

NEP Inspectors: In Ste

While facilities are being targeted for inspections based on high rates of lost workdays due primarily to ergonomic injuries, OSHA citations tend to reflect other workplace safety hazards.

Lisa Gelhaus

During the dog days of summer, Occupational Safety and Health Administration (OSHA) officials in Washington, D.C., began evaluating the effectiveness of a special targeted inspection program that seeks to reduce employee injuries in long term care facilities.

The future of OSHA's National Emphasis Program (NEP) for nursing and personal care facilities could be decided before the end of September, when officials will determine whether the program has achieved its stated goal of reducing caregiver injuries and illnesses by 15 percent. As of Sept. 30, the NEP will either be renewed or become extinct.

But some providers remain skeptical that the NEP can produce a safer work environment. Facilities singled out by the program based on high rates of lost workdays due to injury or illness, they say, are being cited by OSHA inspectors for a broad range of violations such as the mishandling of blood or potential electrical hazards that have little if any connection to problems related to high rates of employee absenteeism.

"The NEP was not supposed to be a comprehensive survey," says Janice Zalen, director of special programs and OSHA liaison for the American Health Care Association (AHCA). "Why are the surveyors citing nonemphasis items?"

By Sept. 30, OSHA compliance officers will have conducted 1,000 inspections of skilled nursing facilities (SNFs), assisted living centers, and facilities for people with mental retardation and developmental disabilities under the

o With **OSHA** Goals ?

auspices of the NEP. Inspection sites were randomly selected from among the 2,000-plus facilities with the highest rate of lost workdays in the long term care category. This means that approximately 50 percent of the top 2,000 facilities will receive OSHA inspections.

A facility was placed on the potential inspection list if it had more than 14 incidents of lost employee workdays per 100 workers due to injury or illness and the facility had not undergone a comprehensive OSHA inspection within the past two years.

Problem Profession

Long term care was ranked among the top 35 industries in employees' injury/illness lost workday incidence rate (LWDII) during the year 2000—the most recent year for which figures are available—according to the Bureau of Labor Statistics (BLS), which compiles incidence rates for some 93,000 industries on a yearly basis. OSHA uses BLS figures on LWDII to indicate which industries are in need of special enforcement programs.

BLS figures indicate that the nursing and personal care facility category registered an average of 7.9 LWDII per 100 workers in 2000, compared with an overall average of only 3 per 100 workers across the broad spectrum of all industries.

“Nursing and personal care facilities are a growing industry where hazards are known and effective controls are available,” said OSHA Assistant Secretary John Henshaw in announcing the launch of the NEP last July. “By focusing on specific hazards associated with nursing and personal care facilities, we can help bring those rates down.”

OSHA initially notified an estimated 2,075 long term care facilities—including 1,579 SNFs, 174 intermediate care facilities for people with mental retardation, and 322 assisted living or other personal care facilities—about the possibility of being inspected under the

NEP Tracking Totals— Sept. 15, 2002, to July 24, 2003

Citation	Number	Dollar Amount
Bloodborne pathogens	1,028	\$620,155
Electrical	400	\$189,845
Medical and first aid	90	\$126,420
Machinery and machine guarding	124	\$80,748
Personal protective equipment	148	\$55,480
Control of hazardous energy	63	\$37,650
Clear communication of hazards	169	\$30,323
Record keeping	114	\$30,250
Blocked exit routes	76	\$24,898
General requirements walking and working surfaces	34	\$18,650
Construction	9	\$17,600
5A 1 (General Duty Clause)	8	\$16,550
Guarding floor and wall hole openings	19	\$12,600
Permit required confined space	22	\$12,373
Asbestos	19	\$6,925
Hazardous material	23	\$4,405
Fire protection	40	\$3,975
Welding cutting and brazing	5	\$3,925
Sanitation	13	\$3,325
Special industries	3	\$2,875
Hand and portable tools	4	\$2,100
Methylene chloride	3	\$1,976
Ethylene oxide	2	\$1,375
Fixed industrial stairs	2	\$1,275
Specification for accidental signs and tags	3	\$975
Material handling and storage	3	\$0
Fixed ladders	2	\$0
Portable metal ladders	1	\$0
Compressed gas	1	\$0

Source: OSHA/Genesis Health Ventures

NEP. Beyond mere notification, the agency's letter provided resources that, if implemented, could bring the facility into compliance prior to the inspection, OSHA said.

