



OSHA's Discount on Danger

OSHA Should Revise Its Informal Settlement Policies to Maximize the Deterrent Value of Citations

By CPR Member Scholars Martha T. McCluskey, Thomas O. McGarity, Sidney Shapiro, and CPR Policy Analyst Katherine Tracy

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Authors

Martha T. McCluskey is a professor at the University at Buffalo Law School, State University of New York and a CPR Member Scholar.

Thomas O. McGarity is a professor at University of Texas School of Law and a CPR Board Member.

Sidney Shapiro is a professor at Wake Forest University School of Law and a CPR Board Member.

Katherine Tracy is a policy analyst at CPR.

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Direct media inquiries by email to [Brian Gumm](mailto:brian.gumm@cpr.org) or [Matthew Freeman](mailto:matthew.freeman@cpr.org), or by phone at 202.747.0698.

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Executive Summary

The Occupational Safety and Health Act of 1970 (OSH Act)—the nation's primary law governing worker health and safety—was enacted to ensure safe and healthy working conditions for all workers across the country. Over the past four decades, the law and the standards issued under it have helped to prevent thousands of occupational injuries and illnesses. But Congress's failure to modernize the Act has begun to erode the Occupational Safety and Health Administration's (OSHA's) ability to enforce it effectively.

Congress has not updated the OSH Act's maximum civil penalties—the fines OSHA can impose for violations of its occupational health and safety standards—since 1990 and has failed to close major loopholes in the law that tend to result in business-friendly enforcement outcomes. Congress has also reduced OSHA's resources in recent years, making it all the more difficult for the agency to address new and emerging hazards and to enforce its existing standards adequately. These statutory and budgetary constraints have resulted in OSHA routinely agreeing to reduce penalties as part of informal settlement agreements in exchange for an employer's promise to fix hazardous conditions immediately.

To understand just how much OSHA reduces penalties, we used Department of Labor data to compare final penalties (called "current penalties" by the agency) to the proposed penalties (called "initial penalties") for private-sector enforcement cases that OSHA began and finalized during the Obama administration (through June 8, 2016). Our data analysis focused on penalties imposed in three scenarios:

- Penalties imposed for all violations cited in fatality investigations;
- Penalties imposed for willful violations cited in complaint investigations; and
- Penalties imposed for all violations cited in any type of investigation of a poultry processing facility.

Across all three data sets, we found that the amount by which OSHA reduces its civil penalties threatens to negate the deterrent value of citations.

On Nov. 2, 2015, President Obama signed into law a budget agreement containing a provision that authorizes OSHA to make a one-time adjustment to its civil penalty amounts, not to exceed the inflation rate from FY 1990 through FY 2015 as measured by the Consumer Price Index—roughly 78

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percent. It also authorizes OSHA to adjust its penalty amounts annually thereafter by the inflation rate for the prior fiscal year. By July 1, 2016, OSHA must publish an interim final rule in the *Federal Register* announcing the adjustment, which is supposed to take effect by Aug. 1. We applaud Congress for finally removing the language blocking OSHA from making these long-overdue adjustments to its civil penalties and urge OSHA to adjust the penalties to the maximum amount permissible.

Addressing employers' ability to delay abatement of hazardous conditions simply by contesting OSHA citations would require further action by Congress, which is unlikely in the near term. Nonetheless, we urge the agency to maximize the deterrent impact of its adjusted civil penalties by revising its settlement policies. Deterrence can only happen when breaking the law poses a high risk to an employer's profit margin or ability to contract with larger companies or win government contracts.

Specifically, we recommend that OSHA:

- Empower workers and their representatives by giving them a meaningful voice in the settlement process.
- Provide area offices with additional guidance on calculating penalty reductions and negotiating settlements. Such guidance should discourage area offices from agreeing to large discounts and other concessions as a matter of practice. First, penalty reductions should be off the table when the economic benefits of noncompliance exceed the proposed penalties. Second, area offices should demand employers do more than simply agree to come into compliance with the law. Third, citations should only be withdrawn, modified, or reclassified when there is clear error on the part of the inspector, when the evidence collected clearly cannot support the citation, or when the employer has produced convincing evidence to support a valid affirmative defense.
- Establish national guidelines discouraging area offices from "informally" settling certain types of cases involving unconscionable violations, such as those involving trench collapses, machine guarding, or lockout/tagout violations, or cases involving hospitalizations or fatalities.

Introduction

Russell Walker, Jr. died at the young age of 29, survived by his lifelong partner, son, and many loved ones. Walker's obituary gives the world a small glimpse into his life.¹ The first line reads, "Loving father; Avid hunter." Walker grew up playing baseball and football. He enjoyed hunting and fishing. He was a cancer survivor. He was fatally injured in an industrial incident on Nov. 7, 2011.

Walker worked as a machine operator at Horn Packaging Company. The company had recently relocated a corrugated box-making machine to its plant in Lancaster, Massachusetts. The CEO had given orders to restart production on the morning of Nov. 7, ignoring the fact that a technician from the firm hired to move the machine had told him just a few days earlier that it was missing the proper guards.

