OSHA REGULATIONS FOR COTTON GINS

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Abstract

The Occupational Safety and Health Administration (OSHA) has primary responsibility over health and safety regulations for businesses in the US. These regulations cover several discrete areas. The first area includes safety regulations which address issues such as machinery guarding, electrical safety and protection against explosions. The second area includes health regulations, which address things like noise and cotton dust exposure. A third area is recordkeeping and reporting, which covers things like OSHA 300 reporting forms, as well as required injury reporting (29 CFR Part 1904).

OSHA regulations are made up of several major parts, but the two of most interest to agriculture are 29 CFR Part 1910 covering general industry and 29 CFR Part 1928 covering agriculture. The general industry regulations apply to the vast majority of businesses in the U.S. The agricultural section specifically includes cotton gins. State plan states: You should know whether your state is a "state plan" state (i.e., administers its own OSHA program) or is under Federal OSHA, since the 26 state plan states (seven cotton states) can have different regulations than Federal OSHA – state standards only have to be "as effective as the Federal standards", but they can be more severe. More details on why gins are agriculture can be found in a 2005 article published in the Cotton Gin and Oil Mill Press (Wakelyn, et al., 2005).

The National Cotton Ginners' Association and all State and Regional Associations spend considerable time and effort developing materials and guidance to assist the ginning industry in complying with these regulations. It is important for individual ginners to understand how these regulations affect their operation, and also how to navigate an OSHA inspection when one occurs.

OSHA Inspections and Citations

In the past few years, there have been a number of OSHA inspections at cotton gins. Some of these inspections were triggered by an employee injury. Others were triggered by employee complaints. In either case, the inspections have several common elements.

It is important to treat the inspection process seriously. Understand that the inspection process is a fact gathering exercise. The inspector does not actually issue the citation. Inspectors gather information, and take it back to the OSHA area office. After reviewing the facts, the area office issues the citation. For this reason, it is not very helpful to ask the inspector questions related to the contents of any proposed citation. On the other hand, it is very important to accompany the inspector throughout the process, and pay very close attention to everything that is inspected. It is a good idea to take notes as the inspector does, and to take a picture of everything the inspector photographs. Don't take the inspector on a "tour" of the gin, but do answer any questions and try to be sure the inspector understands the subject being investigated.

If the inspector has questions, don't hesitate to call the Regional or National association office while the inspector is still on site. Staff, knowledgeable about OSHA inspections, are often able to explain things in a way that will ultimately help the inspector issue more accurate findings. After the citation is issued, there is a second opportunity to explain the employers' point of view related to any violations, but it is usually easier to do so while the inspector is still at the facility.

It is common for OSHA to cite cotton gins under standards that do not apply to the cotton gin. It is important to have knowledgeable people review every OSHA citation to be sure the violations are valid. For example, guarding citations should always be issued under 29 CFR Part 1928.57d (Occupational Safety and Health Standards for Agriculture, 29 CFR 1928) and not 29 CFR Part 1910 (Occupational Safety and Health Standards, 29 CFR 1910). In the case of guarding violations, the standards are typically very similar, but referencing the right section is always important for several reasons. The most important reason is to avoid setting a precedent of citing gins for sections of the rule that do not apply to gins.

Once a citation is received, it is very important to follow timelines and instructions carefully. Utilize legal counsel and/or Association staff to help ensure all timelines and procedures are followed. In most cases, it is best to have an informal enforcement conference with the OSHA Area Director to review each citation. Typically this conference is used to discuss any citations that are not valid. If it can be demonstrated how the citation is in error, OSHA will either re-write or remove that citation. This is also the point at which it can be documented that valid violations have been remedied. In rare cases, it may be preferable to simply sign the citation and return it with a check, but this is the exception and not the rule. Before signing and returning any citation, be sure to have someone review the citation who is knowledgeable about OSHA regulations and how each regulation applies to cotton gins.

Historically, the informal process has generally been adequate to get any citations resolved. If the informal enforcement conference is not successful, then it may be necessary to formally contest the citation. The most typical reason for formally contesting citations has been where OSHA simply did not respond in time to meet their own deadlines. Experience has shown that formally contesting a citation does not close the door to resolving the violation informally, but it does definitely extend the timeline for resolving the violation.

During some recent OSHA inspections, two separate investigations were performed. One investigation covered safety issues, then a second and separate investigation was performed related to health regulations. These two investigations may be performed on the same day, or each may be performed on different days. In at least one of these cases, the citations were also issued separately. In other words, the cotton gin received a health citation, and then received a separate safety citation at a separate time. The process was significantly complicated by this two-step process. First of all, the health citation contained no indication that there was a second safety citation in the works. The attorney representing the employer had to call OSHA and ask whether there was a second citation to be issued. Under OSHA regulations, the employer has 15 days to contest a citation. In this case, the second citation was not received within 15 days of the first citation, so the first citation had to be formally contested so that both citations could be received before the company opened discussions with OSHA.

