



COMMONWEALTH of VIRGINIA

DEPARTMENT OF LABOR AND INDUSTRY

Courtney M. Malveaux
COMMISSIONER

October 14, 2010

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Mr. John M. Hermanson
Regional Administrator, Region III
U. S. Department of Labor – OSHA
The Curtis Center
170 South Independence Mall West
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Philadelphia, PA 19106-3309

SUBJECT: Virginia Corrective Action Plan for FFY 2009 Baseline Special Evaluation Report
(Enhanced Federal Annual Monitoring and Evaluation Report (EFAME))

Dear Mr. Hermanson:

Attached please find the corrective action plan for the Virginia Occupational Safety and Health (VOSH) program. You will note from our responses that VOSH staff reviewed all the inspection case files that were part of the evaluation done by Region III. It is the opinion of my staff, and one in which I concur, that the large majority of the findings and recommendations made by Region III primarily address procedural issues that do not effect Virginia's "as effective as" or final approval status. Without question, part of the credit for the high quality of the VOSH program is the result of the continuing and longstanding excellent support and assistance the VOSH program has received from Region III.

Where further action is necessary regarding your recommendations, the VOSH program will use the following approach:

1. Within 60 days of this letter, a document outlining each recommendation will be provided to our Regional Directors to review with field personnel.
2. Any recommendation that concerns the responsibilities of Regional Directors and/or Compliance Managers will be addressed at the next VOSH managers' meeting, which should occur during the 60 day time frame mentioned above.
3. All of the recommendations will also be reviewed with all VOSH personnel at the annual training conference for VOSH inspectors in 2011.
4. VOSH will notify Region III in writing as each of the above steps is completed.

As I mentioned in our initial response to the EFAME report dated September 17th, the VOSH program prides itself on maintaining equally strong enforcement and cooperative

program elements, and with your help the VOSH program has been able to achieve many great things that benefit Virginia's employees and employers:

- injury and illness rates that are consistently well below the national average in both private and public sector employment, including a 20% reduction in Virginia's total recordable injury and illness rate between FFY 2006 and 2009;
- a 48% reduction in fatal accidents investigated by VOSH since 2005 (2009: 33 fatalities; 2008: 39; 2007: 44; 2006: 55; 2005: 64);
- Virginia's unique regulations in confined space hazards in the construction and telecommunications industries; overhead high voltage line safety; fall protection in steel erection; reverse signal operation in construction and general industry; and compliance with manufacturers instructions for vehicles, machinery, tools and equipment in general industry, construction, maritime and agriculture;
- a national top ten ranking in the rate of state occupational safety and health inspections per number of employers¹;
- 88% of all strategic goals, State Activity Mandated Measures (SAMM) and State Indicator Report (SIR) measures were met or partially met as noted in the EFAME;
- the highest overall on-time complaint response rate in the country;
- an exemplary one of a kind Apprenticeship Program for VOSH Compliance Safety and Health Officers (CSHO), Industrial Hygienists and Safety and Health Consultants;
- a thriving Virginia Voluntary Protection Program (VPP) which now has 43 members; and a Safety and Health Achievement and Recognition Program (SHARP) with 38 members; and
- an annual safety and health conference which is now entering its 16th successful year of outreach to employees, employers, unions, associations and government.

Thank you again for this opportunity to provide our response to the enhanced evaluation process and Virginia's 2010 FFY EFAME report. We look forward to an ongoing cooperative and mutually supportive relationship with Region III. Please accept our sincere thanks for the valuable services you have provided to the Commonwealth of Virginia's employees and employers.

Sincerely,
/Signed/

Courtney M. Malveaux
Commissioner

Enclosures

cc: Assistant Commissioner Bill Burge
VOSH Directors

¹ "Death on the Job The Toll of Neglect", 19th edition, April 2010, AFL-CIO.

VIRGINIA FFY 2009 EFAME CORRECTIVE ACTION PLAN

Recommendation 1: Written documentation should be contained in case files to justify why a non-formal complaint resulted in an inspection (p. 24).

Response: This recommendation generally corresponds to question 26 on OSHA's Case File Review Form, although that question deals with a whole list of possible forms (Narrative, OSHA-1, OSHA-1B, OSHA-170).

