UNTRUSTWORTHY AND IRRELEVANT

Why OSHA citations and related materials should not be admissible to prove liability.

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INTRODUCTION

In the wake of a high-profile incident that falls within the jurisdiction of the Occupational Safety and Health Administration, the number of citations can reach into the double digits, and the fines can amount to hundreds of thousands of dollars. For example, in October 2013, media outlets broadcast that the West fertilizer plant was fined $118,000 by OSHA across 24 separate citations.[1] Likewise, recent headlines proclaimed that OSHA had fined Texas Linen Company $126,400 arising from at least 15 citations.[2]

OSHA investigations, citations, and fines carry a certain amount of weight in the court of public opinion. But how much weight, if any, should such materials carry in a court of law? OSHA citations are not final judgments. Rather, they are merely the beginning of an adversarial legal process.

As sure as incidents resulting in OSHA citations are likely to progress to civil litigation, plaintiffs in such litigation are likely to seek to introduce into evidence OSHA materials as proof of liability. This article analyzes OSHA citations and fines in the context of the Rules of Evidence and caselaw to demonstrate that the admissibility of such materials should be closely scrutinized by courts. In particular, OSHA citations, fines, and investigation reports may lack the requisite trustworthiness to pass muster under the public records exception to the hearsay rule and/or these materials may be irrelevant to the causes of action at issue.

THE ISSUE OF TRUSTWORTHINESS

The analysis of Texas cases begins with a 2006 wrongful death case from the Corpus Christi Court of Appeals. In *Valenzuela v. Heldenfels Bros.*, the trial court admitted into evidence an OSHA citation that had been issued against the decedent's employer.[3] The party seeking this admission was not the plaintiff, but was the defendant, a manufacturer of emulsion tanks. The jury found in favor of the tank manufacturer.[4]

On appeal, the decedent's survivors argued that the trial court's admission of the OSHA citation was an error and that the court should have applied the law relied on in automobile collision cases (precluding the admission of traffic tickets in civil cases).[5] The appellants argued that traffic tickets are inadmissible because they are "given for violation of penal ordinances or statutes and not for the purpose of establishing fault in civil litigation" and, therefore, OSHA citations should be inadmissible in civil cases for the same reason.[6] The court of appeals disagreed, noting that appellants "provided no authority for extending the law related to traffic citations to OSHA citations, and we have found none."[7]

The *Valenzuela* court also analyzed the public records hearsay exception contained in Texas Rule of Evidence 803(8), and noted that the OSHA citations at issue met all three requirements of 803(8) because the citations set forth: 1) activities of the agency related to the citations and penalties; 2) matters observed during the investigation of the accident giving rise to the underlying suit; and 3) factual findings resulting from an investigation of the accident in question conducted pursuant to the Occupational Safety and Health Act of 1970.[8] The appeals court concluded that the trial court had properly admitted the OSHA citations into evidence.[9]

What the *Valenzuela* court ignored in its entirety was the last clause of 803(8)(C), which reads, "unless the sources of information or other circumstances indicate lack of trustworthiness." These 12 words function as a fourth requirement of 803(8) for admissibility. Therefore, a complete description of the elements for admissibility under the public records hearsay exception requires that a record set forth: 1) the activities of the office or agency; 2) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding in criminal cases matters observed by police officers and other law enforcement personnel; 3) in civil cases as to any party and in criminal cases as against the state, factual findings resulting from an investigation made pursuant to authority granted by law; and 4) *unless the sources of information or other circumstances indicate lack of trustworthiness* [emphasis added]. In applying the facts of the case to 803(8), the *Valenzuela* court failed to address whether the sources of information or other circumstances indicated a lack of trustworthiness.