Citations issued to facilities for breaking OSHA's promulgated standards can bring fines of up to \$7,000 per citation for incidents not involving a death. Fines can range up to \$70,000 per citation in cases where a death is determined to have occurred as the result of a “willful act” on the part of an employer. Generally, the average

penalty is estimated at \$950, according to Richard Fairfax, director of OSHA's enforcement unit. The amount of the penalty depends on the severity and repetition of the violation, OSHA says.

The NEP program for long term care was written specifically to emphasize inspections in four basic areas: causes of ergonomic injuries, transmission of bloodborne pathogens, exposure to tuberculosis (TB), and injuries sustained from falls. The major causes of long term care's high LWDII incidence rate are the strains and pains that occur when caregivers overexert while moving or transferring residents (53.4 percent) and the high degree of employ-

ee injuries due to falls (18.6 percent), according to BLS statistics for 2000. Together, these two factors comprise 72 percent of all cases involving days away from work.

In its notice announcing the NEP, OSHA cited its own enforcement data to support the focus on bloodborne pathogens. OSHA data revealed that the most frequent citation issued was for violating the bloodborne pathogens standard. The standard requires employers to follow a series of protocols that protect workers from expo-

sure to blood or other potentially infectious materials.

Regarding exposure to TB during 2000, the Centers for Disease Control and Prevention (CDC) recorded slightly more than 16,370 cases in the United States and identified employees working in SNFs and personal care facilities as having the highest potential risk of being infected. Most of the TB cases in the nation were in people over 65 years of age, CDC says. (OSHA has since determined that TB is no longer an occupational risk and has ceased its development of a standard to protect health workers from it.)

NEP Early Results

Thus far, however, citations issued to providers under the NEP do not reflect a concentration on ergonomic-related transfer injuries or other hazards specific to long term care.

Though OSHA has issued five citations to facilities for ergonomic-related issues, these were predicated on the Occupational Safety and Health Act's General Duty Clause, which mandates that employers are required to provide a workplace free of "recognized hazards."

Recently issued NEP citations to a SNF in Buffalo, N.Y., brought fines totaling \$62,200 for repeated non-ergonomic violations, but OSHA can be very forgiving in reducing the number of a facility's citations and the amount of its penalties. For example, an Idaho provider had its penalties reduced from \$11,025 to \$2,200 after implementing OSHA's suggested safety measures.

The year prior to the launch of the NEP (October 2001 through September 2002), OSHA issued 2,327 citations based on 515 inspections, with penalties totaling more than \$1.1

million. The most prevalent violations involved breach of the standard for bloodborne pathogens, 656 citations carrying fines of \$379,381; violations of mandated electrical standards (too many plugs in a socket) carrying penalties of some \$149,000; and poor communication with employees about on-the-job hazards or hazardous materials, 171 citations carrying fines of \$17,943, according to OSHA.

It is quite possible that since the introduction of the NEP in September 2002 the breakout of OSHA citations for long term care facilities may be virtually identical to the previous year, when the profession did not have the NEP, providers say.

It's evident from the citations issued so far that "OSHA is not limiting the inspection process in order to reduce workplace hazards," says Mark Santoleri, corporate director of educa-

In The Aftermath Of An OSHA Inspection

Following inspections, the OSHA area director can issue citations without penalties, issue citations with proposed penalties, or determine that neither is warranted.

Three Types of Penalties

■ *Other-than-serious* A violation that has a direct relationship to job safety and health but probably would not cause death or serious physical harm. OSHA may propose a penalty of up to \$7,000 for each violation in this category. The agency may adjust a penalty downward, depending on the employer's good faith, history of previous violations, and size of business.

