. After completing a screening, determining coverage and sending a questionnaire to each Complainant and a notification to each Respondent, the Assistant Administrator normally assigns the case to one of the three investigators. If he believes he can resolve the complaint through a settlement, he will hold the case assignment until he determines the case cannot be resolved. At that point, he would assign the case to be investigated.

Tennessee's procedures for handling safety and health discrimination cases are very similar to those of Federal OSHA. They use Federal OSHA's manual as their guide. The only major difference is that the screening process utilizes a questionnaire that each complainant is required to complete and mail back to TOSHA. If a Complainant does not return the questionnaire to TOSHA and does not respond to further requests to submit it, the complaint is dismissed for lack of cooperation.

The three investigators conduct personal interviews and perform onsite investigations in almost every case. All complaints appeared to have been investigated at least as thoroughly as Federal OSHA would have investigated. Tennessee's program is also found to be very effective because investigators properly evaluated the elements of discrimination complaints and the appeal process functioned similarly as that of Federal OSHA. Complainants who disagree with the dismissal of their complaint may appeal the decision with the Commissioner of Labor and Workforce Development. Three Complainants filed appeals with the Commissioner. The Commissioner requested and obtained additional information regarding the cases. Two of the appealed cases are currently under review by the attorney general for possible litigation. The third appealed complaint was dismissed. Currently, complainants are notified of their right to appeal to the Commissioner however TOSHA does not inform them of their right to file a CASPA if he or she is dissatisfied with the conduct or outcome of the State's investigation. Issues related to state plan discrimination complaints and the rights of complainants to appeal to federal OSHA or file a CASPA are under review by federal OSHA.

TOSHA's administration of the 11(c) program is found to be very effective. TOSHA conducts thorough investigations and if a Complainant appeals the dismissal to the Commissioner under TOSHA's appeals process, proper action is taken by the Commissioner to evaluate the case. The two cases that were referred for litigation were not reviewed because it is currently at the attorney general's office going through litigation.

Complaint About State Plan Administration (CASPA)

During this period there was one CASPA filed with the OSHA Area Office in Nashville, Tennessee. CASPA #87-FY09 involved an appeal of a workplace safety and health complaint, which was filed

by a former employee. A detailed review revealed that the CASPA was initiated prematurely, since the CASPA was accepted for investigation before the available administrative remedies within the State were exhausted. Never-the-less, the complainant was notified of the CASPA in a timely manner and this matter was thoroughly investigated by the Area Office. In the future CASPA's in Tennessee will be addressed in accordance with the new CASPA guidelines.

Tennessee CASPAs in FY 2009

Complaint About State Plan Administration (CASPA) Number	Final Notification to Complainant	Recommendation(s)	State Response Letter
CASPA 113- FY09	January 29, 2010	Yes	Yes

Voluntary Compliance Programs

Tennessee did not adopt the federal OSHA Strategic Partnership Program or the OSHA Alliance Program. However, TOSHA implemented the Tennessee Volunteer Star Program in 1997 with two participants. The program is similar to the Federal Voluntary Protections Program (VPP). However, TOSHA limits participation to the Star level, while the OSHA VPP also includes Merit and Demonstration levels participants. Since its inception the program, which now includes 32 worksites, has grown by approximately three worksites per year. In fact, the program has not increased by more than five worksites during any period, with the exception of 2008. TOSHA has effectively managed the growth of its program by primarily limiting participation to employers in the manufacturing Standard Industry Classification (SIC) codes, with exceptional safety and health management systems.

Since the program was established one worksite has experienced two fatal accidents. One occurred in FY 2004 and the second occurred in FY 2005. Fatality inspections were initiated following both incidents and the employer was cited following the FY 2005 accident. The three-year Star evaluation, which was conducted in FY 2006, mentioned the fatal accidents and the actions taken following the events were documented in the report. The employer was permitted to remain in the program. As previously mentioned, TOSHA has adopted the new OSHA VPP directive CSP 03-01-003, which effectively addresses enforcement activities at VPP sites, such as fatalities investigations.

The success of the State's VPP is effectively demonstrated by the Total Case Incident Rates (TCIR) and Day Away, Restricted Time (DART) rates of its participating worksites. However, the State has not established a system to continually monitor the program's overall performance.

Recommendation 8: TOSHA should develop and effectively implement an internal self-evaluation program to assess the overall performance of the VPP program and ensure that proper controls are in place.

