

# How to Document a Willful Trenching Violation in 5 Minutes or Less



LEGAL ISSUES,  
INTERVIEWING, AND  
INVESTIGATIVE  
TECHNIQUES

# TOPICS FOR TODAY

- Legal Basis for Violations
- Investigative and Interviewing techniques
- Why cite willful violations?
- Potential willful fact situations
- Willful: Intentional disregard
- Willful: Plain indifference
- How to document willful conduct
- Case Study: How to document a willful trench violation in 5 minutes or less



# INVESTIGATIVE TECHNIQUES



**Legal Basis for  
Violations**

# LEGAL BASIS FOR ISSUING CITATIONS



- If, upon inspection or investigation, the Director or his authorized representative has **reasonable grounds to believe** that an employer has not fulfilled his duties as prescribed in this Article, or has violated any standard, regulation, rule or order promulgated under this Article, he shall with reasonable promptness issue a citation to the employer.

N.C. Gen. Stat. §95-137(a)



# BURDEN OF PROOF IN COURT



- The Department has the **burden of proving** all elements of the *prima facie* case for each violation
  - By a preponderance of the evidence –  
**“more likely than not”**
- The employer has the burden of proving all elements of its affirmative defenses
  - “Unpreventable” employee misconduct
  - “Impossibility of compliance”



# ELEMENTS OF A VIOLATION *PRIMA FACIE CASE*



Safety and Health  
Review Commission of  
North Carolina

- There is a standard, regulation or other legal requirement (e.g. Statute such as the General Duty Clause) and it applies to the fact situation
- The standard was violated (e.g., a hazard covered by the legal requirement existed)
- Employee(s) were exposed to the hazardous condition
- The employer knew or should have known of the condition or activity (“actual” or “constructive” knowledge”)





# TO PROVE A SERIOUS VIOLATION



- “To prove a serious violation it must be shown by substantial evidence ‘that the violation created a possibility of an accident, a substantially probable result of which was death or serious physical harm.’”

Brooks v. McWhirter Grading Co., Inc., NCOSHD 115, 303 N.C. 573 (N.C. Supreme Court, 1981)





# TO PROVE A WILLFUL VIOLATION



- “In order to show willfulness there must be:
  - (1) employer knowledge of a violative condition,
  - (2) employer knowledge of the standard [rule, regulation or the Act],
  - (3) a subsequent violation of the standard, [regulation, rule or **the Act**], and
  - (4) the violation being committed voluntarily or with **intentional disregard** of the standard or with demonstrated **plain indifference to** [or “**careless disregard of**”] the...Act.”

Associated Mechanical Contractors, Inc. v. Payne, NCOSHD 342 N.C. 825 at 834, 467 S.E. 2d 398 (NC Supreme Court, 1996).





# INVESTIGATIVE TECHNIQUES



## Interviewing

# WHY SHOULD YOU CONDUCT INTERVIEWS?



- To find out the cause of an accident or fatality
- To specifically address employee complaint items
- To assess the safety and health conditions at the worksite (employee training, etc.)
- To support any proposed citations (i.e., need “reasonable grounds” to believe that an employer has violated the law)

# WHY SHOULD YOU CONDUCT INTERVIEWS?




- To assess employers s & h programs when required by a regulation or standard
- To prove the citation items at trial (through the introduction of admissible evidence)
- Which is why it is required by both federal OSHA and the NCOSH Program



# VIRGINIA INTERVIEWS REQUIREMENTS

Federal OSHA state plan monitoring SAMM measures require each inspection have “employee involvement” which Virginia interprets to mean at least one employee shall be interviewed for each inspection. The VOSH FOM requires at least one employee interview **and one supervisory interview** for each inspection. The Virginia FOM provides the following **reasons for taking interview statements:**

- (a) When there is an actual or potential controversy between the employer and employee regarding a material fact concerning a violation;
  - (b) When there is a conflict or difference among employee statements regarding the facts;
  - (c) When there is a potential willful, serious or repeated violation;
  - (d) In accident investigations, when attempting to determine if apparent violation(s) existed at the time of the accident;
- 

# VIRGINIA INTERVIEW REQUIREMENTS

The VOSH FOM provides the following reasons for taking interview statements:

- (e) To document “actual” or “constructive” employer knowledge of the violation;
- (f) To document employee exposure;
- (g) To document whether training requirements under a specific standard have been met;
- (h) When the CSHO suspects the employer may raise an affirmative defense to the violation, such as employee misconduct; and
- (i) When there is a multi-employer question as to which employer created the hazard and which employer had control of the workplace.