The important point to retain from this discussion is that the rules apply to cotton gins in a different way than general industry, and proposed OSHA violations often contain significant errors. If these errors are not corrected, then a precedent could be set by OSHA. In addition, if a citation is agreed to and not corrected properly, there is a good likelihood that OSHA will issue a citation for a repeat violation at some point in the future. Repeat violations carry significant additional weight. Finally, the timelines for each citation are very specific, and each timeline must be carefully followed in order to preserve a right to contest.

Therefore, it is critical to carefully review any OSHA violation and to get a second opinion from a knowledgeable source before agreeing to its terms. In addition, there is a limited amount of time to contest a citation, and if a contest is not made within the time limit, the citation can automatically become final.

Differences between Part 1910 and Part 1928

Agricultural operations are generally very seasonal, and this seasonality is important when looking at safety and health regulations. One example of this is the OSHA Hearing Standard (29 CFR 1910.95). This standard is contained within a portion of 1910 that does not apply to agriculture. The OSHA hearing standard contains employee testing and recordkeeping requirements that would not be possible for seasonal businesses like cotton gins. In this example, cotton gin operators are not subject to the OSHA noise standard. This has been confirmed in writing several times by Federal OSHA. Ginners should provide hearing protection for their workers, and should educate workers on the proper use of hearing protection, as well as the benefits of using hearing protection. [This is suggested on the Federal OSHA web https://www.osha.gov/dsg/topics/agriculturaloperations/hazards_controls.html for agricultural operations – which recognizes that agriculture is not cover by the noise standards]. Ginners are not required to perform the recordkeeping and testing prescribed by the hearing standard. In addition, seasonal noise exposure is a different issue than noise exposure that occurs throughout the year.

This is just one example of the differences between 1910 and 1928. If a gin receives a citation from OSHA, management must be sure to review each part of the citation, and make sure every standard cited actually does apply to a cotton gin operation. Some of the OSHA employees are of the opinion that 29 CFR Part 1928 should not apply to cotton gins and that cotton gins should be subject to all of 29 CFR Part 1910. While everyone is entitled to their own opinion, the fact remains that OSHA is subject to their own rules and regulations, and 29 CFR Part 1928

expressly applies to cotton gin operations. (see US OSHA. 2002a, 'Standards that apply to cotton gins, OSHA Standard Interpretation' Aug 6, 2002, OSHA memorandum to Regional Administrators and state designees https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=24189).

It is important to realize that OSHA citations very commonly have inapplicable standards cited. Be sure to understand whether each item is applicable before agreeing to the citation and before paying and settling the violation. Once the violation is settled, and the penalty is paid, the violation cannot be appealed.

General Duty Clause

Section 5a of the Occupational Safety and Health Act *(OSH Act; PL 91-596 as amended by PL 101 552; 29 U.S. Code 651 et. seq.)* states that an 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;". This is called the general duty clause in the OSHA Act.

The general duty clause can be used for any instance where 1) there is a serious hazard to employees, and 2) the employer recognized or should have recognized the hazard. One good example of this is Lockout/Tagout and the gin's requirement to de-energize equipment before certain maintenance is performed. While the Lockout/Tagout standard does not apply to cotton gins under 1928, the concept of shutting off breakers and locking them out is fairly common. If a cotton gin worker is injured in a piece of machinery that is accidently energized while the employee is working on it, a citation under the general duty clause may be expected.

A citation similar to the one listed above should probably not be contested. On this other hand, if OSHA cited a gin for the very same thing under 1910.147 (Lockout/Tagout), then the citation should be contested. The main reason for contesting is if OSHA successfully cites a gin under 1910.147, then OSHA might next attempt to wrongly cite a gin under 1910.95 (hearing conservation), or 1910.146 (permit required confined spaces).

Injury/Illness Reporting

On January 1, 2015, the new OSHA Injury and Illness reporting rule went into effect. This rulemaking followed a very unusual path. It was proposed in June of 2011, and received comments. The last comments were filed in the docket in November of 2011. After the comment period, the docket basically become dormant, until September 11, 2014, when a document was placed into the docket. On September 18, the rule was promulgated as final (http://www.gpo.gov/fdsys/pkg/FR-2014-09-18/pdf/2014-21514.pdf. Final rule 79 FR 56130, Sep. 18, 2014)

The main point of contention in this rulemaking is that OSHA re-defined the term "amputation" between the proposed rule and the final rule. In the proposed rule, the definition of amputation included the loss of bone, so an injury must include a loss of bone for an amputation to have occurred. In the final rule, OSHA "updated" the definition of amputation by citing a different source for the definition. In the new definition of amputation the loss of a finger or toe tip with or without the loss of bone counts as an amputation. This change was made without any public input, so now employers are placed in a position of not really knowing where the line is between a nipped finger and an amputation. It is likely that this line won't become clear until there have been some citations and possible court rulings clarifying this aspect of the rule.