Program Administration

During the onsite monitoring visit, interviews were conducted with the TOSHA Program Administrator, the Assistant Administrator and several staff members, regarding the administration and management of TOSHA. Issues addressed during these interviews included State funding, the compliance staffing benchmarks, employee training, as well as other fiscal concerns. These interviews did not reveal any areas needing further evaluation at this time.

Ability to Meet Compliance Staffing Benchmarks

Under the terms of the 1978 Court Order in *AFL-CIO v. Marshall* compliance staffing levels (benchmarks) necessary for “fully effective” enforcement program were required to be established for each State operating an approved State plan. In September 1984 Tennessee, in conjunction with OSHA, completed a reassessment of the levels initially established in 1980 and proposed revised compliance staffing benchmarks of 22 safety and 14 health compliance officers. After opportunity for public comments and service on the AFL-CIO, the Assistant Secretary approved these revised staffing requirements on July 22, 1985. At the time of this report, TOSHA’s compliance staffing included 18.33 safety compliance officers and 14.33 health compliance officers. These totals account for the fact that a supervisory position is equivalent to one-third of a full-time compliance position. There are currently six vacant safety compliance positions; however, the State is committed to maintaining its staffing at the established benchmark level. Additionally, the State is currently attempting to fill two vacant health compliance officer positions, which would exceed the established health staffing benchmark. The six vacant safety compliance officer positions in Tennessee, including two vacancies in Knoxville, two vacancies in Nashville, one vacancy in Chattanooga, as well as a vacant safety position in the Public-Sector Division (in Jackson or Memphis, Tennessee) were being filled.

Impact of State funding and other fiscal issues

Due to the ongoing State budget difficulties, in 2009 TOSHA was instructed to submit several alternative budgets. These proposed budgets ranged from a best-case to a worst-case scenario, regarding the financial circumstances within the State. As a result, in July of 2009, the TOSHA lost seven positions, with a total staff reduction from 102 to 95 positions. These reductions included the elimination of three safety compliance officer positions, two industrial hygiene positions, and two clerical positions. These compliance positions were 100 percent State funded positions however due to additional federal funding that is anticipated, the state will no longer have any 100 percent funded positions.

State Internal Evaluation Program

TOSHA does not have an internal evaluation program that meets the criteria outlined in the State Plan Policies and Procedures Manual. Although the Administrator has procedures for routine management of the compliance program and to monitor their progress towards meeting their established goals the program could benefit from periodic in-depth audits that focus on key issues, program areas, or areas of concern to the State. Federal OSHA is available to assist Tennessee with the development of an internal evaluation procedure. Therefore, the following recommendation is

being made:

Recommendation 9: Tennessee should develop and implement a formal program for conducting periodic internal self-evaluations. The procedure should assure that internal evaluations possess integrity and independence. Reports resulting from internal self-evaluations will be made available to federal OSHA.

Furloughs, Office Closures or Other Changes in Services

TOSHA does not anticipate any changes in the level of services provided by the State or its current operations. During this period, Tennessee has not furloughed employees or closed/consolidated offices due to the State's fiscal hardship.

Assessment of Compliance Officers Training Program and Career Development

As stated earlier, TOSHA adopted the federal directive TED 01-00-018, "Training Program for OSHA Compliance Personnel," with minimal differences. These differences include the fact that the State does not offer a construction specialist career path and TOSHA utilizes its own form to document the completion of on-the-job training (OJT).

Newly-hired TOSHA compliance officers are immediately registered in Learning-Link for participation in the initial training courses conducted at the OSHA Training Institute (OTI). Additional courses are scheduled as dictated in the instruction. Basic training is completed when the eight courses outlined in the directive are completed. The State also tracks employee training using a chart, which is referred to as the OTI Training Plan. The OTI Training Plan's purpose is to document all formal training completed by compliance personnel. In addition to the OTI Training Plan, the State also maintains an OTI Course Calendar, which tracks the date and location of all scheduled training. Both documents are maintained on a shared-drive utilized by the Tennessee Department of Labor and Workforce Development. Even after employees complete the OTI training courses they are provided OJT and administered an in-house test, which evaluates their knowledge of the standards and TOSHA procedures. The Commissioner of the Tennessee Department of Labor and Workforce Development, James G. Neeley, supports the career development and training of employees. TOSHA employees are permitted to travel to training courses outside the state and in FY 2009 the State spent \$32,433.00 for employee training. The training needs of all TOSHA compliance personnel are evaluated annually by the supervisors in each area office in conjunction with the section managers. Requests for individual OTI courses are submitted to the training and education office which schedules the approved courses. Compliance officers may be scheduled to attend two additional OTI courses each year based on the need of the CSHO or the local area office, more if a special need exists.