During the late afternoon, while Walker was using the machine to manufacture boxes, he became entangled in an unguarded drive shaft and suffered fatal injuries. The Occupational Safety and Health Administration (OSHA) area office in Springfield, Massachusetts inspected the plant following Walker's death and cited Horn Packaging for one willful and 11 serious violations of federal occupational safety and health standards.

OSHA's original estimated penalty was \$137,000, but a series of reductions left the company with a much smaller bill in the end. Before issuing the citations, OSHA granted a 10 percent discount off each of the 11 serious violations because the company was relatively small.² Then, after OSHA issued the citations, agency officials agreed to an even larger discount of \$52,120 as part of an informal settlement with Horn Packaging. In total, OSHA fined the company only \$78,180 for knowingly violating safety standards and causing Walker's death, not to mention endangering numerous other employees.

When OSHA inspects a workplace and finds serious health and safety violations, the agency ideally would heavily penalize the employer that broke the law and require it correct the violations immediately. Instead, OSHA routinely agrees to reduce the civil fine substantially *in exchange* for the employer agreeing to correct the violations immediately. The scale of the problem is significant. In 2012 alone, penalty reductions for violations cited against private-sector employers in fatality investigations were reduced by a total of \$1.28 million. Because OSHA informally settles the majority of cases, much of this \$1.28 million is the result of settlement negotiations between employers and OSHA area offices.

OSHA encourages this trade-off because of limits on its authority under the Occupational Safety and Health Act (OSH Act), the nation's primary law governing worker health and safety. First, the Act sets maximum penalties

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the agency can impose for each type of violation, but the penalties are too low to deter violators. Second, when determining the penalty for a violation, the Act requires consideration of the gravity of the violation, as well as an employer’s size, history of violations, and good faith in addressing hazards. Third, the Act does not authorize the agency to order employers to fix dangerous conditions immediately. Thus, if an employer challenges a citation, it is not legally obligated to correct, or “abate,” the violation until the Occupational Safety and Health Review Commission issues a final decision or the employer and OSHA agree to a formal settlement.

One of these problems is being addressed now. In November 2015, President Obama signed into law a budget agreement containing a provision that authorizes OSHA to update the maximum civil penalties it may assess for cited violations. Almost every other agency in the federal government has had the authority to adjust its civil penalties for inflation since Congress passed a law granting that authority in 1990. Congress excluded OSHA from that law, so penalties have drastically shrunk in inflation-adjusted terms.

By July 1, 2016, OSHA must publish an interim final rule in the *Federal Register* announcing the adjustment and providing that it will take effect by Aug. 1. The 2015 budget agreement authorizes OSHA to make a one-time adjustment to its civil penalty amounts, not to exceed the inflation rate from FY 1990 through FY 2015 as measured by the Consumer Price Index. Then, each year, the agreement authorizes OSHA to adjust its penalty amounts by the inflation rate for the prior fiscal year.

If OSHA adjusts its civil penalties to the maximum authorized by law—the inflation rate from FY 1990 through FY 2015 (roughly 78 percent³)—OSHA’s maximum fines would be:

Table 1. Maximum OSHA Civil Penalties by Violation Type

Violation Type	Current Maximum Fine	Adjusted Maximum Fine
Willful	\$70,000	\$124,710
Repeat	\$70,000	\$124,710
Serious	\$7,000	\$12,471
Other-than-serious	\$7,000	\$12,471

The business community is likely to come out in strong opposition to OSHA’s adjusted civil penalties. One common argument is that the higher penalties will overly burden businesses and force them to cut jobs. Of course, businesses that maintain safe workplaces in compliance with the law are never subject to these penalties, so the only businesses burdened by

them are those that sought to gain an advantage over competitors by cutting corners and breaking the law.

Expect to hear business lobbyists also make the case that higher civil penalties will result in employers contesting more citations, which in turn will delay the resolution of cases.⁴ This argument is related to the third limitation on OSHA's authority under the OSH Act, mentioned above, that OSHA does not have legal authority to order immediate abatement of serious health and safety violations. Fully addressing employers' ability to delay abatement of hazardous conditions simply by contesting citations would require congressional action.

OSHA's legal and budget limitations are serious problems, but there is a way to maintain a strong enforcement program despite the constraints. OSHA should revise its settlement policies at the same time it adjusts its civil penalties. Doing so will maximize the deterrent impact of those increased penalties by recalibrating the balance of interests at stake in the settlement process. OSHA is unlikely to realize the potential increase in deterrence that increased penalties can create if it continues to agree almost automatically to reduce penalties as a matter of practice. Specifically, we recommend that OSHA:

- Empower workers and their representatives by giving them a meaningful voice in the settlement process.
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- Establish national guidelines discouraging area offices from "informally" settling certain types of cases involving unconscionable violations, such as those involving trench collapses, machine guarding, or lockout/tagout violations, or cases involving hospitalizations or fatalities.

OSHA's Citation Process and Penalty Policies

OSHA enforces its occupational safety and health standards by conducting inspections of worksites and citing employers for violations. Within six months of an inspection, the OSHA area office with jurisdiction over the

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establishment will issue a citation that lists each violation, the proposed penalty (if any), and a proposed date by which the employer must correct each violation.