OSHA noted this as an error in 41 of 102 case files (40%), although only a subset of those errors concerned the issue of documenting why a non-formal complaint resulted in an inspection. From our review of the case files, it appears that most of the non-formal complaints that were "formalized" and/or assigned for inspection were done in response to a VOSH directive (e.g., it is VOSH policy that all non-formal asbestos complaints will be responded to by an inspection; the same policy is found in certain special emphasis programs such as the one for Fall Protection in Construction). VOSH will review the applicable documentation requirements in the VOSH FOM and VOSH Directives with field personnel.

Recommendation 2: Response letters must include appropriate response detailing the outcome of the inspection or investigation activity for each alleged complaint item as outlined in VOSH's FOM (p. 24).

Response: This recommendation corresponds to question 22 on OSHA's Case File Review Form.

OSHA noted this as an error in 6 of 40 complaint files (15%). Although VOSH has determined that at least 1 of the 6 is an incorrect finding (the complaint was anonymous, so there was no contact information for the complainant that could be used to send a letter), VOSH will review the applicable requirements in the VOSH FOM with field personnel.

Recommendation 3: Families of fatality victims must be kept up-to-date about investigations and informed of the outcome of VOSH investigations (p. 26).

Response: This recommendation corresponds to question 25 on OSHA's Case File Review Form.

OSHA noted this as an error in 7 of 16 fatality files (44%), and the finding was primarily directed at a failure of VOSH to send follow-up letters to families on whether the inspection resulted in citations or not. In one of the 7 cases, the victim was from another country and repeated attempts to track down a family member were unsuccessful.

There appears to be a misunderstanding on the part of OSHA about VOSH procedures for contacting family members during a fatal accident investigation. The VOSH FOM provides that an initial contact shall be made with the family and a letter sent explaining our investigation procedures. That first contact letter also states the family member may file a Freedom of Information Act (FOIA) request for documents from the case file as they become releaseable. The Division of Legal Support (DLS) handles family members' FOIA requests for copies of citations and case files. FOIA files are maintained in the Central Office and are not generally included in the VOSH inspection file.

The VOSH FOM, chapter II-B provides the following procedure for follow-up contacts with family members after the initial letter is sent:

Follow-up Contact. Follow-up contact shall be maintained with a key family member or other contact person, **when requested**, so that the survivors can be kept up-to-date on the status of the investigation. Such contact can be by personal visit, telephone or letter, as requested by the family member. These contacts shall be made at appropriate times; e.g., after citation issuance, after an informal conference, after a contest, or closing of the case. (Emphasis added).

People who have lost a loved one grieve in many different ways. VOSH's procedure leaves it up to the family as to how much or how little involvement they want to have in the investigation process. VOSH will review the applicable requirements in the VOSH FOM with field personnel.

Recommendation 4:

Ensure that interviews with employer representatives and employees are documented in case files.

Response: This recommendation corresponds to questions 10 and 12 on OSHA's Case File Review Form.

OSHA noted this as an error in 5 of 102 case files or approximately 5%. VOSH does not consider an error rate this low to be judged a serious problem. The Director of DLS always addresses the issue of employee and supervisory interviews at the annual VOSH training conference for CSHOs and will do so again at the next conference in 2011.

Recommendation 5: The requirements for case file documentation are outlined in Chapter III of VOSH's FOM. These policies and procedures should be reviewed with all management and compliance staff to assure that all employees are following these procedures and understand what specifically is required to be maintained in a case file (p. 28).

Response: This recommendation does not provide enough detail for VOSH to determine what course of action is needed. In the EFAME narrative section dealing with this recommendation, OSHA referenced the following items:

1. lack of documentation of employer knowledge, which is referenced in Recommendation 6;
2. failure to document strategic plan activity codes on the OSHA-1; and
3. lack of documented interviews with employer representatives.

The second and third issues will be addressed at the annual VOSH training conference for CSHOs in 2011. The first issue is addressed under Recommendation 6. below.

Recommendation 6: VOSH must ensure that OSHA 1Bs are adequately documented. Provide additional training to investigators on case file documentation and the importance of having each OSHA 1B fully documented (p. 28).