TOSHA employees interested in obtaining their professional certifications are provided access to training materials. The State does not finance the employee's enrollment in preparation courses or the actual certification examination. However, if an employee successfully completes the certification examination they are provided with a four and one half percent increase in their salary, which is equivalent to one-step on the State pay scale.

Stakeholder Interviews

During this monitoring effort an attempt was made to contact a wide range of stakeholders within the State to obtain their feedback regarding the program. Stakeholders contacted in connection with this effort included: the Tennessee - American Federation of Labor and Congress of Industrial Organizations (AFL-CIO); the Memphis Building Trades and International Brotherhood of Electrical Workers (IBEW) local #474; the Nashville Building Trades; the Tennessee Road Builders Association; the Tennessee Homebuilder's Association; the Tennessee Chamber of Commerce & Industry; Associated General Contractors – Middle Tennessee Branch; Associated Builders & Contractors – Mid Tennessee Chapter; the co-chair for the Tennessee Safety Congress; as well as a representative from the TOSHA Advisory Council.

The stakeholder interviews were all conducted by telephone. Following an introduction, the stakeholders were provided a brief explanation for the call and asked one simple question at the outset, “How would you assess the Tennessee Occupational Safety and Health Program?” A few stakeholders suggested that the State hire more compliance officers and increase its penalties to encourage greater adherence to workplace safety rules. However, the most common words used to describe the State program were fair, cooperative and consistent. The majority of the stakeholders contacted during this process voiced confidence in TOSHA and indicated that they had a positive impression of the Tennessee Occupational Safety and Health Program.

Appendix A: Findings and Recommendations

FY 2009 Tennessee State Plan (TOSHA) Enhanced FAME Report prepared by Region IV

Italics = paraphrase

	Findings	Recommendations
1	<i>Field notes are destroyed at the instruction of the state's attorney when the compliance officer completes the violation form and worksheet. Except for fatality case files, many of the case files reviewed did not contain witness or management statements. (p. 9)</i>	In accordance with the state's Field Operations Manual, all field notes, diagrams, photos, and any other documentation obtained or produced during inspections should be included in the case file.
2	<i>Most case files did not contain a case file diary sheet or log to document significant actions associated with that particular file. (p. 9)</i>	Tennessee's case file should include a diary to document: significant actions; communication between management and the CSHO; communication between TOSHA and the employer.
3	<i>Current employees are encouraged to formalize their complaints and TOSHA conducts inspections for all formalized complaints regardless of the nature of the hazard. 30% of the 31 complaint inspection case files reviewed were in-compliance inspections. (p. 10)</i>	Management should evaluate complaints including formal complaints to determine when an investigation would be more appropriate to allow a more effective use of their resources.
4	<i>Letters are sent to the next of kin at the beginning of fatality investigations informing them of the investigation and that "the results will be made available upon their request without charge." However, TOSHA does not contact the next of kin after the inspection is complete unless it is initiated by the next of kin. (p. 12)</i>	At the conclusion of a fatality investigation the state should send the next- of-kin a letter and a copy of any citation(s) issued, or a letter advising them that no violations were found. The next-of-kin should be informed of informal conferences and hearings, as well as any changes in the citations as a result of a settlement or hearing. A copy of the letter should be maintained in the file.
5	<i>A number of the case files reviewed did not include injury or illness data from the OSHA 300 logs or an explanation for the lack of the data. (p. 13)</i>	Tennessee should assure that each case file includes documentation of the company's injury and illness experiences and that the data is entered into IMIS.
6	<i>Although TOSHA follows the same procedures as Federal OSHA for determining the classification of violations, the State classifies a lower percentage as serious. In addition, the Regions review of case files indicated that Federal OSHA may have classified some of the State's non-serious violations as serious and some of the low or medium severity as high severity. (p. 15)</i>	Tennessee should assure that each violation is documented accurately for severity and probability and reviewed for proper classification.
7	<i>Many case files did not establish adequate knowledge, noting only reasonable diligence and/or plain view. (p. 14-16) The Region notes that this may contribute to the relatively low number of willful violations.</i>	Tennessee should require compliance officers to establish and document specific knowledge to support violations.
8	<i>TOSHA's VPP performance is demonstrated by reductions in TCIR and DART rates of its participating worksites, but the State has not established a system to continually monitor the program's overall performance. (p. 23)</i>	TOSHA should develop an effectively implement an internal self-evaluation program to assess the overall performance of the VPP program and ensure that proper controls are in place.
9	<i>TOSHA does not have an internal evaluation program as required by the State Plan Policies and Procedures Manual. (p. 25)</i>	Tennessee should develop and implement a formal internal self-evaluation program. The procedure should assure that internal evaluations possess integrity and independence. Resulting report from these evaluations should be made available to federal OSHA.