Depending on the severity of a violation, OSHA will classify it as one of the following:

- **Willful:** The employer has demonstrated either an intentional disregard for the requirements of the OSH Act or a plain indifference to employee safety and health.
- **Repeat:** The employer has been cited previously within the past five years for the same or a substantially similar condition or hazard and the citation has become a final order of the Occupational Safety and Health Review Commission.
- **Serious:** There is a substantial probability that death or serious physical harm could result from the violation and the employer knew or should have known of the presence of the violation.
- **Other-than-Serious:** The incident or illness that would be most likely to result from a hazardous condition would probably not cause death or serious physical harm, but would have a direct and immediate relationship to the safety and health of employees.

Calculating the Initial Penalty

When deciding the appropriate penalty amount for a violation, OSHA begins with a baseline penalty that reflects the gravity of the violation—the severity of the hazard involved and the probability of a resulting injury or illness. From the baseline penalty, OSHA considers whether to reduce the penalty further based on the employer’s size, good faith, and history of violations.⁵ OSHA routinely reduces penalties at this stage as a matter of practice, rather than considering on a case-by-case basis whether a reduced penalty is warranted.

An employer with fewer than 250 employees is eligible for a discount ranging from 10 percent to 80 percent. An employer that has an occupational health and safety management system in place qualifies for a good faith discount of 15 or 25 percent for low- or moderate-gravity serious and other-than-serious violations so long as no repeat violations were found and cited during the same inspection. Another 10 percent discount is given to employers that have been inspected in the past five years and not been cited for any violations classified as serious or above. To top it off, OSHA will discount a penalty by 15 percent in certain instances when the employer fixes the hazard during or within 24 hours of the inspection. Notably, OSHA applies these reductions before it has even issued a citation.

Over the course of the Obama administration, OSHA has sought to make improvements to its penalty policy by revising its procedures for calculating and adjusting civil penalties and focusing on the most serious violations.

According to the AFL-CIO, the new policy put in place in 2010 has doubled the average federal OSHA penalty for serious violations, from roughly \$1,000 to \$2,000.⁶ But despite increases in average penalties for some years, there have also been some declines in the average penalty amount for other years since the new policy took effect. And unfortunately, the average in any given year is still far below the maximum amount that OSHA could have imposed.

Reduced Penalties and Other Concessions in Informal Settlement Agreements

Once OSHA officially issues a citation, the employer has up to 15 days to challenge it by filing a Notice of Contest. Typically, before filing the Notice of Contest, employers will request an informal conference with OSHA during which (or shortly thereafter) OSHA and the employer can agree to an “informal” settlement. The OSHA Area Office Director approves the terms of the informal settlement, which may include reducing the proposed penalty, reclassifying or completely withdrawing citations, or extending the abatement date.

OSHA contends that it must grant these concessions to employers at this early stage to incentivize them to settle cases informally instead of filing a Notice of Contest. Otherwise, employers can contest the citations, which moves the case to the docket of an Administrative Law Judge and, eventually, the Occupational Safety and Health Review Commission, an independent three-member tribunal created by Congress to review OSHA enforcement actions. In these proceedings, the Regional Solicitor of Labor takes over the case and formal settlement proceedings begin. This process may take several months or years to complete.

While the case is before the Review Commission, the employer is not legally obligated under the OSH Act to correct underlying violations of citations it has contested, potentially endangering workers in the meantime. OSHA prefers to settle the case early in exchange for the employer agreeing to correct violations promptly. Informal settlements can also serve as a means for OSHA to negotiate terms with an employer that include more protective measures, like instituting or enhancing a health or safety program, agreeing to audits or regular inspections, and the like. Additionally, settling a case is much less resource-intensive for the agency.

As a way to enhance accountability and deterrence in companies with major violations, OSHA issues press releases announcing significant cases with high initial penalties. This public attention campaign has rattled companies that have been the subject of one or more press releases. In fact, according to public statements from high-level OSHA officials, several companies have asked what they can do to ensure OSHA does not issue a press release about them, for which OSHA has responded that they can maintain a safe and healthy workplace. This is an innovative approach to maximizing OSHA’s paltry enforcement resources. But it is important to recognize that even in these cases, OSHA routinely engages in substantial penalty reductions.

Jack-booted Thugs or Paper Tigers?

Congress saddled OSHA with a herculean task: ensuring every worker enjoys safe and healthful employment. The national OSHA office has some state-level agencies to help with the task, but federal officials are responsible for ensuring safety and health in approximately 5.5 million private-sector workplaces in 29 states.⁷ In an era of woefully underfunded government agencies, OSHA is among the most downtrodden, with an enforcement budget sufficient to employ only about 800 federal inspectors.

Among federal inspectors most weighty tasks are two types of investigations that demand a strong enforcement response: inspections following a worker's death on the job, and inspections prompted by complaints from workers that uncover willful violations. The significance of fatality investigations goes without saying. Worker complaints, particularly those that lead to inspectors uncovering willful violations, are also noteworthy. Consider the risks a worker takes when informing government officials that her employer is intentionally violating federal law.⁸

To understand just how much OSHA reduces penalties in these two types of cases, we used Department of Labor data to compare final penalties (called "current penalties" by the agency) to the proposed penalties (called "initial penalties") for private-sector enforcement cases that OSHA began and finalized during the Obama administration (through June 8, 2016). For each data set, we calculated the median values, which represent the middle point of the number range. Because of potential outliers, calculating the median provides a better representation of the middle value than does the average.