# TYPES OF FACT WITNESSES

## FACT WITNESSES:

Compliance Officers ultimately become a witness to things observed based on first hand knowledge

- Employees (but some will be hesitant to testify) – hostile or adverse employee witnesses can pose problems at trial)
- Company Officers, Managers and Supervisors
- Others:
  - Other employers and their employees
  - State and local government inspectors and other personnel
  - Police and EMT
  - Bystanders
  - Homeowners (e.g., tree trimming, asbestos/lead removal)



# RELIABILITY OF TESTIMONY

- The source must be trustworthy
- Hearsay is generally not considered reliable and hence, not often admitted into evidence
- Hearsay is an **out of court statement or writing** offered to prove the truth of what was said



# RELIABILITY OF TESTIMONY

- There are several general exceptions to the Hearsay Rule:
  - An **admission** by an owner, officer or current supervisor of a Defendant in a VOSH Case (i.e. Admission of a Party-Opponent) – **CSHO's can testify to such admissions**
  - Dying declaration
  - Business records
  - Medical records





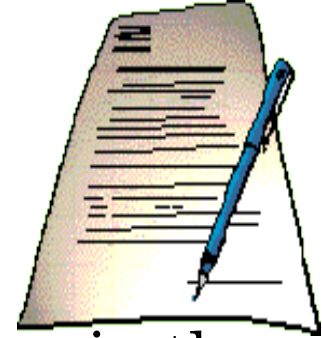
# DOCUMENTING INTERVIEWS

To assure reliability:

- Privacy of statement
- Employee and supervisory:
  - Videotape (if permitted)
  - Audiotape (if permitted)
  - Statements under oath
  - Signed statements
  - Unsigned statements (verbally acknowledged by the witness as accurate, if possible, and so noted on the statement in writing by the CSHO)



# TAKING STATEMENTS



- Get detailed statements as early as you can in the investigation – statements that are as close to contemporaneous as possible are generally considered more accurate and reliable
- Put important statements in “quotes” – AKA “Notes with Quotes”
- You may have to interview a person multiple times
- Get statements from injured employees, even if they hire an attorney (Administrative Subpoena)
- Get statements from supervisors, managers, partners, owners – **the knowledge of managers/supervisors is “imputed” to the company**
- Give family members an opportunity to provide information about any work-related information the deceased may have shared



# TAKING STATEMENTS

- Whenever possible, take verbatim notes of supervisor/management interviews, including questions asked and the answers
- CSHO's can testify to what a manager/supervisor told them
- Can be used to “impeach” the witness during deposition or trial testimony if the supervisor changes their story at trial
- Get statements from neutral parties with no interest in the outcome of the case
- Check if accident site was changed
- Request 911 recordings



# GENERAL OBSERVATIONS

- Interviewing is high level skill
- You need to practice it regularly
- You can't always just flip it on and off like a light switch
- You never know when you're going to need it on a case. A simple trenching case can turn into a willful case in the blink of an eye



# INTERVIEWING TIPS




- Establish a rapport with the person when gathering their personal information
- Be respectful
- Explain the purpose of the interview
- Make clear your purpose is to identify safety and health issues so they can be fixed
- In an accident situation, make clear you need to find out as much as possible to make sure no one else gets hurt