Appendix B: Tennessee State Plan (TOSHA) FY 2009 Enforcement Activity

	Tennessee	State Plan Total	Federal OSHA
Total Inspections	2,375	61,016	39,004
Safety	1,771	48,002	33,221
<i>% Safety</i>	75%	79%	85%
Health	604	13,014	5,783
<i>% Health</i>	25%	21%	15%
Construction	786	26,103	23,935
<i>% Construction</i>	33%	43%	61%
Public Sector	568	7,749	N/A
<i>% Public Sector</i>	24%	13%	N/A
Programmed	1,829	39,538	24,316
<i>% Programmed</i>	77%	65%	62%
Complaint	303	8,573	6,661
<i>% Complaint</i>	13%	14%	17%
Accident	49	3,098	836
Insp w/ Viols Cited	1,845	37,978	27,165
<i>% Insp w/ Viols Cited (NIC)</i>	78%	62%	70%
<i>% NIC w/ Serious Violations</i>	71%	62%	87%
Total Violations	5,318	129,363	87,663
Serious	2,945	55,309	67,668
<i>% Serious</i>	55%	43%	77%
Willful	1	171	401
Repeat	29	2,040	2,762
Serious/Willful/Repeat	2,975	57,520	70,831
<i>% S/W/R</i>	56%	44%	81%
Failure to Abate	21	494	207
Other than Serious	2,322	71,336	16,615
<i>% Other</i>	44%	55%	19%
Avg # Violations/ Initial Inspection	2.9	3.3	3.1
Total Penalties	\$ 2,150,779	\$ 60,556,670	\$ 96,254,766
Avg Current Penalty / Serious Violation	\$ 617.20	\$ 800.40	\$ 970.20
Avg Current Penalty / Serious Viol- Private Sector Only	\$ 1,202.90	\$ 934.70	\$ 977.50
% Penalty Reduced	27.2%	51.9%	43.7%
% Insp w/ Contested Viols	1.7%	13.0%	7.0%
Avg Case Hrs/Insp- Safety	16.2	15.7	17.7
Avg Case Hrs/Insp- Health	33.3	26.6	33.1
Lapse Days Insp to Citation Issued- Safety	27.6	31.6	34.3
Lapse Days Insp to Citation Issued- Health	36.1	40.3	46.7
Open, Non-Contested Cases w/ Incomplete Abatement >60 days	13	2,010	2,234

Source: DOL-OSHA. State Plan INSP & ENFC Reports, 11-19-2009. Federal INSP & ENFC Reports, 11-9-2009. Private Sector ENFC- State Plans 12.4.09 & Federal 12.14.09

Appendix C: TOSHA FY 2009 State OSHA Annual Report (SOAR)

(Available Separately)

Appendix D: FY 2009 State Activity Mandated Measures (SAMM) Report

RID: 0454700

MEASURE	From: 10/01/2008 To: 09/30/2009	CURRENT FY-TO-DATE	REFERENCE/STANDARD
1. Average number of days to initiate Complaint Inspections	2737 9.37 292	47 9.40 5	Negotiated fixed number for each State
2. Average number of days to initiate Complaint Investigations	865 4.30 201	37 4.62 8	Negotiated fixed number for each State
3. Percent of Complaints where Complainants were notified on time	289 98.63 293	5 100.00 5	100%
4. Percent of Complaints and Referrals responded to within 1 day -ImmDanger	5 100.00 5	0 0 0	100%
5. Number of Denials where entry not obtained	0	0	0
6. Percent of S/W/R Violations verified			
Private	0 .00 1448	0 .00 1448	100%
Public	0 .00 1423	0 .00 1423	100%
7. Average number of calendar days from Opening Conference to Citation Issue			
Safety	56315 38.20 1474	2385 45.86 52	2489573 43.8 56880
Health	21475 49.36 435	672 51.69 13	692926 57.4 12071