Penalties Imposed for All Violations Cited in Fatality Investigations

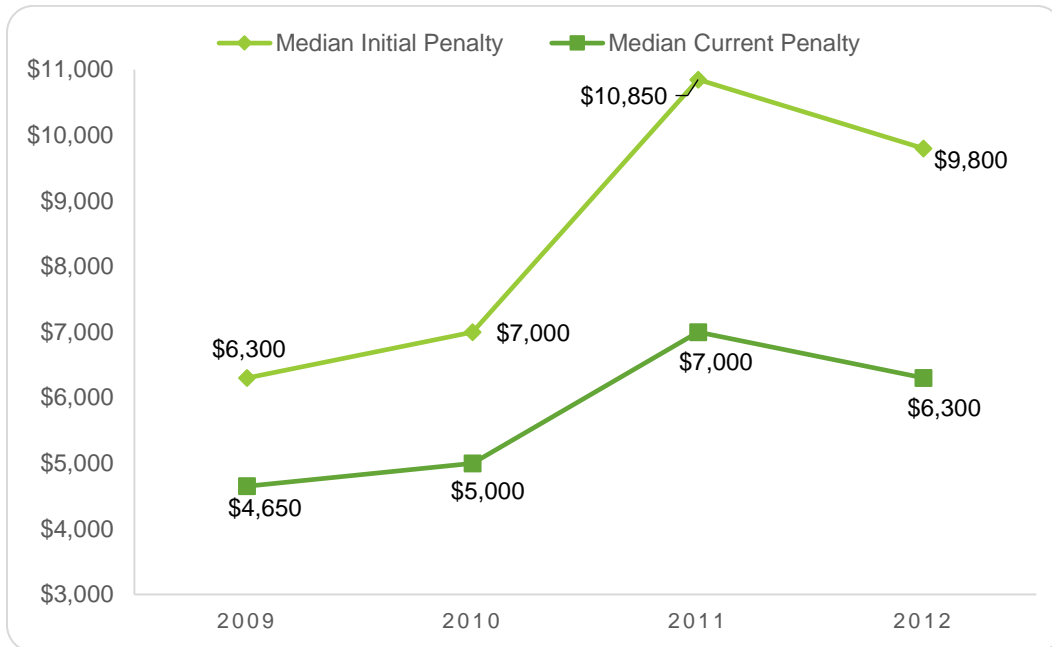
The first data set we reviewed compares proposed and final penalties imposed for violations cited against private-sector establishments in 1,773 fatality investigations opened and closed between Jan. 20, 2009, and June 8, 2016, the date of our search. Our search did not return any cases opened after 2012 because later cases are still under review by OSHA.

Figure 1 below shows the median initial penalty compared to the median final (current) penalty imposed across all fatality cases during each year from 2009 to 2012.

Across all years and for all violation types, the median initial penalty imposed in any given case was \$7,900, and the median current penalty was \$5,800. The median deduction per case was \$1,600. The median deduction as a percentage of initial fines was 25 percent per case. The amount deducted from initial penalties in all 1,773 investigations totaled \$9.45 million. It is important to remember that this reduction is on top of the first penalty reduction based on the gravity of the violation and discounts based

on an employer's size, history of violations, and good faith, as discussed earlier in this report.

Figure 1. Initial vs. Current Penalties in Fatality Cases



*For purposes of this calculation, each case is considered under the year in which the first citation was issued.

Case Study: Walt Disney World

On July 5, 2009, a monorail driver at Walt Disney World in Orlando, Florida suffered fatal injuries when two train cars collided. One of the train cars was holding on the track while the second car was switching to a separate track so that it could travel to the maintenance area. Before the switch beams were locked into position or energized, the command was given to go ahead with the switching operation that would remove the second train car from the track. The car reversed, but since it was still on the same track as before due to the failed switching operation, it collided with the holding car, killing the driver on impact and injuring six park guests. Following the fatality, OSHA inspectors cited Walt Disney World for two serious and two repeat violations and proposed \$44,000 in civil fines. As part of an informal settlement agreement with Disney, OSHA reduced the proposed penalties for both of the repeat violations, for a total fine of \$35,200.

Penalties Imposed for Willful Violations Cited in Complaint Investigations

Filing a complaint with OSHA is a courageous act. Not everyone is willing to risk the potential consequences to get help changing the safety and health practices of an employer. Too often, the improvements that might come with OSHA's oversight are followed by a pink slip, reduced hours, or some other, more subtle form of retaliation. That is especially the case when the complaint involves an employer that would willfully violate federal law.

