**TN OSHA State Plan**

**Formal Response to FY 2022 Follow-up FAME Report**

**Continued 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 Plan Response:** 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.

As a result of the FY21 FAME audit, TOSHA again conducted additional training on documenting employer knowledge. The CSHO training was completed on September 12th and 29th, 2022.

However, the FY22 Follow up FAME again discusses the subjective nature of documenting employer knowledge of violations in a case file. TOSHA leadership feels that the documentation of knowledge has improved, additional training was conducted and concluded prior to this follow up audit; therefore, the finding should have been closed.

 **Continued Finding FY 2021-02**: *The Tennessee State Plan has failed to adopt OSHA’s initial FY 2016 maximum and minimum penalty increase and subsequent annual penalty amount increases.*

**Status:** *Correcting this finding requires the State legislature to amend the TOSH Act. Department leadership is working with State leadership to move toward resolution.  TOSHA has briefed executive leadership on OSHA’s position requiring the increase in maximum and minimum penalties.  Proposal to increase penalties was sent to the Governor’s office for approval; however, it had not made it to the legislature. This finding is being continued.*

**State Plan Response:** Tennessee OSHA and LWFD Department leadership are working with state leadership to move toward resolution as it is considered necessary for TOSHA to have a program that is “at least as effective as” Federal OSHA.