The definition of amputation is important under the new guidelines because all amputations and losses of eyes are now reportable, even if they don't result in a hospitalization. In addition, all inpatient hospitalizations are reportable if they involve the care or treatment of a patient. Hospitalizations are not reportable if the worker is admitted for observation and not subsequently treated. These types of incidences must be reported within 24 hours of the employer finding out about the incident. Employers are still required to report any fatality within eight hours of the incident, and any fatality is reportable if it occurs within 30 days of a work related incident.

In the discussion of the final rule, OSHA states that in 2010, employers reported 14 incidences where three or more workers were hospitalized. This was the threshold under the old rule. Under the proposed rule, OSHA estimates it will receive 66,000 to 100,000 additional reports annually. OSHA also estimates there will be 5,000 reportable amputations per year that do not require any hospitalization. It seems clear from the analysis in the rule that OSHA intends to have a very broad interpretation of the definition of amputation.

There are several things that are not addressed in this rule. One of them is how OSHA intends to sort through all the new reports that are expected. Another is what OSHA intends to do with all this additional information. OSHA is predicting the reporting will increase from about one per month to somewhere around 180 to 275 reports per day. It would seem unlikely that there will be adequate OSHA staff to read through all those additional reports, so actually inspecting all of those facilities would certainly seem unlikely.

The lack of meaningful public input on the final details of this rule is concerning. In addition, the lack of any specific plan for actually using the data seems problematic, but this seems to be a recurring theme in the current set of OSHA proposals moving through the regulatory process these days.

This rule is now in effect, so employers must be sure to understand the obligations under this rule. The reporting methods are similar to that in the previous rule. In addition, as a part of this rulemaking, OSHA is developing an online reporting form. There is a general OSHA injury reporting web page up on the main OSHA web site, which explains reporting requirements and lists contact information for reporting injuries.

Injury/Illness Reporting (Part 2)

There is a second proposed rule related to how Injuries and Illnesses are recorded and reported (proposed 8 Nov 13; Supplemental NPRM 14 Aug 14, 2014). This rule is call the "Proposed Rule to Improve Tracking of Workplace Injuries and Illnesses". OSHA seems to view this rule as a fairly simple modernization of the reporting requirements, but employers are viewing it quite differently.

Under current rules, employers are required to record Injury and Illness data on the OSHA 300 form, and then are required to summarize this data on the OSHA 300a summary form. The OSHA 300a must be posted in the workplace from February 1 to April 30 in the year following the year covered by the form.

Under the proposed rule, the employer would be required to copy this same accident and injury data into an online OSHA database. OSHA would then make this data public on the internet. OSHA is arguing that since the data is currently posted in the workplace and made available to OSHA inspectors, it is essentially public information and therefore putting it out on the internet should not be a problem. According to OSHA, one of the benefits of posting this data will be that workers will be able to use this data to find safe places to work.

Employers are arguing that this rule has a high potential for disclosure of personally identifiable worker information, and confidential business information. This rule also has the potential to mislead readers who are not familiar with the workplace. The current system encourages reporting of injuries that are potentially work related, or have been potentially aggravated at work. A worker may have hurt their leg playing softball a few weeks ago, but if the worker aggravates the injury climbing into a truck two weeks later, the employer would possibly record this injury as a potential workplace injury. Having a system that puts incidences like these on the web for all to see may discourage the "no-fault" emphasis currently in place, and may also cause an employer who is diligent in reporting potential injuries to be seen in an unfavorable light through a database that has only the basic information.

Finally, there is the employee privacy to consider. In the comments filed by Texas Cotton Ginners' Association, an example was used of a small town where the only two employers are a cotton gin and a convenience store. If one worker in the gin breaks their leg, and another at the store injures their arm, then there is no possible way to put these two injuries into an online database without everyone in town knowing exactly who was injured. The concern in the above example is serious, but in the case of health related injuries, the privacy matters can be even more important to the injured worker.

A timeline is not currently available for this rule, but it is important to keep an eye on this rule's progress as the rulemaking goes forward.