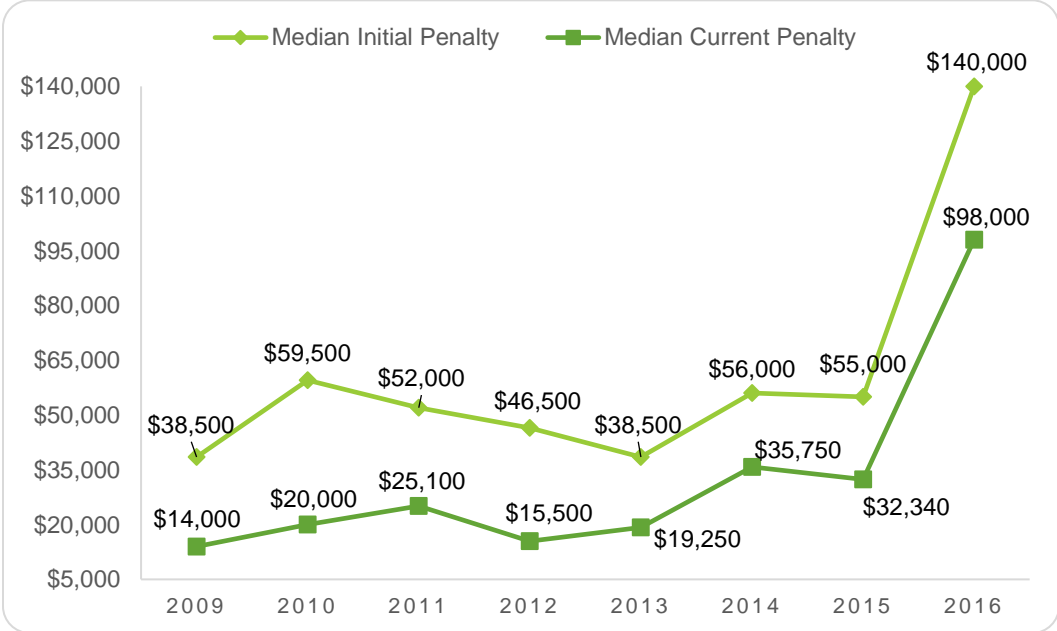
We reviewed the Department of Labor’s data on willful violations cited against private-sector establishments in 239 complaint investigations opened and closed between Jan. 20, 2009, and June 8, 2016, the date of our search. This data set includes only the total penalties imposed for willful violations. It does not include other types of violations cited in each case.

Figure 2 below shows the median initial penalty compared to the median current penalty imposed for all willful violations in complaint cases during each year from 2009 to 2016. For 2016, OSHA’s enforcement data only include one complaint case with two willful violations, which means the median penalty amounts for willful violations per case in 2016 is equal to the penalty amount for that single case.

Across all years, the median initial penalty imposed for willful violations in any given case was \$49,500, and the median current penalty was \$21,000. The median deduction given off willful violations per case was \$17,000. The median deduction as a percentage of initial fines penalty proposed was 47 percent per case.

The amount deducted from initial penalties for willful violations cited in all 239 complaint investigations totaled \$7.91 million. Again, this deduction is on top of the first penalty reduction based on the gravity of the violation and discounts based on an employer’s size, history of violations, and good faith, as discussed earlier in this paper.

Figure 2. Initial vs. Current Penalties for Willful Violations in Complaint Cases



*For purposes of this calculation, each case is considered under the year in which the first citation was issued.

Case Study: Koser Iron Works

On Oct. 1, 2014, OSHA's federal office responded to a complaint about working conditions at Koser Iron Works, Inc., a steel fabrication company located in Barron, Wisconsin. The inspection uncovered two willful, four repeat, 12 serious, and two other-than-serious safety violations resulting from the company's failure to safeguard workers from dangerous amputation hazards. OSHA proposed a civil fine of \$102,180 and issued a press release touting the high penalty amount imposed. Yet OSHA's area office ultimately agreed to settle the case informally with Koser Iron Works, which resulted in a \$30,654 reduction from the proposed penalty.

The Jungle, Revisited

A handful of American manufacturing industries have bucked the trend of reduced employment over the last few decades. Poultry slaughter and processing is one. The U.S. poultry processing industry includes hundreds of companies, with the top four poultry producers processing almost 60 percent of the market. In 2015, the industry employed nearly 223,000 individuals.

According to the Bureau of Labor Statistics' most recent data on nonfatal occupational injuries and illnesses, the poultry processing industry had 4.3 total recordable cases per 100,000 full-time workers in 2014, compared to the national average for private industry of 3.2 total recordable cases.⁹ Given that injuries and illnesses are not always reported or recorded, the true number is probably much higher.

Common jobs performed in poultry plants include receiving and killing, evisceration and inspection, cutting and deboning, processing and packing, and sanitation and cleaning. Workers performing these tasks are at risk of a range of injuries to every part of their bodies.