# INTERVIEWING TIPS

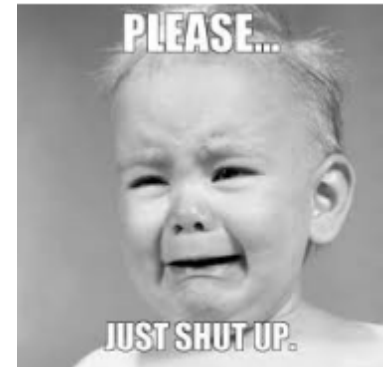
*A “leading question” is one where you supply an answer you are looking for in the body of the question.*

*But you may prevent a more truthful and valuable narrative disclosure that way.*

- Use open ended questions at the beginning of an interview
  - Avoid leading questions (You didn't see the stop sign, did you)
  - Generally avoid “yes” and “know” questions, except where you are trying to confirm something a person just stated or implied
- 

# INTERVIEWING TIPS

- It is okay to ask a question and **just shut-up**. Let the person keep talking.
- Be sure and **wait a few seconds after the person stops talking**. Do this every time you ask a substantive question.
- Silence will sometimes cause the person to want to fill it with further information.
- Don't interrupt or talk over the person. If you do, make a note of your thought so you can come back to it.

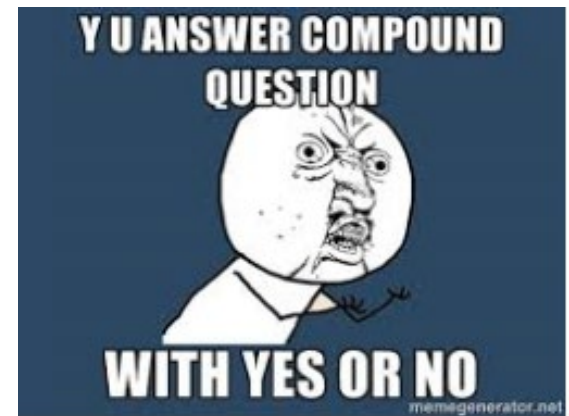




# INTERVIEWING TIPS

- Don't ask “compound” questions  
– i.e., two questions in one.

*Are you in favor of  
less expensive and  
safer cars?*





# INVESTIGATIVE TECHNIQUES



**Documenting Willful  
Violations**

# WHY WILLFUL

- Why cite WILLFUL Violations?
  - Because that is where the facts lead you
  - Remember that malicious intent is not a requirement for willful
  - There is the occasional “bad actor” employer
  - There are good employers who have some “bad actor” supervisors
  - Sometimes the conduct is so BAD it is criminal

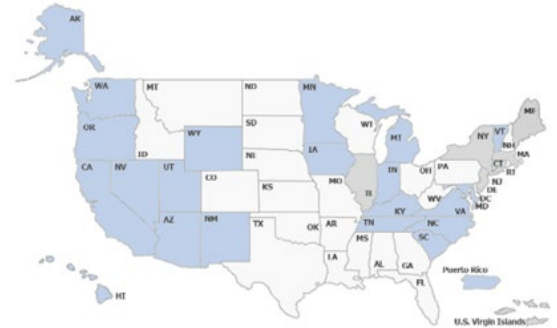


# CRIMINAL CONDUCT

- **Criminal Prosecution for Death of 16 Year Old**
  - Following a July 23, 2019 fatal accident investigation of a trench collapse resulting in the death of Spencer Lunde, 16, the owner of Digges Development Corporation, Thomas Digges, was charged with involuntary manslaughter and cruelty and injury to children. He has since plead guilty to involuntary manslaughter and his sentencing is scheduled for October 28, 2022.



# WILLFUL VIOLATIONS



- Why cite WILLFUL?
  - To be a credible State Plan, you need to have a credible enforcement deterrent, and citing willful violations can be a deterrent to future unsafe/unhealthy conduct
- One State Plan's Experience 2009 – Enhanced FAME
- A Virginia study on its willful violations found they were upheld 70% of the time from 1993 to 2003



# WILLFUL DEFINED

- The NIOSH Review Commission definition:
  - the violation is committed voluntarily or with **intentional disregard** of the standard or with demonstrated **plain indifference to [or careless disregard of]** the...Act [or to employee safety and health].”





