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23rd Annual Las Vegas Seminar:
Workers' Compensation:
It's Been A Long, Strange
Trip

**OSHA Update for Workers'
Compensation Practitioners**
Attorney William L.S. Ross
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OSHA Update for Workers' Compensation Practitioners

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ABA – "Rik Williger's Last Seminar"
Tropicana Hotel, Las Vegas, NV

May 19, 2017



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What's New?

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- > **Penalty Increases (near 80%)** 8/1/16
- > **Accident Reporting Requirements** 1/1/15
(and OSHA follow-up process)
- > **Electronic Reporting Requirements** 12/1/16
(and more!)



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What's New?

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- > Silica 6/23/16
- > Hearing Loss Rule Expansion
- > Criminal Enforcement
("Yates Memorandum" 9/9/15)
- > "Name and Shame"
- > Who is the/a (citeable) Employer?
(independent contractors; joint employers;
"gig/on-demand economy")

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What's New?

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- > Fall Protection (General Industry)
- > Construction Safety and Health Programs
Management Guidelines
- > Temporary Workers Guidelines 4/27/16
- > Transgender Workers
- > Kink.com Cal/OSHA PPE Enforcement
- > Marijuana Industry Worker Protection
- > Inspection "Weighting" System



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OSHA Inspections

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- > OSHA Inspections (reason for):
 - Imminent danger
 - FAT/CAT (eight and twenty-four hour rules)
 - Formal complaint
 - Referrals
 - "Plain view"
 - SST (General Industry)
 - UT "Dodge Reports" (Construction)
 - NEPs, REPs and LEPs
 - Informal "fax and phone"
 - Follow-ups



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OSHA Inspections

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- > OSHA Inspections (type of):
 - Accident
 - Complaint
 - "Plain View"
 - NEPs, REPs and LEPs
 - Random and SST
 - Focused
 - Severe Violator Enforcement Program (SVEP)



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OSHA Inspections

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> Multi-Employer Worksite Citation Policy:

- Exposing Employer
- Creating Employer
- Controlling Employer
- Responsible Employer
- *Summit Contractors Case*
- Independent Contractors and Joint Employers



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OSHA Inspections

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> Conduct of the Inspection:

- Opening Conference
- "Walk Around" (and who may participate)
- Photos/Videos, Sampling, Measurements, Etc.
- Programs Review
- Employee Interviews
- Closing Conference
- Trade Secrets
- Union/Employee Involvement

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OSHA Inspections

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> Legal Elements of an OSHA Violation:

- Applicability of cited standard
- Fact of violation
- Employee exposure ("hazard")
- Employer knowledge (actual or constructive)



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OSHA Inspections

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> Employer Affirmative Defenses:

- Unilateral employee misconduct/unsafe act
- "Greater hazard" rule
- Infeasibility of abatement



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OSHA Inspections

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> Citation Classifications:

- Willful
- Repeat
- Failure to abate
- Serious
- OTS
- De minimus



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OSHA Inspections

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> Components of an OSHA Citation:

- Standard implicated (unless “General Duty Clause”)
- Facts supporting violation
- Proposed penalty (across the board increase August 2016)
- Abatement deadline (no requirement to set forth feasible abatement method; frequently abatement suggestions are made)

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Sample OSHA Citation

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Citation 1 Item 6 Type of Violation: **Serious**

29 CFR 1926.451(g)(1): Each employee on a scaffold more than 10 feet (3.1 m) above a lower level were not protected from falling to that lower level:

On or about January 31, 2011, at the North Kaufman water supply tower jobsite located on County Road 139, the employer did not ensure that employees working from single-point adjustable suspension scaffolds more than 10 feet above a lower level were protected from falling to the lower level.

Date By Which Violation Must be Abated:	08/04/2011
Proposed Penalty:	\$ 4620.00

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OSHA Inspections

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> Post-Citation Procedures:

- Area Director Informal Conference (fifteen federal business day deadline!)
- Notice of Contest to OSHRC (must be within same fifteen day deadline)
 - Assigned to ALJ
 - Bench hearing in approximately nine months with discovery allowed; Federal Rules of Evidence apply (unless Simplified proceedings track)
 - Limited intervention rights of union
 - Discretionary appeal to full Review Commission; further appeal to Federal Courts of Appeal

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OSHA Inspections

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> Red Flag OSHA Citations:

- **Any** citation connected to an accident
- **Worse** -- connected to accident **and** violation is characterized as:
 - Willful
 - Repeat
 - Failure to abate
 - General Duty clause (“Section 5(a)(1)”)
- Abatement of alleged hazard would lead to substantial cost and/or substantially disrupt operations



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OSHA Inspections

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> Each employer:

- Shall furnish to each of his employees employment and a place of employment which are free from **recognized hazards** that are causing or are likely to cause death or serious physical harm to his employees;
- Shall comply with occupational safety and health standards promulgated under this chapter.