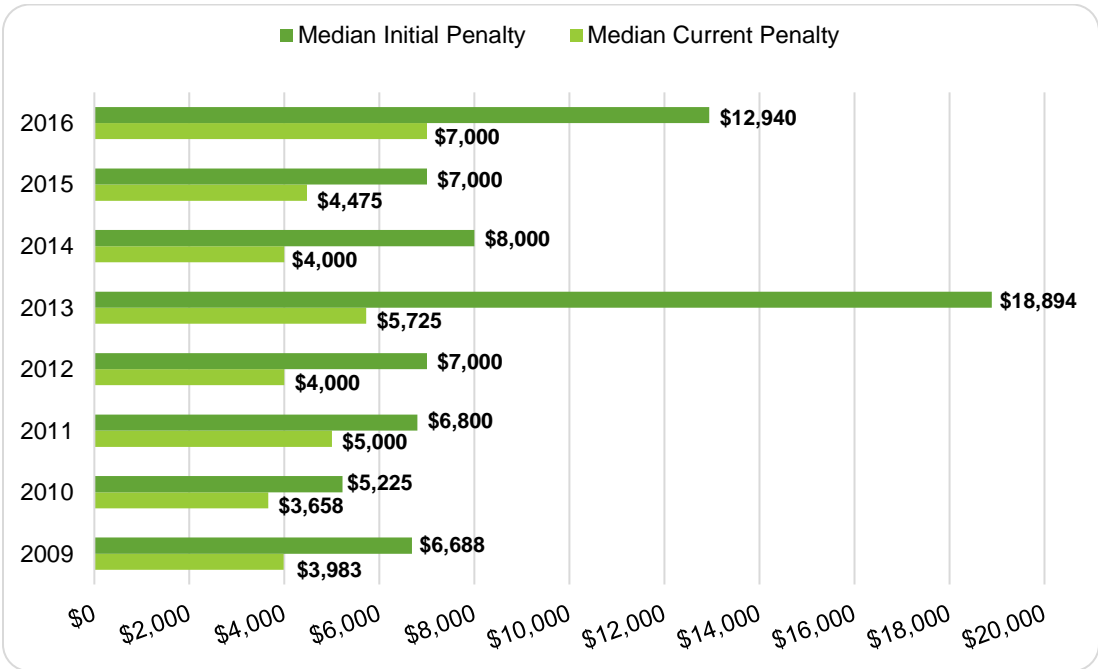
Musculoskeletal disorders like carpal tunnel syndrome and shoulder injuries are particularly high among workers because of rapid line speeds and because they are often assigned tasks that require forceful and repetitive twisting, cutting, and chopping, as well as awkward postures. Other injuries include cuts and scrapes, injuries from falling on slippery floors, amputations, chemical exposures, and adverse health effects from company policies like denying bathroom breaks.¹⁰

We reviewed Department of Labor data on penalties imposed for all violations cited against private-sector poultry processing establishments in 245 investigations opened and closed between Jan. 20, 2009, and June 8, 2016, the date of our search.

Figure 3 below shows the median initial penalty compared to the median current penalty imposed across all poultry processing industry investigations during each year from 2009 to 2016. Across all years and for all violation types, the median initial penalty imposed in any given poultry processing facility investigation was \$7,000, and the median current penalty was \$4,718. The median deduction per case was \$3,000. The median deduction as a percentage of initial fines was 40 percent per case. The amount deducted from initial penalties in all 245 poultry processing facility investigations totaled \$2.18 million.

As stated in the previous section, it is noteworthy that this deduction is on top of the first penalty reduction based on the gravity of the violation and discounts based on an employer’s size, history of violations, and good faith.

Figure 3. Initial vs. Current Penalties in Cases Against Poultry Processors



*For purposes of this calculation, each case is considered under the year in which the first citation was issued.

Case Study: Allen Family Foods

On Sept. 9, 2009, OSHA conducted an inspection of Allen Family Foods, a poultry processing facility located in Harbeson, Delaware. The Maryland Occupational Safety and Health issued a referral to federal OSHA relating to the establishment after finding numerous serious and willful violations at one of the company’s Maryland-based facilities. The inspection of the Delaware facility uncovered similar violations, resulting in the company being cited for 33 safety violations (30 serious and three other-than-serious) and 17 health violations (15 serious and two other-than-serious). OSHA proposed penalties of \$112,200 for the safety violations and \$70,000 for the health violations. OSHA and Allen Family Foods entered an informal

settlement on the safety violations, in which OSHA agreed to reduce the initial penalty of \$112,200 to \$78,540 and to delete one other-than-serious violation. Allen Family Foods contested the health violations and later agreed to a formal settlement with OSHA, which resulted in a \$21,000 penalty reduction and the deletion of two serious violations.

It is noteworthy that OSHA has had occasion to inspect this plant three more times since 2009. Within one year of the 2009 inspection, OSHA received a complaint about working conditions at the same facility in Delaware, but the inspection did not result in any citations against the company. OSHA inspected again on Dec. 16, 2014, finding six serious and three other-than-serious violations and proposing a penalty of \$38,000. Allen Family contested all nine citations and the case remains open as of the date of our search, June 8, 2016. OSHA inspected the facility once again in July 2015, finding three serious violations, for which the agency proposed a \$17,000 fine. Despite the long history of violations at this facility, OSHA's area office informally settled the case with Allen Family Foods, agreeing to reclassify one serious violation to other-than-serious, for a penalty of \$5,000. OSHA gave an additional \$3,000 discount off the remaining two serious violations, for a total current penalty of \$14,000.

Our Findings and Recommendations

OSHA staff bear a difficult burden in resolving cases where employers put their workers at risk or, too often, fail to eliminate risks in time to avoid injuries or death. The agency's caseload is massive. And each case must account for a loophole in the OSH Act that permits employers to essentially hold workers hostage in settlement negotiations by permitting employers to leave hazards unabated while an appeal is pending. As a result, area offices often cut civil fines drastically and agree to reclassify or withdraw citations in exchange for an employer's agreement to fix hazardous conditions immediately, establish additional health and safety programs, allow follow-up inspections, reform internal health and safety policies, or make other improvements.

