Minimizing Your OSHA Liability

presented by

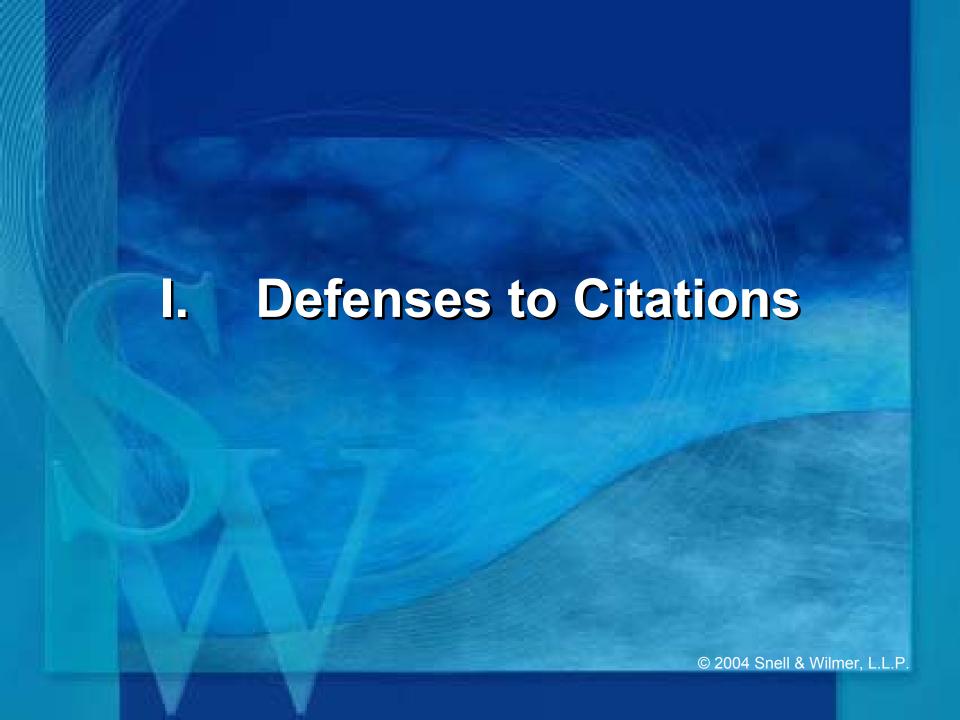
Charles P. Keller Snell & Wilmer, L.L.P Phoenix, Arizona (602) 382-6265 ckeller@swlaw.com

Self-Evaluation

- Do you work for a company that has safety policies and procedures?
- Do those safety policies and procedures address the typical hazards your employees encounter on a daily basis?
- Does your company provide weekly safety training regarding various aspects of the safety policies and procedures?

Self-Evaluation cont'd

- Does someone from the company frequently inspect or audit company job site to ensure employees are complying and management is enforcing the written safety policies and procedures?
- If violations are discovered, are the offenders disciplined and is documentation of that discipline retained?



Three ways to attack a citation

- Procedural defects
- Defects in the prima facie case
- Affirmative defenses

Procedural Defects

- CO must present his/her card and identify himself/herself
- Hold opening conference
- Must be allowed to accompany CO during inspection
- Hold closing conference