RID: 0454700

MEASURE	From: 10/01/2008 To: 09/30/2009	CURRENT FY-TO-DATE	REFERENCE/STANDARD
8. Percent of Programmed Inspections with S/W/R Violations			
	936	30	92328
Safety	61.66 1518	60.00 50	58.6 157566
			National Data (3 years)
Health	193 62.06 311	6 60.00 10	11007 51.2 21510
			National Data (3 years)
9. Average Violations per Inspection with Vioations			
S/W/R	3065 1.60 1909	133 2.01 66	420601 2.1 201241
			National Data (3 years)
Other	2289 1.19 1909	91 1.37 66	243346 1.2 201241
			National Data (3 years)
10. Average Initial Penalty per Serious Violation (Private Sector Only)	2113625 1321.84 1599	82350 1680.61 49	492362261 1335.2 368756
			National Data (3 years)
11. Percent of Total Inspections in Public Sector	563 23.86 2360	6 19.35 31	1805 24.5 7359
			Data for this State (3 years)
12. Average lapse time from receipt of Contest to first level decision	5240 374.28 14	0 0	4382038 246.1 17807
			National Data (3 years)
13. Percent of 11c Investigations Completed within 90 days	16 61.54 26	0 0	100%
14. Percent of 11c Complaints that are Meritorious	10 38.46 26	0 0	1466 20.8 7052
			National Data (3 years)
15. Percent of Meritorious 11c Complaints that are Settled	10 100.00 10	0 0	1263 86.2 1466
			National Data (3 years)

Appendix E: FY 2009 State Indicator Report (SIR)

CURRENT MONTH = SEPTEMBER 2009

INTERIM STATE INDICATOR REPORT (SIR)

STATE = TENNESSEE

PERFORMANCE MEASURE	----- 3 MONTHS-----		----- 6 MONTHS-----		-----12 MONTHS-----		-----24 MONTHS-----	
	FED	STATE	FED	STATE	FED	STATE	FED	STATE
C. ENFORCEMENT (PRIVATE SECTOR)								
1. PROGRAMMED INSPECTIONS (%)								
A. SAFETY	6212	207	11892	475	21855	989	42572	2008
	67.3	78.1	67.5	78.4	66.8	80.1	65.2	78.4
	9230	265	17617	606	32713	1235	65304	2561
B. HEALTH	508	75	1004	151	1963	290	3678	548
	34.5	54.0	34.1	54.3	35.3	51.5	34.0	47.6
	1471	139	2946	278	5559	563	10829	1152
2. PROGRAMMED INSPECTIONS WITH VIOLATIONS (%)								
A. SAFETY	4645	172	8997	409	16745	878	32019	1733
	67.7	68.5	65.9	73.3	65.8	74.1	65.9	77.6
	6860	251	13654	558	25453	1185	48603	2233
B. HEALTH	368	72	746	133	1486	248	2884	458
	52.2	81.8	50.8	76.4	51.7	76.5	55.6	74.7
	705	88	1468	174	2873	324	5187	613
3. SERIOUS VIOLATIONS (%)								
A. SAFETY	15510	233	29490	488	56535	1055	111717	2153
	81.8	40.5	81.1	38.9	80.0	40.7	79.4	40.8
	18952	575	36371	1255	70692	2595	140747	5280
B. HEALTH	2802	113	5343	245	10035	453	19393	884
	70.1	37.4	69.9	40.9	69.7	40.9	67.7	42.2
	4000	302	7645	599	14395	1108	28659	2093
4. ABATEMENT PERIOD FOR VIOLS								
A. SAFETY PERCENT >30 DAYS	2938	62	5782	139	12109	334	25516	765
	15.9	15.0	16.2	15.5	17.6	17.7	18.7	19.7
	18492	414	35597	896	68607	1882	136812	3879
B. HEALTH PERCENT >60 DAYS	256	116	577	176	1452	293	3111	757
	6.3	26.0	7.5	20.1	10.0	17.0	10.9	20.4
	4078	446	7720	876	14561	1719	28488	3712

CURRENT MONTH = SEPTEMBER 2009

INTERIM STATE INDICATOR REPORT (SIR)