In full recognition of this balancing act, but also noting the importance of a strong rule of law that deters bad actors and levels the playing field for the many employers that do what is necessary to protect workers, we urge OSHA to revise its settlement policies. Congress sent a clear signal with its 2015 budget agreement authorizing OSHA to update its civil penalties for the first time since 1990—it is time to level the negotiating table that for too long has tilted in favor of employers that skirt the law. We recommend that OSHA:

- **Empower workers and their representatives by giving them a meaningful voice in the settlement process.**

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- Establish national guidelines discouraging area offices from “informally” settling certain types of cases involving unconscionable violations, such as those involving trench collapses, machine guarding, or lockout/tagout violations, or cases involving hospitalizations or fatalities.

These recommendations are eminently reasonable, given OSHA’s mandate to ensure safe work for all. But the truth of the matter is that they represent a bold set of reforms for an agency that has for years wielded its enforcement powers in a way that looks almost apologetic from the perspective of workers’ rights advocates.

Engaging Workers in Settlement Discussions

The OSH Act does not require OSHA to do much to inform workers about the outcome of an inspection, much less engage with them as it negotiates with the employer, ostensibly on their behalf. The paternalism baked into the 45 year-old statute flies in the face of modern norms regarding the relationships between government agencies and the people they are supposed to protect. Over the years, OSHA has made some strides toward better engagement with people affected by its enforcement actions. For example, the agency now makes some effort to share basic information about the process with families of workers killed on the job. But the underlying attitude of “trust us, we know what’s best” limits the effectiveness of its enforcement program as a tool for building partnerships with the workers who will be the long-term force pushing for improved health and safety practices at every worksite.

To better engage workers and their representatives in the enforcement process, OSHA should give them a voice in settlement discussions. OSHA officials should seek to include affected workers and their representatives in the informal conference with the employer or in a separate meeting if requested by either party, to apprise them of the citations and potential terms of settlement. OSHA should specifically invite workers who filed a complaint that resulted in citations, workers who participated in the inspection, and their union representatives (in unionized establishments) to participate in an informal conference. At the meeting, OSHA should carefully

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consider any information provided by workers or their representatives relating to the hazards and measures required to abate them completely. OSHA should also address concerns about hazards not cited by inspectors, the classification of cited violations, the period of abatement, potential retaliation by the employer, or any other issues related to the case.

In addition, technologies unheard of at the time Congress passed the OSH Act could prove useful. If OSHA inspectors were to request employee contact information as part of standard records requests at the start of an inspection, mobile numbers and e-mail addresses could be used to deliver links to copies of citations and forms for submitting comments to the agency. The same information should also be delivered to any worker representative identified during the inspection.

Redefining the Terms of Informal Settlements

During informal settlement negotiations, OSHA area office staff have broad leeway to revise not only the dollar amount attached to citations, but also the terms and timing of fixing hazards that led to citations, and even the mere existence of the citations. OSHA's "Field Operations Manual" provides nationwide guidance on these issues, but the guidance is minimal. For instance, the FOM, as it is known colloquially, states that area offices should only modify or withdraw penalties and citations (or citation items) "where evidence establishes during the informal conference that the changes are justified."¹¹ The manual also states that penalty amounts should be negotiated based on "the circumstances of the case and the particular improvements in employee safety and health that can be obtained."

OSHA should update the FOM to provide area offices with clear, detailed guidance that they can follow in deciding what terms are appropriate to consider when negotiating an informal settlement with a violator. Three changes are in order.

First, penalty reductions beyond those already included in the initial penalties listed in a citation should not be granted as a matter of practice by area offices. Rather, OSHA area offices should address the factors required by law (gravity of violation, history of violations, and business size), then analyze the amount of money the employer saved by not complying with the standard in the first place. If the economic benefits of noncompliance exceeded the proposed penalties, additional penalty reductions should be off the table. This is a bold new approach to negotiating, but under the existing permissive guidelines, the final penalties OSHA imposes after initial reductions and settlement negotiations are so small that their deterrent value must be negligible. Deterrence happens when breaking the law poses a high risk to an employer's profit margin or ability to contract with larger companies or win government contracts.

OSHA should update the Field Operations Manual to provide area offices with clear, detailed guidance that they can follow in deciding what terms are appropriate to consider when negotiating an informal settlement with a violator.

Second, area offices should demand that employers do more than simply abate hazards if employers want to bargain for reduced penalties, extended penalty payment plans, or other concessions. OSHA should not reward employers during settlement negotiations for agreeing to spend money to do what they were already required to do—comply with the law and ensure safe and healthy working conditions.

Third, area offices should only withdraw, modify, or reclassify a citation when there is clear error on the part of the inspector, when the evidence collected clearly cannot support the citation, or when the employer has produced convincing evidence to support a valid affirmative defense. Area offices should be clear that modification or reclassification is preferred over completely withdrawing a citation. Moreover, area offices should not withdraw or reclassify willful violations that resulted in a worker's death. Such cases involve potential criminal misconduct, and the area office should work with the Regional Solicitor of Labor's office to investigate thoroughly and refer the case to the U.S. Department of Justice for criminal prosecution. Withdrawing or reclassifying a willful violation completely eliminates the possibility of criminal prosecution, allowing the most egregious violators to go unpunished.

