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DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT  
OCCUPATIONAL SAFETY AND HEALTH DIVISION  
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August 16, 2022

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

RE: Tennessee OSHA Response to the FY 2021 Federal Annual Monitoring and Evaluation (FAME) Report

Dear Mr. Petermeyer:

Our office has received the results of the FY 2021 Comprehensive Federal Annual Monitoring and Evaluation (FAME) report your staff conducted of our program. The report contained two findings; therefore, a Corrective Action Plan (CAP) is required.

Tennessee OSHA would like to take this opportunity to thank you and your staff for the courtesy and professionalism extended to our staff while on-site.

The following formal response is provided to you to address the two findings in the FY 2021 FAME, as well as the three observations listed in the report.

**Finding FY2021-01:**

*In 17 of 43 (39.5%) case files reviewed that had violations, employer knowledge was not adequately documented.*

**Recommendation FY2021-01:**

*TOSHA should implement strategies to ensure that adequate actual or constructive knowledge is documented in all inspection casefiles as required by the Tennessee FOM.*

**State Comments:**

Tennessee OSHA disagrees with this assessment. Respectfully, the evaluators requested, and were provided access to, 70 inspection case files. TOSHA was then provided over 50 pages of notes evaluating these case files, including comments on complaint and referral records that had also been requested. Unfortunately, this did not include any method for

TOSHA to determine which 17 files were believed by the evaluation team to lack documented employer knowledge.

A review of past FAME reports shows a similar finding was issued to TOSHA in the 2009 FAME:

“FY 2009-07: Many case files did not establish adequate knowledge, noting only reasonable diligence and/or plain view...”.

TOSHA implemented, at that time, an aggressive training program to improve documentation to satisfy the evaluators, and by the FY2011 FAME, this subject was no longer a finding or observation.

This item reemerged in FY2013 as an observation:

“OB-2: In many case files, documentation of actual employer knowledge was lacking. Compliance officers are establishing and documenting constructive (With the exercise of reasonable diligence the employer should have known) rather than actual knowledge in the knowledge section of the 1B worksheet.”

A review of the FY 2015 FAME Appendix B shows this observation once again “closed”.

This item reemerged in the FY2019 FAME as a new observation in the FAME delivered on June 26, 2020 with 96 calendar days remaining in FY2020.

The FY2020 FAME review of this FY2019 observation states:

“Status: TOSHA’s position asserts that all required elements of employer knowledge are at least as effective as those utilized by Federal OSHA based on the following: A review of the SIR from the three-year period of 10/1/2017-9/30/2020 demonstrates that TOSHA vacates 15.87% of violations as compared to the Federal RID’s 19.33%. Over the same period, a review of the Inspection Summary report reveals TOSHA contest rate is 2.99% as compares to the Fed OSHA contest rate of 10.53%. Additionally, over that period the number of cases in which the Review Commission has found in favor of the respondent remains zero. This observation is being continued pending verification during the FY 2021 FAME review.”

TOSHA’s training on this topic has been steadfast since 2009 when first mentioned. Any objective review of files over that period will show an improvement in quality and quantity of this documentation, even in the face of a low contest rate and high violation retention rate. While TOSHA holds the stance it has far exceeded “at least as effective as” in any practical measure, the agency will make an effort to divert resources to conduct even more training on documenting employer knowledge.

**Finding FY2021-02:**

*The Tennessee State Plan has failed to adopt OSHA’s initial FY 2016 maximum and minimum penalty increase and subsequent annual penalty amount increases.*

**Recommendation FY2021-02:**

*TOSHA should work with their state authorities to complete the legislative changes necessary to enable it to adopt maximum and minimum penalty amounts that are at least as effective as OSHA's maximum and minimum penalty levels.*

**State Comments:**

Tennessee OSHA has briefed executive leadership on OSHA's position that increasing penalties, while it may or may not have a secondary effect of decreasing the number of workplace injuries and deaths, is considered necessary for TOSHA to have a program that is "at least as effective as" Federal OSHA. Correcting this finding requires the state legislature to amend the TOSH Act. Department leadership is working with state leadership to move toward resolution.

Although not required as part of the Corrective Action Plan (CAP) per the State Plan Policies and Procedures Manual, the following formal response is provided to you to specifically address the observations noted in the FY 2021 FAME.