Response: We assume that this recommendation relates to questions 31 and 32 on the OSHA Case File Review Form, which address documentation requirements for employee exposure and employer knowledge.

OSHA noted lack of employee exposure documentation as an error in 14 of 102 case files (14%), but we could find no explanation in most of the files identified for why the federal reviewer determined that documentation of employee exposure was lacking. VOSH does not believe that there is a lack documentation of employee exposure in the case files we have reviewed, with perhaps only a few minor exceptions. If there is a problem, it is limited to one region where OSHA found 8 errors out of 22 cases (57% of the total of 14). That regional office has reviewed the 8 files and could find no significant omissions and asked if OSHA uses different criteria for documenting employee exposure than does Virginia. VOSH is not aware that it has any different criteria than OSHA on this issue. Nonetheless, the DLS Director will address the issue at our annual VOSH training conference in 2011.

With regard to documenting employer knowledge, OSHA noted inadequate documentation as an error in 9 of 102 case files (9%). Our review of case files confirms OSHA's finding that some CSHOs relied too much on phrases such as "due diligence" or "plain view." The Director of DLS will address the issue of documenting employer knowledge at the annual VOSH training conference for CSHOs in 2011.

Recommendation 7:

Alleged violation descriptions should reflect specific hazards noted on OSHA-2 forms for each violation (p. 28).

Response:

This recommendation does not appear to correspond to any specific question on the Case File Review Form.

In order to respond to this recommendation, VOSH requests additional clarification from OSHA on this issue. Neither OSHA's FOM nor VOSH's FOM require alleged violation descriptions to reference specific hazards, with the exception that General Duty Clause violations must reference a serious hazard to which employees were exposed (e.g., a crushing hazard or electrocution hazard). In addition, we instruct our CSHOs, when preparing Hazard Communication Standard violations, to list which chemicals employees were exposed to in the AVD.

If the federal reviewers were talking about some other types of violations than those listed above, we would appreciate some additional detail on how we are to proceed. The DLS Director will address the General Duty and Hazard Communication issues at our annual VOSH training conference in 2011.

Recommendation 8: Bulk samples should be taken by industrial hygienists whenever suspected combustible dust is encountered in a work place (p. 28).

Response: This recommendation corresponds to question 18 on OSHA's Case File Review Form.

This error was found in 1 of 102 case files. VOSH does not consider a less than one percent error rate to rise to the level of a serious problem. This issue will be addressed at the annual VOSH training conference for CSHOs in 2011.

Recommendation 9: OSHA-300 logs for three years must be obtained from [the] employer and reviewed by compliance officers, pursuant to VOSH's FOM, while on-site during inspection activity (p. 28).

Response: This recommendation corresponds to question 19 on OSHA's Case File Review Form.

VOSH agrees that certain case files, primarily in one regional office, did not contain copies of the OSHA 300 logs as required by the VOSH FOM. In one region 22 case files were reviewed by OSHA staff, with 15 of the 22 case files (68%) identified as not containing OSHA 300 logs as required. VOSH has determined that 10 of the 15 case files (67%) were properly identified by OSHA as not having the required copy of the OSHA 300 log.

However, in 5 of the 15 case files (33%) identified by OSHA as not having the required copy of the OSHA 300 log, VOSH determined that those employers were not required by regulation to have an OSHA 300 log because of the number of employees in the company or because the employer had been in business for less than one year.

This issue did not appear to be a significant problem in any of the other regional offices. In fact, one other region noted that the only inspection case file identified as not having a copy of the OSHA 300 log did not have one because the employer had failed to fill one out and that a citation was issued to the employer.

This issue will also be addressed at the annual VOSH training conference for CSHOs in 2011.

Recommendation 10: VOSH must retrain compliance staff in the proper type of documentation needed to justify violation severity classification in accordance with VOSH FOM procedures (p. 30).

Response: This recommendation corresponds to question 29 on OSHA's Case File Review Form.