There are two obvious reasons why OSHA citations may be "untrustworthy" and inadmissible under the Rules of Evidence. First, an OSHA citation is the institution of an adversary proceeding against an employer. Like a criminal indictment or traffic ticket, an OSHA citation lacks indicia of reliability. Under Texas law, traffic tickets

are inadmissible in civil cases for this very reason.[10]

Second, it can be extremely difficult to take the deposition of OSHA investigators to explore their findings and determine the bases for their conclusions.[11] This reality is fundamentally different from a case involving a public record generated by a police officer or Department of Public Safety accident investigator (who can be subpoenaed and deposed). A litigant is left without a strong or reliable legal mechanism to explore and test the reliability of OSHA findings and writings. If the reliability of the OSHA reports cannot be tested, then they cannot be deemed reliable.[12]

In *Carrillo v. Star Tool Co.*, an oil field employee of Sierra Well Service was killed during the course and scope of his work.[13] At the time of the accident, Carillo was using a tool that had been rented from Star Tool (the defendant).[14] At trial, the plaintiff tried to offer a letter OSHA had written to Sierra Well Service, who was not a defendant at trial. The trial court excluded the letter because "it was irrelevant to Star Tool's liability."[15] The jury found for the defendant.

On appeal, appellants argued that the letter from OSHA was relevant to show that Star Tool breached the standard of care owed to Carillo.[16] The appeals court disagreed, calling into question the trustworthiness of the OSHA letter, which contained "recommendations … based on the opinion of one OSHA investigator who did not testify at trial" and did not carry with it a certain "indicia of reliability."[17]

Notably, the party opposing the admission of a public record bears the burden of proving its untrustworthiness.[18] Further, challenges for a lack of trustworthiness should focus on the report's methodology rather than the accuracy of its conclusions.[19] The factors that bear on trustworthiness and methodology include 1) timeliness of the investigation; 2) investigator's skill or experience; 3) whether a hearing was held; and 4) possible bias when reports are prepared with a view to possible litigation.[20]

THE QUESTION OF RELEVANCE

The basic admissibility hurdles under Texas Rules of Evidence 401, 402, and 403 apply to OSHA citations and other administrative materials. In *Marathon Corp. v. Pitzner,* the Corpus Christi Court of Appeals affirmed a trial court's exclusion of an OSHA citation issued to Pitzner's employer for its failure to provide him with a safety harness for his roof repair work.[21] The employer had contracted with Marathon for Pitzner to repair equipment on Marathon's roof.[22] Pitzner was injured after falling off the roof, and he sued Marathon.[23] The trial court entered judgment for Pitzner after a jury award in his favor, and Marathon appealed.

During trial, Marathon tried to cross-examine Pitzner's witnesses with evidence that the employer had received an OSHA citation and paid a fine for not providing a safety harness to Pitzner for the Marathon job.[24] The court of appeals affirmed the trial court's exclusion of that evidence, citing Texas Rules of Evidence 401 to 403: "[i]n light of the evidence that there was no place on the roof where such a safety belt could be attached."[25] Therefore, even though OSHA cited Pitzner's employer for not providing him a safety harness, Pitzner could not have used a harness, and that inconsistency rendered the OSHA citation irrelevant and inadmissible.

A more recent Texas appellate court opinion also rejected the admission of OSHA citations for the purpose of proving negligence.[26] In *Hill v. Consol. Concepts, Inc.*, Consolidated Concepts was hired to construct or repair a roof on a McDonald's franchise store. CCI subcontracted the work, and one of the subcontractors was Hill. Hill fell from the roof, injuring his leg, which was ultimately amputated below the knee.[27] He sued CCI for negligence and gross negligence in its failure to provide him with adequate fall protection.[28]

During trial, in order to establish that Hill had assumed responsibility for his own safety, CCI presented as evidence a document Hill had signed, agreeing to comply with all OSHA standards and regulations. Believing this opened the door for evidence that OSHA regulations required CCI to provide safety equipment, Hill offered evidence of OSHA regulations, OSHA citations issued to CCI and fines paid, and other certified administrative documents.[29] The trial court refused to admit the OSHA evidence,[30] reasoning that the case involved common law negligence, not OSHA regulations.[31] The jury found Hill to be 51 percent negligent, and the court rendered a take-nothing judgment for CCI.