STATE = TENNESSEE

PERFORMANCE MEASURE	----- 3 MONTHS-----		----- 6 MONTHS-----		-----12 MONTHS-----		-----24 MONTHS-----	
	FED	STATE	FED	STATE	FED	STATE	FED	STATE
C. ENFORCEMENT (PRIVATE SECTOR)								
5. AVERAGE PENALTY								
A. SAFETY								
	280876	34625	628826	58975	1303857	126850	2663433	251625
OTHER-THAN-SERIOUS	923.9	199.0	998.1	181.5	1030.7	201.7	1049.4	202.9
	304	174	630	325	1265	629	2538	1240
B. HEALTH								
	83100	49525	142950	59525	294225	93500	654830	135125
OTHER-THAN-SERIOUS	799.0	811.9	803.1	531.5	855.3	397.9	867.3	309.9
	104	61	178	112	344	235	755	436
6. INSPECTIONS PER 100 HOURS								
A. SAFETY								
	10459	458	19991	933	37160	1940	73338	3996
	6.1	6.8	5.7	6.6	5.5	6.6	5.3	6.3
	1722	67	3533	141	6727	296	13759	631
B. HEALTH								
	1764	159	3581	325	6701	651	12705	1315
	1.8	3.1	1.7	3.2	1.6	3.2	1.5	3.1
	994	51	2112	102	4125	202	8503	426
7. VIOLATIONS VACATED %								
	1278	30	2561	64	5139	122	10097	194
	4.9	1.9	5.0	1.9	5.1	1.9	5.0	1.4
	26336	1539	51387	3289	100187	6589	201495	13610
8. VIOLATIONS RECLASSIFIED %								
	1130	16	2440	28	4798	65	9539	132
	4.3	1.0	4.7	.9	4.8	1.0	4.7	1.0
	26336	1539	51387	3289	100187	6589	201495	13610
9. PENALTY RETENTION %								
	13523966	526109	27149245	908903	54889469	1912730	111585445	3698272
	63.4	89.8	62.9	88.3	63.2	88.5	62.9	88.0
	21315664	586125	43130384	1029000	86796382	2160400	177346966	4203075

CURRENT MONTH = SEPTEMBER 2009

INTERIM STATE INDICATOR REPORT

STATE = TENNESSEE

PERFORMANCE MEASURE	----- 3 MONTHS-----		----- 6 MONTHS-----		----- 12 MONTHS-----		----- 24 MONTHS-----	
	PRIVATE	PUBLIC	PRIVATE	PUBLIC	PRIVATE	PUBLIC	PRIVATE	PUBLIC
D. ENFORCEMENT (PUBLIC SECTOR)								
1. PROGRAMMED INSPECTIONS %								
A. SAFETY	207	120	475	217	989	507	2008	1099
	78.1	93.8	78.4	95.2	80.1	96.6	78.4	96.2
	265	128	606	228	1235	525	2561	1142
B. HEALTH	75	14	151	23	290	35	548	68
	54.0	93.3	54.3	95.8	51.5	85.4	47.6	84.0
	139	15	278	24	563	41	1152	81
2. SERIOUS VIOLATIONS (%)								
A. SAFETY	233	296	488	547	1055	1259	2153	2335
	40.5	92.5	38.9	95.8	40.7	93.5	40.8	92.9
	575	320	1255	571	2595	1346	5280	2513
B. HEALTH	113	42	245	115	453	174	884	320
	37.4	79.2	40.9	73.2	40.9	76.0	42.2	65.2
	302	53	599	157	1108	229	2093	491

CURRENT MONTH = SEPTEMBER 2009

COMPUTERIZED STATE PLAN ACTIVITY MEASURES

STATE = TENNESSEE

PERFORMANCE MEASURE	----- 3 MONTHS-----		----- 6 MONTHS-----		----- 12 MONTHS-----		----- 24 MONTHS-----	
	FED	STATE	FED	STATE	FED	STATE	FED	STATE
E. REVIEW PROCEDURES								
1. VIOLATIONS VACATED %	446 22.8 1956	6 10.9 55	875 24.2 3609	6 7.3 82	1756 23.4 7506	6 5.7 106	3749 24.1 15528	9 6.3 142
2. VIOLATIONS RECLASSIFIED %	282 14.4 1956	6 10.9 55	563 15.6 3609	8 9.8 82	1133 15.1 7506	10 9.4 106	2274 14.6 15528	13 9.2 142
3. PENALTY RETENTION %	2319074 54.1 4286744	29125 85.9 33925	4080249 51.5 7922126	55475 84.5 65675	10792902 58.5 18457526	64325 84.5 76125	20045599 55.9 35865959	81425 85.3 95425