# DOCUMENTING WILLFUL VIOLATIONS

## ○ Potential Willful Fact Situations

- Supervisor/owner **immediately** present
- An open, obvious and very hazardous situation with longstanding industry recognition of the hazard (e.g., trenches, powerlines, fall hazards, scaffolding, lockout/tagout, machine guarding)
- Imminent danger situations and how the company did or did not respond



# DOCUMENTING WILLFUL VIOLATIONS

## ○ Potential Willful Fact Situations

- Third repeat (or First or Second if facts warrant)
- Evidence that the employer tampered with an accident scene
- Evidence that safety or health shortcuts were taken because of productivity, time, financial issues



Downtown Charleston crane collapse ...  
live5news.com



# DOCUMENTING WILLFUL VIOLATIONS

**Safety or health shortcuts taken because of productivity, time, financial issues:**

Commissioner of Labor of the State of North Carolina,  
v. Fitesa North America Corporation (1999)

- Employee killed when caught in nip point on compression roller #2 on line #3.
- The company “pushed to optimize production at the expense of safety in order to please shareholders....[the company] was dissatisfied with the production levels which limited sales.”
- The company “trained its employees in unsafe methods of removing wraps around rollers and did not stop the machine to remove the wraps after being warned by one of its employees...of the dangers of cleaning the rollers while the machine was running....”





# DOCUMENTING WILLFUL VIOLATIONS



## ○ Potential Willful Fact Situations

- Same supervisor cited previously
- Precautions taken at one place at the jobsite but not at another
- Intentional violation of contractual requirements
- Previous notification of hazard (VDOT inspector, local building inspector, employee complaint, previous employee injury)



# DOCUMENTING WILLFUL VIOLATIONS



## ○ Potential Willful Fact Situations

- Removal or disabling of a safety device (removal of guard, disabling of a safety interlock)
- Open and overt warning tags/signs ignored
- Immediate correction after the accident is preferred but may also be an indication that the employer may have known how to fix the issue before the accident but chose not to do so – ask **WHY**




# WILLFUL: INTENTIONAL DISREGARD

- To establish intentional disregard, you must first show that the Owner or Employer knew of the NIOSH standard, regulation, rule or the Act and its requirements (can be done through imputed supervisor knowledge):
  - Ask the owner/supervisor – Tell me about this trench? Get them talking.
  - Make “Notes with Quotes” – a CSHO can testify to statements made by a supervisor or owner at trial – exception to hearsay rule.



# WILLFUL: INTENTIONAL DISREGARD

- Stay away from questions where the owner/supervisor can answer yes/no.
  - If you have to ask a yes/no question and you don't believe the answer, ask the question a different way and come back to the issue and ask again, if necessary.
  - Research prior citation(s) (Same supervisor?)
  - Research prior accident(s) (review OSHA 300 logs, workers' compensation cases)
  - Prior warning from NIOSH, OSHA, Department of Transportation, Building inspector, etc.
- 

# WILLFUL: INTENTIONAL DISREGARD

- Once you establish the employer knew of the standard/regulation/statute, you need to determine **WHY** they violated the regulation.
- If the answer to **WHY** is:
  - The cost of compliance was too expensive
  - We didn't have time to do it that way
  - The job was only going to take a minute
  - My way is safer than NCOSH's way



Then you should be considering willful



# WILLFUL VIOLATIONS: GOOD FAITH EXCEPTION

- If the Answer to **Why** is:
  - I thought what I was doing was in compliance with the regulation; or
  - I was mistaken about the facts; or
  - I tried my best to comply and there is evidence of the effort; or
  - I didn't think the regulation covered the work we were doing

And the assertion is **reasonable, believable, and in good faith**, willful is less likely

The courts recognize a **“good faith”** exception to potentially willful conduct – **can still cite serious.**



# WILLFUL: PLAIN INDIFFERENCE



- Plain Indifference [also “careless disregard”] is established where the:
  - Employer makes no effort to discover hazardous conditions and comply with the Act when given the opportunity to do so
- Focus on the “WHAT,” “WHEN” and “HOW LONG” in documenting plain indifference.