**Observation FY 2021-OB-1:**

*Inspection field notes, including interview notes in the inspection files, are transferred to the Violation Worksheet Form and the notes are destroyed in accordance with the Tennessee Public Records act, specifically n T.C.A. § 10-7-301(14) which is contrary to Tennessee Field Operations Manual Chapter 5 – Case File Preparation and Documentation – XII. Inspection Records.*

**Federal Monitoring Plan:**

*The OSHA Area Office will closely monitor by to ensure TOSHA implements strategies to ensure field notes, including interview notes, are included in all inspection casefiles as required by the Tennessee FOM.*

**State Comments:**

Tennessee OSHA strongly disagrees with this observation. The text of the Tennessee Field Operations Manual Chapter 5 – Case File Preparation and Documentation – XII. Inspection Records paragraph A.2. states:

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. ...

These records are not retained so that TOSHA may comply with state open records law. The absence of these notes, has not been demonstrated by evaluators to hinder TOSHA's ability to effectively enforce workplace safety and health standards in the decade since this observation was first determined to be a finding on the FY2009 FAME:

"FY 2009-01: 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 did not contain witness or management statements. ..."

In the FY2010 FAME Appendix B, the status of the above finding was identified as “**Closed**”, with the State Action Taken field containing:

The State’s Position is that all pertinent information including photos to substantiate violations is transferred from field notes to the 1B. Field notes will be included if the TN OSHA Attorney determines it is in the best interested to include them. The TOSHA attorney has instructed all field personnel to either destroy or include all field notes in the case file per the TOSHA FOM. This has never been challenged.”

In the FY2013/FY2014 FAME, the subject of notes reemerged as an observation. From FY2015 FAME, appendix B:

FY2013-OB-03/FY2014-OB-03: Field notes are destroyed at the instruction of the state’s attorney when the compliance officer completes the violation form (1B Worksheet).

The FY2015 FAME, in Appendix B again marks Current Status as “**Closed**”

In the FY2019 FAME, this item reemerges in Appendix B as a new observation:

“FY 2015-OB-02 [sic]: Inspection field notes, including interview notes in the inspection files, are transferred to the Violation Worksheet Form, and the notes are destroyed.”

The FY2020 FAME appendix B shows this observation’s status as “Continued”.

Given that this observation has been, at times, a finding, an observation, and closed with no changes to the inclusion of notes in the case file and no apparent degradation of TOSHA’s ability to effectively enforce safety and health standards in Tennessee, it is TOSHA’s request that Federal OSHA concur in assessing that while TOSHA’s process regarding field notes may not be identical, it is objectively “at least as effective as”.

**Observation FY 2021-OB-2:**

*TOSHA issued only two willful violations, which were reclassified to serious, following the informal conference. Casefile reviews identified seven cases with evidence of intentional disregard or plain indifference and a heightened awareness however willful violations were not pursued.*

**Federal Monitoring Plan:**

*The OSHA Area Office will closely monitor State data and review casefiles during the FY 2022 FAME review to ensure cases with evidence of intentional disregard or plain indifference and a heightened awareness are pursued.*

**State Comments:**

TOSHA can understand this observation, in that a lower number of willful serious citations were issued this year versus last; however, the staff attorney offers his opinion about each

tentative willful case. If he feels there is no merit to pursuing willful, then most likely it will not be pursued. In addition, the reclassification of a willful citation during an informal or a formal settlement meeting has no bearing on this issue.

Tennessee OSHA will continue to apply classifications in accordance with its Field Operations Manual, recognizing that the determination of “intentional disregard” or “ordinarily negligent” can be subjective.

**Observation FY 2021-OB-3:**

*TOSHA incorrectly and inconsistently uses administrative closure and case withdrawal procedures. Specifically, certain cases were listed as agency withdrawals but dismissed because of a lack of cooperation by the complainant.*

**Federal Monitoring Plan:**

*During the FY23 FAME review, OSHA will review a sample of cases administratively closed or dismissed due to Complainant's lack of cooperation and ensure the State Plan is correctly and inconsistently using administrative closure and case withdrawal procedures.*

**State Comments:**

Tennessee OSHA will increase efforts to reduce the clerical errors addressed by this observation.

We look forward to continuing to work with the Region 4 staff to improve the effectiveness of our program and our mutual goal of eliminating safety and health hazards from the workplace.

Sincerely,

Wendylee K. Fisher  
Assistant Commissioner  
TOSHA