On appeal, Hill argued that CCI made OSHA regulations an issue at trial by "opening the door" and the trial court erred by refusing evidence that OSHA regulations placed responsibility for workplace safety on CCI. The 14th Court of Appeals held that the OSHA evidence at issue was irrelevant to the case.[32] A negligence case is based in common law, and duty is the threshold question.[33] Hill had to prove that CCI owed him a duty before he could prevail on his claim, and it was precisely for this point that he sought to introduce OSHA regulations.[34] "[O]ur common law is not expanded by OSHA regulations—either a general contractor owes a duty based upon our common law principles, or it does not. Therefore, the regulations were not relevant to the issue of duty. They may not be used to establish negligence per se (citations omitted). … Additionally, the OSHA regulations likely would have only confused and misled the jury into believing that CCI had a federally mandated duty to Hill that it should enforce in this suit."[35]

Hill further argued that he should have been allowed to use OSHA administrative records of fines and citations to demonstrate that CCI failed to provide workers with fall protection in previous instances for impeachment purposes during trial.[36] The court reiterated that "evidence of whether OSHA would hold CCI responsible for any safety violations through citations and fines is irrelevant to the issue of common law negligence; therefore, the citations and fines paid had no bearing on liability."[37] The court further explained that impeachment of witnesses has limits and requires a legitimate foundation. Even if a witness denied that CCI had received certain fines and citations, the evidence was still inadmissible because it was irrelevant.[38]

The 14th Court of Appeals' holding in *Hill* is inconsistent with some prior cases[39] and consistent with others.[40] The closest unifying principle is that OSHA standards apply to employers in relation to their employees. Therefore, a convincing argument for inadmissibility can be made in suits where the trial defendant was not the subject of the OSHA investigation. Similarly, while OSHA regulations bind an employer with respect to their employees and might provide probative evidence of the standard of care for the employer-employee relationship, they do not bind an employer to an independent contractor.[41] If a company has no duty to an independent contractor to comply with OSHA regulations, evidence of those regulations or of violations is inadmissible.[42]

In *Hall v. Dieffenwierth*, the plaintiff, an independent contractor, severed two fingers while working on a tractor-trailer after an employee of a different company (TCI) started the engine.[43] At summary judgment, Hall argued that TCI had a duty to comply with OSHA's lockout/tagout regulation, requiring employers to establish a program to disable machines to prevent unexpected start up.[44] The appeals court found that TCI had no duty to Hall to comply with the regulation.[45] Because TCI employees had never performed maintenance and repairs on the tractors at TCI, and because "TCI had no duty to follow the OSHA regulation with regard to its own employees … there was no duty to extend to Hall."[46] Thus, OSHA regulations or violations were not admissible as evidence of negligence by TCI.[47]

The *Hall* court similarly rejected the plaintiff's argument that TCI's lack of a lockout/tagout procedure amounted to negligence per se.[48] The court explained that the 5th Circuit has held that regulations promulgated under the OSHA statute neither create an implied cause of action nor establish negligence per se.[49] The court also noted that Texas courts have held that common law is not expanded by OSHA regulations.[50] It further referenced a 6th Circuit case that held that a breach of OSHA's specific duty clause is negligence per se only if the injured party is a member of the class of persons OSHA was intended to protect (that is, employees).[51]

Moreover, only certain kinds of OSHA regulations may be used as evidence of negligence per se. OSHA regulations that impose a duty of compliance conditioned on what is reasonable cannot be used as the basis for a negligence per se claim (versus those that establish a mandatory standard of conduct, such as requiring motorists to stop at red lights).[52] Thus, in Texas, only regulations that establish a mandatory standard of conduct can serve as the basis for negligence per se by an employee against an employer.