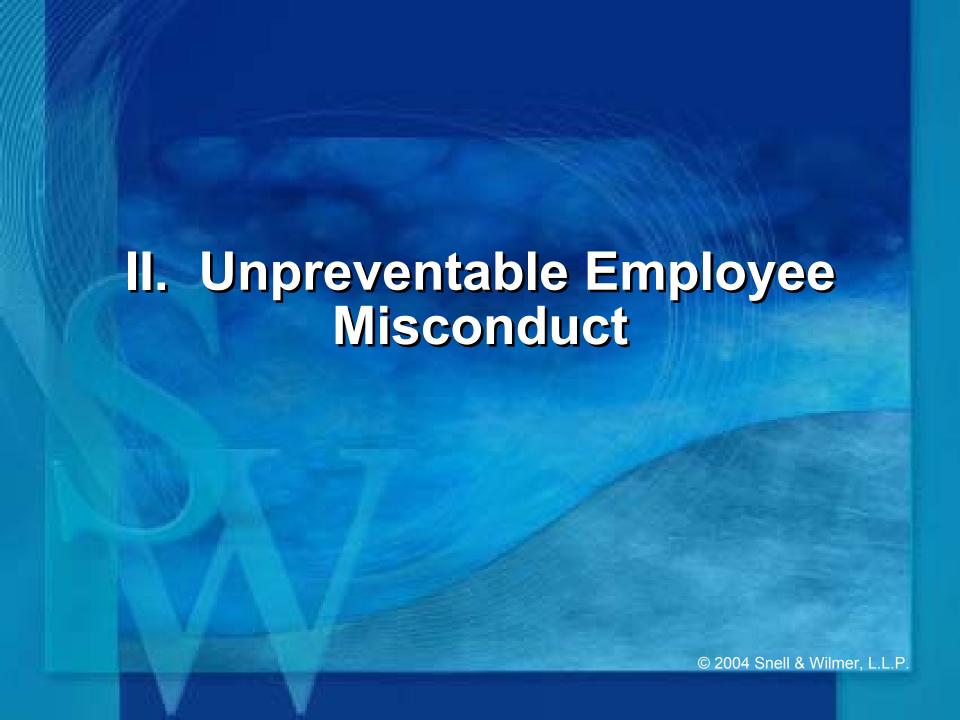
Attack Prima Facie Case

OSHA must prove by a preponderance of the evidence four elements

- → Cited standard applies
- → Failure to comply with the cited standard
- → Employees an access to the violative condition
- →The employer knew or should have known of the condition with the exercise of reasonable diligence
 - Knowledge either, actual or constructive, will be imputed to the employer from any supervisor, foreman

Affirmative Defenses

- Numerous affirmative defenses available
- Most very difficult to prove
 - →Impossibility, greater hazard, economic infeasibility



Unpreventable Employee Misconduct

- Single, best defense is Unpreventable Employee Misconduct Defense, also called Isolated Employee Misconduct Defense.
 - →Basically shifting liability back to employee
 - → Premise of this defense is that it would be unfair to cite the employer who has promoted safety and trained the employees for something that could not be prevented

Unpreventable Employee Misconduct cont'd

- → The beauty or strength of this defense is that you can implement all the necessary elements of the affirmative defense into your work environment before you even get cited.
- →If you have these elements in place there is a strong chance you will not get cited or will be able to beat any citation you receive.

Unpreventable Employee Misconduct cont'd

- What are the four elements of the unpreventable employee misconduct defense?
 - → Employer has work rules designed to prevent the cited violation
 - → Employer has adequately communicated these rules to its employees
 - Employer has taken steps to discover violations of its work rules and/or OSHA regulations by its employees
 - → Employer has effectively enforced the rules when violations have been discovered

Employer Has Work Rules Designed to Prevent the Cited Violation

- Work rules must address the hazards most frequently encountered by your employees.
- Work rules must be as strict or stricter than the OSHA standards (i.e., mirror the OSHA regulations language).
- Work rules need to be in writing.
- Work rules should be distributed to <u>all</u> employees.

Employer Has Work Rules Designed to Prevent the Cited Violation cont'd

Employees should sign and date an acknowledgement upon receipt of the work rules.

"I, _____, hereby agree that I have received, read, understood and had an opportunity to ask questions about XYZ Company Safety Policies and Procedures. Any additional questions I may have may be directed to ___."

Work rules should be in Spanish as well as English if you employ employees that are Spanish-speaking only.

