

Breaking Ground

THE MAGAZINE OF THE MASTER BUILDERS' ASSOCIATION OF WESTERN PENNSYLVANIA

JULY/AUGUST 2023

HEALTHCARE MARKET UPDATE

The logo for St. Clair Health, featuring a stylized blue and white emblem to the left of the text "St. Clair Health" in a white, sans-serif font. The logo is illuminated against the dark facade of the building.

St. Clair
Health

The logo for the Master Builders Association (MBA), consisting of the letters "MBA" in a large, bold, white, sans-serif font. The logo is positioned in the bottom right corner of the cover, partially overlapping the grassy foreground.

MBA

LEGAL PERSPECTIVE

WHEN OSHA COMES KNOCKING

BY WILLIAM S. MYERS

Construction contractors are a special target for enforcement by the Occupational Safety and Health Administration (OSHA), and that starts with the inspection. This article discusses how to plan for an inspection, and then how to conduct, conclude, and follow up to make the best of your dealings with OSHA from the inspection—with a focus on practicalities.

A Few Points About OSHA and You

First, OSHA is the federal agency within the Department of Labor charged with regulating and enforcing workplace safety in the vast majority of worksites in America. OSHA has approved twenty-two “State Plan States” to handle this function, so if you are building in one of those states, “OSHA” is going to be a state agency. However, for the most part, the principles discussed in this article apply to both federal OSHA and approved State Plan agencies.

Second, OSHA is among the best government agencies I have dealt with in many years of law practice. With few exceptions, I have found them to be competent, professional, and even courteous. However, there is a reason they carry badges. OSHA is an enforcement agency. Its inspectors are not your friends, they are not your safety consultants, and they are not looking to improve your safety program. They are there to find violations and build evidence to support the citations and penalties they fully expect to impose and advertise—it is what they do.

Third, focusing on the inspection itself, I would be remiss if I did not point out that the best way to neutralize the risks of an OSHA inspection, and to turn back citations when issued, is to build a good safety program that is run by good safety people. That is a two-pronged approach that will fail if you have only one of those prongs.

Fourth, you have an involuntary and ongoing regulatory relationship with OSHA, so it is best to make it courteous and cooperative as well. However, absent extraordinary circumstances, when OSHA inspectors are on your jobsite, they are there with your consent and only insofar as you consent. While you may not interfere with an appropriate inspection, you most certainly should be actively involved to guide the process and keep it within the bounds of your agreement. More on that below.

BEFORE THE INSPECTION—PREPARING

Inspection Chiefs

Designate a representative for OSHA inspections at each worksite, along with one or more alternates to assist and to fill in if the first is absent. Also, give it a name that suits the responsibility, such as “inspection chief.” The point is, there

should be one person in charge of all aspects of an OSHA inspection, and it should be clear to everyone who that is and what that means.

A good candidate is the site safety manager, but whoever is selected, he or she must have adequate experience to step up immediately to manage the inspection and be able to drop everything at a moment's notice to do that. The inspection chief should be thoroughly trained in this role and have detailed familiarity with the worksite and the contractors.

If feasible, the inspection chief should have an assistant, preferably a fully-trained alternate who will accompany and assist throughout the inspection. This assistant should be prepared to help with or handle the notes, photographs, and videos described below, so the inspection chief can focus on guiding the inspection.

Training, Tools, Facilities

Perhaps the simplest way to train the inspection chief and others is to develop a detailed inspection checklist that can serve as a one-stop tool for training, planning, “day-of” action plan, and post-inspection follow-up.

The inspection chief should prepare a notebook or device suitable for carrying along and taking notes throughout an inspection. He should also have camera equipment at the ready with a full charge and working flash to take photographs and video, and he should be trained to use them to get quality results in tense situations.

Designate a room for the opening conference, closing conference, employee interviews, and where the inspector can review documents or wait to begin the inspection. This can be difficult on smaller projects, but, if at all possible, find a room in an office trailer or other facility that is properly equipped and can be used on short notice without interruption. This can be critical for an orderly inspection and for controlling a difficult inspector.

Required Records and Other Contractors

Make sure all required notices and records are posted and maintained for the site and are available on short notice. Find out if the current OSHA poster is up and ask if the log summaries are posted and certified (when that is required).

If you have subcontractors, include them in the preparations, and encourage them to follow similar preparation and inspection protocols. Your interests may not always align with theirs, but at this stage they do, so try to cooperate with them to the extent feasible.