CONCLUSION

The admissibility of OSHA citations, fines, reports, and other investigation records to prove liability in civil litigation must be closely scrutinized by the court—particularly the issues of trustworthiness and reliability. Although cases such as *Valenzuela* support the admissibility of OSHA materials, the better-reasoned argument is that OSHA materials are untrustworthy and, therefore, do not satisfy the public records exception to hearsay. Further, there are several scenarios that make OSHA regulations irrelevant and inadmissible. We are reminded that the documents and headlines that may influence the court of public opinion are not necessarily admissible in a court of law. **TBJ**

NOTES

1. *See e.g.*, Dallas Morning News, Oct. 10, 2013, *available at* http://www.dallasnews.com/news/west-explosion/headlines/20131010-osha-fines-west-facility-118300-in-24-citations.ece.
2. *See e.g.*, Reliable Plant, *available at* http://www.reliableplant.com/Read/27856/OSHA-fines-Texas-Linen.
3. No. 13-04-241-CV, 2006 WL 2294562 (Tex. App.—Corpus Christi Aug. 10, 2006, no pet.).
4. *Id.* at *1.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at *2.
9. *Id.*
10. *Cox v. Bohman*, 683 S.W.2d 757, 758 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.) (reversing the trial court's admission of evidence of a traffic citation: "Unless a plea of guilty to a traffic offense was made in open court, according to law, evidence of such guilty plea is not admissible in a civil suit for damages arising out of negligence giving rise to the charge.") (citing *Barrios v. Davis*, 415 S.W.2d 714, 716 (Tex. Civ. App.—Houston 1967, no writ)).
11. *See, e.g., Ferto v. Fielder*, No. 10cv1729, 2010 WL 3168293, at *2 (N.D. Ill. Aug. 5, 2010) (citing OSHA's *Touhy* regulations—29 C.F.R. § 2.20 *et seq*.—requiring the Deputy Solicitor of Labor's approval before OSHA investigators may be deposed and noting that state courts lack jurisdiction to compel OSHA investigators to testify absent a waiver of sovereign immunity); *Baker v. U.S., Dep't of Labor*, 31 F. Supp. 2d 985, 987-988 (S.D. Fla. 1988) (affirming the Department of Labor's *Touhy* denial that OSHA investigators may be deposed in a state wrongful death suit), *amended on reconsideration on other grounds*, No. 97-7387-CIV., 1998 WL 1085734 (S.D. Fla. Oct. 7, 1998).
12. *Ingram v. Menasco, Inc.*, No. Civ. A. CA-4-81-372-K, 1984 WL 145980, at *2 (N.D. Tex. Aug. 1, 1984) (pre-trial order excluding evidence of OSHA report because defendants could not cross-examine report's author to demonstrate trustworthiness, and jury would be unduly influenced and unable to reach an independent decision); *see also Carrillo v. Star Tool Co.*, No. 14-04-00104-CV, 2005 WL 2848190 (Tex. App.—Houston [14th Dist.] 2005, no pet.).
13. *Carrillo*, 2005 WL 2848190, at *1.
14. *Id.*
15. *Id.* at *2.
16. *Id.*
17. *Id.* at *2.