OSHA noted this as an error in 10 of 102 case files or approximately 10%. Several of those 10 case file reviews questioned severity classification on more than 1 violation, which brings the total violations in question to approximately 15. In the 102 case files reviewed by OSHA, 631 violations were issued. Although VOSH disputes several of the classification errors cited by OSHA, if we assume that the 15 errors found are valid, that still means that VOSH had an error rate of approximately 2.4% (15/631). VOSH does not believe an error rate this low indicates a deficiency in CSHO training. Nonetheless, VOSH will review the applicable requirements in the VOSH FOM with field personnel at its next annual training conference in 2011.

Recommendation 11: Promptly enter OSHA-166 (particularly item 22) data into database (pp. 31, 38).

Response: This recommendation generally corresponds to question 26 on OSHA's Case File Review Form, although that question deals with a whole list of possible forms (Narrative, OSHA-1, OSHA-1B, OSHA-170).

OSHA noted this as an error in 41 of 102 case files or approximately 40%. VOSH will address this OSHA-166 issue with field personnel at its next annual training conference in 2011.

Recommendation 12: Case file diary sheets must be used in accordance with VOSH's FOM procedures. This form needs to be kept at the top of the case file so that a reviewer can tell at first glance the status of the case (p. 31).

Response: This recommendation corresponds to questions 27 and 28 on OSHA's Case File Review Form.

OSHA noted this as an error in 23 of 102 case files or approximately 23%. VOSH will review the applicable requirements in the VOSH FOM with field personnel at its next annual training conference in 2011.

Recommendation 13: VOSH must, in accordance with its own procedures as outlined in its FOM, call employers for outstanding abatement documentation and/or send abatement letters on all cases where abatement documentation has not been received by VOSH (p. 31).

Response: This recommendation corresponds to question 44 on OSHA's Case File Review Form.

OSHA noted this as an error in 4 of 102 case files or approximately 4%. VOSH takes abatement tracking and certification very seriously and considers anything below 100% abatement to be unacceptable. VOSH will review the applicable requirements in the VOSH FOM with Regional Directors and Compliance Managers at its next manager's meeting.

Recommendation 14: Case files must be documented by Regional Directors to explain why the maximum penalty reduction of 40% was granted to employers where minimal abatement was required to come into compliance. Penalty reduction factors should be reviewed in detail with Regional Directors.

Response: This recommendation corresponds to question 39 on OSHA's Case File Review Form.

OSHA noted this as an error in 13 of 102 case files or approximately 13%. The errors were noted primarily in two of the four VOSH regions. Although VOSH has determined that at least 1 of the 13 errors is an incorrect finding, in that the file contained an EISA which was signed by the employer - criteria for when to use an EISA is contained in the VOSH FOM and does not need to be repeated in the case file, VOSH will review the applicable requirements in the VOSH FOM with Regional Directors and Compliance Managers at the next managers' meeting.

Recommendation 15: Copies of signed settlement agreements must be maintained in case files (p. 33).

Response: This recommendation and the finding that supported it were not found to be justified by a review of actual VOSH case file documents. Of the case files identified by OSHA as not having a copy of the signed settlement agreement when one was required, VOSH did not find a single example to support OSHA's finding. In the cases identified by OSHA, citations were issued and **not**

contested by the employer, so no changes were made to the violations or penalties and no settlement agreement was required or entered into. VOSH will take no further action with regard to this recommendation.

Recommendation 16: OSHA 91 data should be entered into the IMIS system for all sampling (p. 38).

Response: VOSH has begun entering OSHA 91 data into IMIS for all sampling. An initiative has begun to enter OSHA 91 data retroactively for all files where sampling was conducted in FY2010.

Recommendation 17: VOSH must adopt federal program changes within the six month period (p. 40).

Response: The only federal program change noted in the EFAME report that VOSH had not adopted in a timely manner is Federal OSHA's revised Field Operations Manual (FOM). VOSH is currently in the process of revising its FOM, but notes that Federal OSHA took several years to fully revise its FOM, while VOSH was only given six months to do so. VOSH does not believe that following our current FOM in any way means that the VOSH program is not as effective as the OSHA program.

Recommendation 18: VOSH must update its current Discrimination directive (pp. 42-43).

Response: VOSH is currently in the process of updating its Discrimination directive.