

U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210



October 5, 1990

Mr. Steve McWilliams, Executive Director
National Association of Elevator Contractors
4053 LaVista Road, Suite 120
Tucker, Georgia 30084

Dear Mr. McWilliams:

Thank you for your letter of August 27, concerning Section 5(b) of the Occupational Safety and Health Act (OSH Act) and our enforcement policy of not citing employees for violations of the safety and health standards.

Although this section states that each employee shall comply with all rules, regulations and orders issued under the OSH Act, the Act does not permit the issuance of citations and penalties to employees. Section 9 of the Act, titled "Citations", provides for issuing citations only to employers.

Section 5(a)(1) of the OSH Act requires the employer to furnish each employee employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm. Additionally, Section 5(a)(2) requires the employer to comply with occupational safety and health standards promulgated under the OSH Act.

The employer can exercise control over the actions of employees by developing effective safety and health programs which include disciplinary actions.

Employee actions are always taken into account during all OSHA inspections, and employees and employee representatives are encouraged to participate. Unsafe actions by employees are brought to the attention of the employer. In those situations where the employer has met all the conditions for affirmative defense, no citation is issued. The conditions for affirmative defense associated with "unpreventable employee misconduct" or "isolated event" are listed below.

The violative conduct was:

1. unknown to the employer; and
2. in violation of an adequate work rule which was effectively communicated and uniformly enforced.

However, it is our experience that unsafe acts of employees are often known by management and that they are often allowed to proceed without remedial action. When it is found that employers have not been pro-active in controlling these conditions, citations are issued to the employer.

Thank you for your interest in occupational safety and health. If we can be of further service, please do not hesitate to contact us.

Sincerely,
Gerard F. Scannell
Assistant Secretary