18. *See Beavers v. Northrop Worldwide Aircraft Servs., Inc.*, 821 S.W.2d 669, 675 (Tex. App.—Amarillo 1991, writ denied) (affirming admissibility of U.S. Army helicopter crash report, but noting "trial court must focus upon the trustworthiness, *i.e.*, the methodology of the report, and leave the jury to make credibility decisions and determine what weight to afford a report's findings."). Note that the *Beavers* court held that federal public-records rulings were "very persuasive" because Texas Rule of Evidence 803(8) and Federal Rule of Evidence 803(8) are nearly identical. *See id.* at 674-675.
19. *Id.*; *see also Moss v. Ole S. Real Estate, Inc.*, 933 F.2d 1300, 1306 (5th Cir. 1991); *Crompton-Richmond Co., Inc. Factors v. Briggs*, 560 F.2d 1195, 1202 n.12 (5th Cir. 1977).
20. *See Beavers*, 821 S.W.2d at 675; *Pilgrim's Pride Corp. v. Smoak*, 134 S.W.3d 880, 892 n. 2 (Tex. App.—Texarkana 2004, pet. denied) (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 (1988).
21. 55 S.W.3d 114, 142-143 (Tex. App.—Corpus Christi 2001), *rev'd on other grounds*, 106 S.W.3d 724 (Tex. 2003) (per curiam).
22. *Id.* at 122.
23. *Id.*
24. *Id.* at 141.
25. *Id.* at 143; *see also Reynolds v. Warthan*, 896 S.W.2d 823, 827-828 (Tex. App.—Tyler 1995, no writ) (affirming trial court's ruling that certain FDA drug-incident reports were inadmissible as misleading because the reports themselves disclaimed that they "did not establish a causal link between [the drug] and the reported symptoms").
26. *Hill v. Consol. Concepts, Inc.*, No. 14-05-00345-CV, 2006 WL 2506403 (Tex. App.—Houston [14th Dist.] Aug. 31, 2006, pet. denied); *see also Perez v. Smart Corp., Inc.*, No. 04-12-00712-CV, 2013 WL 6203358, at *3 (Tex. App.—San Antonio Nov. 27, 2013, no pet.).
27. *Id.* at *1.
28. *Id.* at *2.
29. Note that the citations offered in *Hill* were from prior incidents. Regardless, the strong language used by the court in *Hill* would seem to equally apply to the incident in question.
30. *Id.*
31. *Id.* at *3.
32. *Id.* at *4.
33. *Id.*
34. *Id.*
35. *Id.* at *4, *4 n.5.
36. *Id.* at *5.
37. *Id.*
38. *Id. at* *6.
39. *See Costilla v. Crown Equip. Corp.*, 148 S.W.3d 736, 740 (Tex. App.—Dallas 2004, no pet.); *Wal-Mart Stores, Inc. v. Seale*, 904 S.W.2d 718, 721 (Tex. App.—San Antonio 1995), *appeal dism'd by* No. 04-94-00295, 1995 WL 654562 (Tex. App.—San Antonio Nov. 8, 1995); *Baker Marine Corp. v. Herrera*, 704 S.W.2d 58, 61 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.); *McCown v. U.S. Pers., Inc.*, No. Civ. A. 305CV1582M, 2006 WL 2623938, at *5 (N.D. Tex. 2006) ("Evidence of non-compliance with regulations issued by the Occupational Safety and Health Administration are admissible as evidence of an employer's negligence.") (citing *Dixon v. Int'l Harvester Co.*, 754 F.2d 573, 581 (5th Cir. 1985)).
40. *See Hickey v. J. C. Penney Co.*, No. 05-95-00914-CV, 1996 WL 479568, at *3 (Tex. App.—Dallas 1996, writ denied) ("Appellant has cited us to no authority, and we are aware of none, that stands for the proposition that OSHA regulations set a standard for property owners who are not employers."); *see also Sprankle v. Bower Ammonia & Chem. Co.*, 824 F.2d 409, 416-417 (5th Cir. 1987).
41. *See Hickey*, 1996 WL 479568, at *3; *see also Hall v. Dieffenwierth*, No. 2-07-058-CV, 2008 WL 2404462 at *1 (Tex. App.—Fort Worth June 12, 2008, pet. denied) (per curiam).
42. *Id.*
43. No. 2-07-058-CV, 2008 WL 2404462 at *1 (Tex. App.—Fort Worth June 12, 2008, pet. denied) (per curiam).
44. *Id.* at *2 (citing 29 C.F.R. § 1910.147(a)(3) (2002)).
45. *Id.* at *3.
46. *Id.* at *2-*4.
47. *Id.* at *4.
48. *Id.* at *3.
49. *Id.*
50. *Id.*
51. *Id.* (citing *Teal v. E.I. DuPont de Nemours & Co .*, 728 F.2d 799, 805 (6th Cir. 1984)).
52. *Supreme Beef Packers, Inc. v. Maddox*, 67 S.W.3d 453, 457-458 (Tex. App.—Texarkana 2002, pet. denied).

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