Employer Must Adequately Communicate the Work Rules

- There is no "grace period" granted by OSHA for new employees.
- Need to ensure new employees are properly trained prior to being sent to work
 - → Examine your orientation program
 - →Classroom, video, one-on-one review of work rules, interactive computer program
 - →OTJ training will not provide a defense

Employer Must Adequately Communicate the Work Rules cont'd

- Continued training
 - → Done at a minimum on a weekly basis
 - → Educate employee regarding most frequently encountered hazards
 - → Review portions of work rules and OSHA standards
 - → Distribute hand-outs
 - → Maintain documentation!
 - date, names of individuals in attendance, trainer, translator, detail specific topics covered, job site or location of class

Employer Must Adequately Communicate the Work Rules cont'd

- → Hold class in Spanish as well as English
- → Management person should run session
- →Office person should maintain strict records of weekly meeting and track subject matters
- → Discipline supervisor for failure to hold meeting or for failure to return documentation in timely manner
- → Periodically use guest speaker or do demonstration to enforce safety (i.e., video vendor demo.)

Take Steps to Discover Violations

- Most complicated element because, if done, employer can also allege it did not have constructive knowledge
- Element OSHA will attack
 - → Question laborers
 - how long did condition exist?
 - how long were they performing in such a manner?
 - did their supervisor instruct them to work in such a manner?
 - did their supervisor or anyone else from the company know they were doing this?

Take Steps to Discover Violations cont'd

- Management official in charge of job site, foreman, supervisor or superintendent, must not have had any knowledge of misconduct.
- On-site management representatives or agents should inspect job site at least daily.
 - → Detect hazard
 - written up hazards condition and abatement taken
 - → Detect work rule violation
 - write up employee(s)

Take Steps to Discover Violations cont'd

- Use other resources to do periodic safety inspections
 - → Company safety representative
 - → Top company management officials
 - →Worker compensation carrier
 - → General liability carrier
 - → Outside consultant/auditor
 - → Sub-contractor

Discipline When Violations Are Discovered

- Second element frequently attacked by OSHA
- Does your company have a disciplinary system?
 - →Is it in writing?
 - → Is it in or referenced in the work rules?
 - → Do the employees know they can be disciplined for violation of work rules?
 - →Do the supervisors know they can, and will be disciplined for failing to discipline an employee for violating the work rules?

Discipline When Violations Are Discovered cont'd

- → Do you document verbal warning?
- → Do you track discipline?
- → Have you suspended or terminated an employee for violating your safety rules?
- →Are employees aware that other employees have been disciplined for violating work rules?
- Your safety program must have "teeth." In order to have that, you must enforce the safety rules through discipline.

III. What if the Supervisor is Violating the Safety Rule? © 2004 Snell & Wilmer, L.L.P.

If Supervisor Violates the Safety Rule

- Normally, the affirmative defense fails if it is shown that the supervisor was the bad actor or the supervisor had knowledge of the bad acts and did not stop them.
- Supervisor's knowledge is imputed to the company. The company had the knowledge of the violation and failed to correct it. Thus, it was not unpreventable.
- The success of this defense depends in large part on the enforcement of the work rules by the supervisor.

If Supervisor Violates the Safety Rule cont'd

- Can allege unpreventable employee misconduct involving a supervisor, but the burden of proof is very high for employer.
 - →Act does not impose strict liability on the employer
 - → Must truly prove action was an isolated, unauthorized act of misconduct by the foreman.
 - → The employer had done everything possible to ensure compliance

If Supervisor Violates the Safety Rule cont'd

- Elements needed
 - →Significant demonstration of employer's commitment to safety
 - effectively implemented work rules
 - training of supervisors
 - →Effective communication of work rules to supervisors and employees alike
 - significant evidence supervisor was well trained
 - →Supervision of supervisory employees to ensure compliance of work rules

If Supervisor Violates the Safety Rule cont'd

- → Discipline of previous supervisors
 - This supervisor should have no past problems
- →No evidence of past safety issue with supervisor in question

Conclusion

- Supervisors must comply with company work rules and ensure enforcement of them.
- Employees must know they can be disciplined for failing to comply with the work rules.
- Employer must document all compliance steps.
- Auditing the workplace and progressive discipline are the keys to a successful safety program and an enforceable affirmative defense.