When Settling Should be a Solution of Last Resort

Some of OSHA's cases involve hazards or incidents that are, simply put, unconscionable. Employers have known for thousands of years how to prevent trench collapses. Machine guarding and lockout/tagout rules ensure such a basic level of protection that employers' failure to abide demands a strong response. And cases involving hospitalizations and fatalities often uncover such deep management problems that OSHA should use the cases to send the message: "This behavior cannot be condoned." These are just a few of the types of cases that OSHA leadership should discourage area offices from settling informally.

By revising its informal settlement policies, OSHA can better ensure it is not agreeing to substantial penalty reductions and other concessions in exchange for employers' promises to institute abatement measures that turn out to be inadequate or that the employer never intends to institute.

Moreover, discouraging settlements in cases involving egregious violations ensures scofflaws are held accountable. Discounted penalties and modified citations could result in a company's violation history appearing much rosier than it otherwise would, helping repeat violators go unnoticed and unpunished. By denying penalty reductions and requests to reclassify or withdraw citations, employers that repeatedly engage in unconscionable risk-taking can be recognized and appropriately penalized.

OSHA area offices often contend that informal settlements can be a means of getting employers to agree to terms to which they would not otherwise

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consent. However, if an employer contests a citation, the Review Commission also has authority to negotiate for benefits, which can extend beyond correcting the specific violations cited by the area office. Section 10(c) of the OSH Act authorizes the Review Commission to affirm, modify, or vacate any citation or proposed penalty or direct “other appropriate relief.” This might include things such as formal health and safety programs, training or retraining workers, or even corporate-wide or enterprise-wide hazard abatement.

In other words, OSHA should drive a harder bargain and obtain greater protection for workers as part of its settlement process in appropriate cases. Employers that dislike the harder bargain and choose to contest a citation will risk more substantial penalties being levied against them by the Review Commission.

Endnotes

¹ Obituary, *Russell W. Walker Jr.*, SENTINEL & ENTERPRISE, Nov. 9, 2011, <http://www.legacy.com/obituaries/fitchburg/obituary.aspx?n=russell-w-walker&pid=154539308>.

² The details of this case as discussed herein are based on documents in the OSHA Inspection File in the Matter of Horn Packaging, Inspection No. 315516005 (on file with author), which OSHA provided to the Center for Progressive Reform in response to a Freedom of Information Act (FOIA) request submitted to OSHA Region I on Aug. 22, 2013. For publicly available information relating to this case, see News Release, Occupational Safety & Health Admin., U.S. Dep't of Labor, U.S. Labor Department's OSHA Cites Lancaster, Mass., Packaging Manufacturer Following Worker Fatality (May 7, 2012), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASE_S&p_id=22341.

³ Memorandum from the Exec. Office of the President, Office of Mgmt. & Budget, to the Heads of Exec. Dep'ts & Agencies, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Feb. 24, 2016), <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2016/m-16-06.pdf>.

⁴ *Protecting America's Workers Act: Modernizing OSHA Penalties*, Hearing on H.R. 2067 Before the Subcomm. on Workforce Prots. of the H. Comm. on Educ. & Labor, 110th Cong. 84-100(2010) (statement of Jonathan L. Snare, Partner, Morgan, Lewis & Bockius LLP, on behalf of the Chamber of Commerce), https://www.uschamber.com/sites/default/files/legacy/testimony/100316_snaretestimony.pdf.

⁵ U.S. OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, CPL 02-00-159, OSHA INSTRUCTION, FIELD OPERATIONS MANUAL 6-1 to 6-13 (2015), https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-159.pdf.

⁶ AFL-CIO, DEATH ON THE JOB: THE TOLL OF NEGLECT 20 (25th ed. 2016), http://www.aflcio.org/content/download/174867/4158803/1647_DOTJ2016.pdf.

⁷ U.S. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, QUARTERLY CENSUS OF EMPLOYMENT AND WAGES (2015), http://data.bls.gov/cew/apps/table_maker/v4/table_maker.htm?type=4&year=2015&qtr=A&own=5&ind=10&supp=0 (last modified June 02, 2016); *State Plans: Office of State Programs*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/dcsp/osp/> (last visited June 22, 2016).

⁸ *See generally Whistleblower Protection Laws*, CTR. FOR PROGRESSIVE REFORM, <http://www.progressivereform.org/WorkerWhistleblower.cfm>.

⁹ BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, SUMMARY TABLES – DETAILED INDUSTRY DATA PRESENTING INCIDENCE RATES OF INJURIES AND ILLNESSES COMBINED AND INJURIES ONLY (2014), <http://www.bls.gov/iif/oshwc/osh/os/ostb4343.pdf>.

¹⁰ *See generally* OXFAM AM., LIVES ON THE LINE: THE HUMAN COST OF CHEAP CHICKEN (2015), <https://www.oxfamamerica.org/publications/lives-on-the-line/>; OXFAM AM., NO RELIEF: DENIAL OF BATHROOM BREAKS IN THE POULTRY INDUSTRY (2016), <https://www.oxfamamerica.org/explore/research-publications/no-relief/>.

¹¹ U.S. OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, CPL 02-00-159, OSHA INSTRUCTION, FIELD OPERATIONS MANUAL 8-1 (2015), https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-159.pdf.

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