DURING THE INSPECTION—MANAGING

Initial Contact

When the OSHA inspector arrives, the inspection chief should be notified immediately. If he is not immediately available, the inspector should be ushered into the designated room and asked to wait briefly for the inspection chief's arrival.

The inspection chief should greet the inspector, note the time of his or her arrival and review his or her credentials carefully. At this stage, or perhaps during the opening conference, the company must decide whether to allow the inspection without a search warrant. Whether to demand a warrant is a subject for a different article, but it is highly inadvisable to do so without consulting legal counsel. This article assumes a warrant is not demanded.

The union representative for affected employees must be notified and allowed to participate, including in the opening conference. Alert other contractors if their work areas or employees are implicated. All these things take time, and they should be done expeditiously, but they illustrate from the start the value of the designated room where the inspector can wait during this time.

Opening Conference

The first formal part of an inspection is the opening conference. If the inspector does not explain this at the beginning, ask him to identify the scope of the inspection, and specifically what areas, equipment, processes, and employees he wishes to inspect and why—and about how long it will take. The inspection chief should talk through all of that and come to an understanding. If the inspection is based on a complaint or accident, it should be limited to directly related areas.

Advise the inspector that if he wishes to interview employees, they must be scheduled to minimize work disruption. Offer to provide personal protective equipment for the inspector as needed. If applicable, inform the inspector of any trade secrets and request confidential treatment. Take notes of everything the inspector says at the opening conference. Listen and be courteous, and do not volunteer or acknowledge awareness of potential problems. Do not discuss prior safety issues at the worksite, even if they have been remedied.

One or more managers should walk the jobsite during this meeting to advise employees of the impending inspection, ensure they are wearing PPE and are complying with safety rules, and correct obvious safety issues. Finally, think through the best route from the opening conference to the inspection locations, considering what the inspector will see along the way.

The Walk-Through Inspection

The inspection chief should always accompany the inspector and gently guide the process to stay within the agreement. The inspector may expand that for "plain view" violations,

but beyond that, it should be kept to the agreed scope. If the inspector becomes unreasonable in this, the inspection chief may ask the inspector to return to the designated room while the inspection chief consults with site management or legal counsel.

Answer the inspector's questions courteously but provide only what is needed to explain a job or process. Do not volunteer information and do not admit or debate. If the inspector points out a problem, fix it immediately if feasible, but do so without discussing it except to clarify how he wants it fixed. Make note of comments by the inspector and comments or allegations by the union.

Do not demonstrate work tasks for the inspector. If one is being performed in an ordinary course, the inspector may observe and record it, but do not allow him to direct employees to do things, and do not assist him by directing employees to perform tasks as a demonstration.

OSHA is an enforcement agency. Its inspectors are not your friends, they are not your safety consultants, and they are not looking to improve your safety program. They are there to find violations and build evidence to support the citations and penalties they fully expect to impose and advertise—it is what they do.

Finally, take the same photographs and videos as the inspector, from the same position and angle, so you end up with the same evidence. Make notes about the location and the subject of each photograph and video. This is critical for evaluating citations, which is usually months later, because OSHA will not share its evidence at that juncture.

Employee Interviews

OSHA inspectors may interview non-supervisors privately, but they may not interfere with operations. Schedule all employee interviews in advance and in the designated room. Do not allow "stop and talk" interviews during the walkaround that last more

than a few minutes, but note the name, time, location, and comments associated with any conversations that are allowed.

Advise the employees they have the right to a representative in the interview, assure them they are not in trouble, and they should be truthful, but also alert them that OSHA likely will ask them to sign a statement prepared by OSHA. The employees are not obligated to sign anything, but they should get a copy of anything they sign. Note the name, time, and duration of interviews, and do not question employees afterward without further guidance.

Finally, do not allow supervisor interviews without a company representative, and the supervisor should not sign anything offered up by OSHA.

Records Requests

If the inspector asks for documents other than injury logs, politely ask him or her to make the request in an email. There are legal issues with producing documents, and making this simple request puts them off for another day, when more time and legal counsel are available.

Closing Conference

The closing conference may occur the same day or later, but it is the last formal part of an inspection. Listen closely and make notes of the exact nature of each alleged violation and the cited standard number. Do not agree or disagree or debate, and do not volunteer information about the alleged violations or any other safety issues at the project. The inspector has significant influence on issuing citations, so be courteous and do not exhibit hostility.