Combustible Dust

The combustible dust rulemaking has been in the works for over five years. OSHA already regulates some combustible dusts, such as grain dust (29 CFR 1910.272), but this rulemaking is an effort to bring all types of

combustible dust under one regulation. There are several very significant problems with this rulemaking. The largest issue in the rulemaking is defining the term "combustible dust". When this rulemaking is explained in more public forums, it is commonly in a context that mentions large explosions, such as the one which occurred at the fertilizer plant in West, Texas, or the sugar factory explosion in Georgia. On the other hand, if OSHA had intended to regulate dusts that explode, shouldn't OSHA have called it the "explosible dust" standard? OSHA appears to be concerned with dusts that combust which might lead to dust explosions.

From our perspective, the most important issue with the term "combustible dust" in this rulemaking is defining what makes a dust "combustible". There are several methods of measuring combustibility and explosibility, and different methods don't all measure the same thing. There is a common opinion that any test must measure the ability of a dust to propagate the flame front, and the dust must have a Minimum Explosible Concentration (MEC). The good news is OSHA seems to have realized that this definition is critical for moving a rule forward. The bad news is the actual parameters OSHA will use when bringing this rule forward are unknown.

NFPA 652 is being finalized and many think this standard will be the basis for any rule OSHA finalizes. OSHA is already writing citations for combustible dust hazards in some industries using the general duty clause, the housekeeping rule, and the revised Hazard Communication Standard/Global Harmonized Standard [which specifically covers combustible dust as a 'hazard not otherwise classified' (HNOC) (Jan 9, 2014, OSHA guidance on combustible dust under HazCom), but this should not affect gins].

While the rulemaking seems to be at a standstill right now, experience from projects such as the injury and illness reporting rule show that these rules can become final with little warning. Industry is preparing for this rule by studying dust commonly found in a cotton gin, and understanding how it behaves in a fire. By understanding the nature of cotton gin dust, the industry will be able to react quickly and knowledgeably whenever the combustible dust rule begins moving again.

Dr. Calvin Parnell at Texas A&M has been leading this work and has published papers on the topic (Parnell et al., 2012, Ganesan et al., 2012). Through this work, and complementary work at the USDA-ARS cotton ginning laboratories, the hope is to be able to demonstrate that cotton gin dust is not combustible under any new proposed regulatory scheme. As a side note, this work is yet another example of the cotton industry taking a leadership role in regulatory work. This definition of "combustible dust" will affect a tremendous number of industries across the agricultural and non-agricultural business spectrum. The cotton industry appears to be one of the few taking pro-active steps to help define both the problem at hand, and potential solutions that would be reasonably achievable.

Summary

OSHA is having an ongoing impact on the cotton ginning industry on two fronts. First, OSHA inspections are continuing, and in some cases are including a health inspection and a separate safety inspection. If a cotton gin facility is inspected by OSHA, it is critical that management understand the OSHA inspection and citation process, and that all timelines and steps in this process are carefully followed.

When a facility is inspected by OSHA, it is critical to get help from experts knowledgeable in the OSHA process. This should be done as soon as the inspection is complete, and well before the citations are issued. All gin managers should understand how to act if OSHA inspectors arrive, and it would probably be a good idea for the manager to discuss this process with office managers, ginners and superintendents, so that everyone understands how the process works.

Second, OSHA has several new and proposed rules on the books that may have a significant impact on businesses. It is very important that employers keep a close eye on these new and proposed rules, and understand how these items may impact their business. The gin associations are aware of these and are available to provide guidance as these issues progress.

References

29 CFR Part 1910 Occupational Safety and Health Standards – www.osha.gov

29 CFR Part 1928 Occupational Safety and Health Standards – www.osha.gov

Ganesan, B., C.B. Parnell, Jr., and R.O. McGee. 2012. Laboratory testing of explosible/combustible dust. p. 575-582. *In* Proceedings Beltwide Cotton Conference, Orlando, FL. 3-6 Jan. 2012. National Cotton Council of America, Cordova, TN.

Occupational Safety and Health Act of 1970. Public Law 91-596. Section 5(a)(1) – www.osha.gov

Parnell, Jr, C.B., R.O. McGee, B. Ganesan, F.J. Vanderlick, S.E. Hughs, and K. Green. 2012. A critical evaluation of combustible/explosible dust testing methods - Part 1. Journal of Loss Prevention in the Process Industries. 26(3):427-433. http://dx.doi.org/10.1016/j.jlp.2012.07.017.

Wakelyn, P.J., D.W. Thompson, B.M. Norman, C.B.Nevius, and D.S. Findley. Why Cotton Ginning is Considered Agriculture. *Cotton Gin and Oil Mill Press* 106(8), 5-9 (2005).