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General Duty Clause Citation Example

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Citation 1 Item 1 Type of Violation: **Serious**

Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer does not furnish employment and a place of employment which was free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that:

On or about January 29, 2011 at least one employee of [REDACTED] operated a Spider ST-17 single-point adjustable suspension scaffold that did not have authorized rigging connectors.

Among other methods, one feasible means of abatement includes but is not limited to:

Following the manufactures operator's manual that specifies the approved method of securing the Spider ST-17 single-point adjustable suspension scaffold.

Date by Which Violation Must be Abated:	08/04/2011
Proposed Penalty:	\$ 4620.00

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Look Back: 2011/2012 UPDATE

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- > Increased Injury Reporting Requirements (FAT/CAT rule expanded)
- > Accident and Illness Prevention Program Rule (“find and fix” rule)
- > Recordkeeping: Ergonomic Injury Column on OSHA 300 (with SIC to NAICS)
- > Infectious Disease Rule (Healthcare)

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Look Back: 2011/2012 UPDATE

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- > Violence in the Workplace
(new Enforcement Directive 9/8/11)
- > Occupational Noise/Hearing Conservation
(re-emphasis on PPE?)
- > Globally Harmonized Systems
(labeling)
- > Texting While Driving
(“employers neither to require nor condone”)
- > Safety Incentive Plans
(continue to be disfavored -- potential VPP disqualification)

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New FAT/CAT Requirements (and process)

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- > 24 hour reporting now required for:
 - Any in-patient hospitalization
 - Amputation (but not avulsion)
 - Loss of an eye

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New FAT/CAT Requirements (and process)

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- > OSHA FAT/CAT Questionnaire
(response due in 5 days):
 - Root cause analysis, including failure of safety procedures or devices and abatement methodology
 - Inspection based on response category (I thru III)

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New FAT/CAT Requirements (and process)

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- > Recommended penalty increase for failure to report (\$1K to \$5K)
- > New rapid response inquiry (RRI) inspections
(self audit privilege?)

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New Electronic Filing Rule (Injury & Illness Forms)

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- > Employers with 250+ employees must electronically submit 2016 300As by 7/1/17 and 300s, 300As, and 301s by 7/1/18 (March 2nd thereafter)
- > Employees with 20 to 249 in “high hazard” industries must submit 300As annually as of 7/1/17 and 7/1/18 (March 2nd thereafter)

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New Electronic Filing Rule (Injury & Illness Forms)

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- > Employers: “must establish a reasonable procedure for employees to report work-related injuries and illnesses promptly and accurately. A procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness.”

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New Electronic Filing Rule (Injury & Illness Forms)

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- > Safety Incentive Programs Effect?
 - “Fairfax Memorandum” March 2012
- > Drug Testing Policies/Rules Effect?
 - Probable cause needed?
 - Nature of testing/test results
 - Workers’ Compensation, DOT, and other legal basis
- > Discipline for Safety Violations Effect?

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New Electronic Filing Rule (Injury & Illness Forms)

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- > Late Reporting Rules Effect?

Perez v U. S. Steel:

- “immediately?”
- “within seven (7) days?”
- “as soon as reasonably possible, but in no event later than leaving the plant or eight (8) hours after becoming aware”



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New Electronic Filing Rule (Injury & Illness Forms)

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- > Near misses and accidents not resulting in injury: “as soon as reasonably possible, but in no event later than leaving the plant”



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OSHA Under the New Administration?

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- > “Stakeholders” vs. the “Regulated Community”
- > Secretary of Labor Alexander Acosta/OSHA Administrator?
- > Congressional Review Act
- > Executive Actions
- > “Two for One” Policy on New Regulations
- > Budget Cuts



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Questions/Discussion

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Thank You for Coming!

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