## PLAIN INDIFFERENCE: HOW LONG? WHEN? WHAT (DID THEY DO OR NOT DO)?

### **Employee killed in 12 foot deep trench collapse:**

“Although AMC had been on this site for months before the accident, corporate safety personnel had not inspected the site for compliance, and their first visit was after the accident.”

“AMC’s safety manual was created before the accident but not given to laborers, pipe fitters, or the pipe fitter’s foreman on this project until after the accident.”

Associated Mechanical Contractors, Inc. v. Payne, NCOSHD 342 N.C. 825 at 834, 467 S.E. 2d 398 (NC Supreme Court, 1996).





# PLAIN INDIFFERENCE: HOW LONG? WHEN? WHAT (DID THEY DO OR NOT DO)?

- **Examples of Plain Indifference:**

- a. Higher management officials were aware of a NIOSH standard, regulation, rule or provision of the Act applicable to the company's business, **but made little or no effort to communicate the requirement to lower level supervisors and employees.**



- **North Carolina Commissioner of Labor v. City of Mt. Airy (1994) (General Duty Violation)** (fatal accident at wastewater treatment plant, unclogging 12" pipe at bottom of sludge well pit containing raw sewage; 2nd employee overcome by fumes but survived):
- City Safety Director was also fire chief for 16 years and had received training on confined spaces as well as a manual (Standard Operating Procedure for Manhole and Confined Space Entry – "SOP Manual"). The Director attended NCDOL training on CNSP on multiple occasions.
- Annual loss control report had section dedicated to Water/Sewer/Waste Treatment with CNSP entry procedures.
- The SOP Manual and loss control reports were filed away and not used. The city did not have testing equipment and employees were not trained in testing requirements or CNSP entry procedures.
- The Superintendent for wastewater treatment plants held a Grade IV certification from the state as a plant operator, had received training based on the Sacramento Manual which included CNSP hazard descriptions and SOPs for safe entry. The court stated that he "did not dwell on safety in his training for Grade IV certification."
- The Supervisor of the plant did not read the CNSP portions of the Sacramento Manual and failed to train employees on the hazards of hydrogen sulfide and methane gases which can collect in sludge well pits.



# PLAIN INDIFFERENCE: HOW LONG? WHEN? WHAT (DID THEY DO OR NOT DO)?

- **Examples of Plain Indifference:**



- a. Higher management officials were aware of a NIOSH requirement applicable to the company's business, **but made little or no effort to communicate the requirement to lower level supervisors and employees.**

- **North Carolina Commissioner of Labor v. City of Mt. Airy (1994)**

- In general duty clause cases, there is no standard, rule or regulation to demonstrate employer knowledge of.
- The City of Mt. Airy holds that in general duty clause cases where the Commissioner alleges the employer's intentional disregard of or plain indifference to **"employee safety and health"** there is no requirement to prove employer knowledge of the non-existent "standards."
- The Commissioner can substitute employer knowledge of such things as "recognized industry standards" such as national consensus standards.
- **Commissioner of Labor of the State of North Carolina v. Re-Mulch, Inc., (2010). This fatal accident involving an employee caught in a mulch spreader resulted in a willful general duty clause violation where the employer was found to recklessly disregard employee safety by ignoring posted manufacturer's warning signs prohibiting work around the blower mechanism while it was in operation.**



- **"[I]f the employer made no attempt to comply with the Act when given the opportunity to do so, "plain indifference to" or "careless disregard of" the Act and/or employee safety can be shown as proof that a violation was willful."**

# PLAIN INDIFFERENCE

- Examples of Plain Indifference:

b. Company officials were aware of a continuing NIOSH-related compliance problem, but made little or no effort to avoid violations

- EXAMPLE: Multiple repeat citations addressing the same or similar conditions.
- EXAMPLE: Previous injuries to employees or accidents of a certain type occurred recently (OSHA 300 logs, workers' compensation cases, reported or unreported hospitalizations, amputations, loss of an eye, or fatalities).