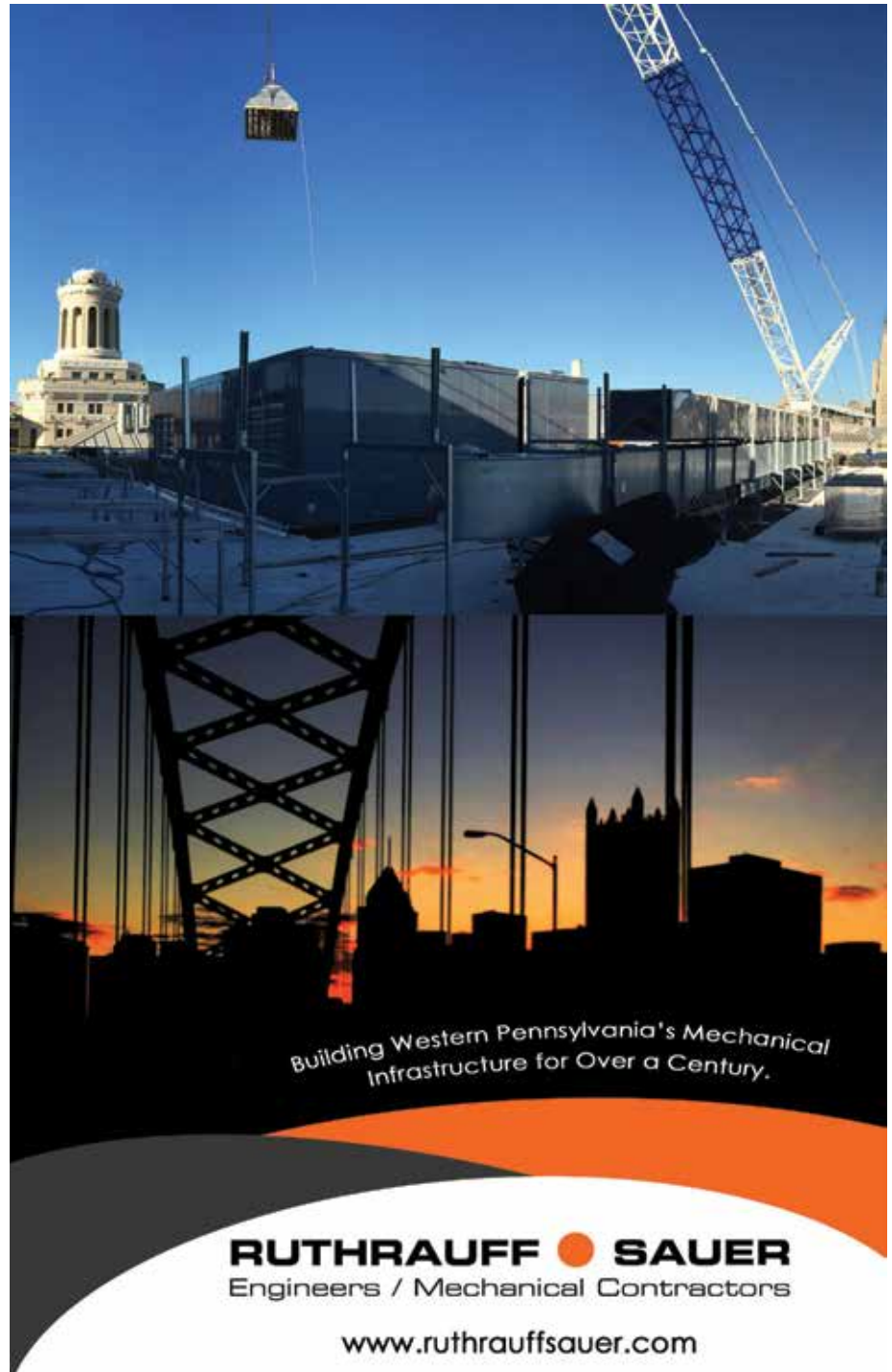
The inspector usually asks the employer to propose corrective measures and agree on an abatement date. Do not do this but turn it around to ask the inspector what corrective measures he or she thinks are appropriate and make a note of them.

AFTER THE INSPECTION—REPORTING

As soon as the inspector leaves, type out all inspection notes in narrative form. That discipline forces the inspection chief to fill out the details while events are still fresh. The narrative and notes should be addressed to the company's legal counsel. Also, promptly develop and transfer all photographs and video to portable media. Then review, label, and catalog all of them, giving the time, location, and a description of what is portrayed in each.

If OSHA contacts the inspection chief or others at any time after the inspection, politely refer him to the appropriate official or legal counsel without discussing the substance of the case. **BG**

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