# SUMMARY: HOW DO YOU DOCUMENT WILLFUL CONDUCT?

- Intentional disregard – WHY?
- Plain indifference – WHAT, WHEN and HOW LONG
- Owner/Supervisory interview statements/Notes With Quotes
- Lengthy duration
- Previous warnings – other government agency
- Previous citations/accidents/complaints
- Immediate correction after the accident is preferred but is also an indication that the employer may have known how to fix the issue before the accident – ask **WHY**



# CASE STUDY





# HOW TO DOCUMENT A WILLFUL VIOLATION IN FIVE MINUTES OR LESS

- The Tidewater Area of Virginia





An unshored, unsloped trench in sand  
5 1/2 to 6 feet deep.

**PLAY VIDEO AND DISCUSS**





### Willful trench violation:

- Supervisor admits knowledge of trenching standard requirements
- Depth of trench over 5 feet
- Sand as type C soil
- Need for sloping or shoring; availability of trench boxes
- That the only time they normally used trench boxes was for sewer work





## Willful trench violation.

- Supervisor admits he has authority to correct safety violations
- The trench should have been sloped/shored
- That sand was sloughing off
- They did not use a trench box because they were almost done with the job
- An accident could have happened in the last five seconds in the trench
- The other crew leader left the job site when he saw the CSHO coming

## TABLE OF CASES

Associated Mechanical Contractors, Inc. v. Payne, NCOSHD 342 N.C. 825 at 834, 467 S.E. 2d 398 (NC Supreme Court, 1996), <https://casetext.com/case/associated-mechanical-contractors-v-payne>

Commissioner of Labor of the State of North Carolina v. Fitesa North America Corporation (1999), NCSHRC, <https://oshrc.nc.gov/media/976/open>

Commissioner of Labor of the State of North Carolina v. City of Mt. Airy (1994), NCSHRC

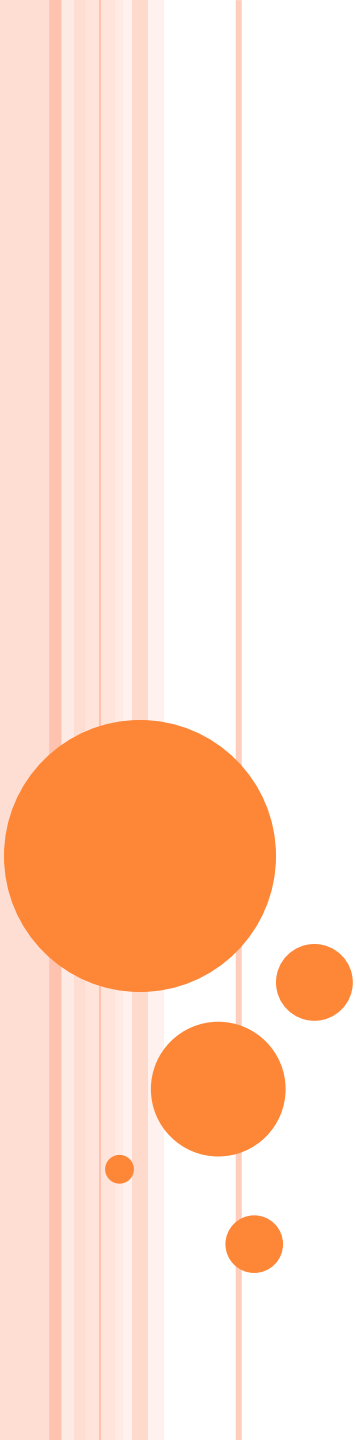
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# QUESTIONS?



**Jay Withrow, Director**  
**Division of Legal Support, ORA, OPPPI, and OWP**  
**Virginia Department of Labor and Industry**  
**600 E. Main Street, Suite 207**  
**Richmond, VA 23219**  
**[jay.withrow@doli.virginia.gov](mailto:jay.withrow@doli.virginia.gov)**  
**804.786.9873**

**Visit our website at [www.doli.virginia.gov](http://www.doli.virginia.gov)**