■ *Serious* A violation where there is substantial probability that death or serious physical harm could result and that the employer knew, or

should have known, of the hazard. OSHA may propose a mandatory penalty of up to \$7,000 for each serious violation. The agency may reduce the penalty for a serious violation based on the employer's good faith, history or previous violations, gravity of the alleged violation, and size of business. When the adjusted penalty amounts to less than \$100, OSHA does not propose a penalty.

■ *Willful* A violation that the employer intentionally and knowingly commits or a violation that the employer commits with plain indifference to the law. The employer either knows that what they are doing constitutes a violation, or is aware that a hazardous condition existed and made no reasonable effort to eliminate it. OSHA may propose penalties of a minimum of \$5,000

and a maximum of up to \$70,000 for each willful violation. OSHA may reduce the penalties depending on the size of the business and its history of previous violations. Usually, OSHA does not give employers cited for willful violations credit for good faith.

The Appeals Process

When issued a citation or notice of a proposed penalty, an employer may request an informal conference with OSHA's area director, who is authorized to reach settlement agreements with employers who willingly make adjustments. This avoids prolonged legal disputes. OSHA must conduct an informal conference with the employer within the 15-working-day contest period.

Employers that cannot meet the ➤

tion, health, and safety for Genesis Health Ventures, Kennett Square, Pa. Santoleri has been closely observing the NEP program.

According to OSHA's Fairfax, compliance officers are required by the Occupational Safety and Health Act to issue citations for any violation that is found during an inspection—even those not directly related to the profession's high rate of LWDII.

But allowing compliance officers to issue citations for any OSHA violation during a surprise NEP visit is tantamount to conducting a full-scale OSHA inspection, say experts.

AHCA's Zalen is also critical of the time lapse between the collected BLS data and when the actual inspections occurred. Current inspections are based on employer-reported lost workday injury and illness data for calendar year 2000 that were sent to OSHA in

2001. By the time BLS released the findings, nearly two years had elapsed since the data were first collected. Thus, BLS released 2001 findings in mid-2003.

Ergonomic Guidelines

One possible reason for not seeing more ergonomic citations under the NEP is that OSHA does not have an enforceable ergonomic standard. While the Clinton administration issued such a standard at the tail end of 2000, Congress repealed it in 2001, with the advent of a new administration. President Bush declared that his administration would implement voluntary ergonomic guidelines, and SNFs became the first profession to receive the voluntary guidelines in March 2003.

The ergonomic guidelines for nursing facilities recommend that employ-

ees use mechanical lifts to avoid manually transferring patients whenever possible. Henshaw said the guidelines would not be used as the basis for enforcement actions against long term care facilities. But some say this is a Catch-22 situation, since OSHA can cite facilities for injuries that were caused by known ergonomic hazards under its ubiquitous General Duty Clause.

Observers of the NEP are also concerned about the agency's seemingly counterproductive actions on ergonomics and wonder why the agency would issue an enforcement program before issuing voluntary guidelines.

"Why begin an enforcement program in September and then, months later, provide the tool?" Zalen asks.

The juxtaposition of enforcement before guidelines occurred because

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abatement dates as issued or amended at the informal conference must submit a request for an extension, or a Petition for Modification of Abatement (PMA). A PMA must be filed in writing with the OSHA area director who issued the citation no later than the close of the next working day following the date the director originally set for abatement.

In cases where there is a disagreement with OSHA regarding the citation, abatement time, or proposed penalty, the employer has 15 working days after receiving the citation or notice of proposed penalty to notify the OSHA area director in writing. An oral disagreement is not sufficient. This written notification is called a Notice of Contest.

Any employer, employee, or employee representative can also request an informal conference within the 15-working-day contest period

to discuss inspection results.

Based on information and evidence presented at the informal conference, OSHA may enter into an informal settlement agreement with the employer, which could involve changes to citation, penalties, or abatement dates.

The Review Process

If the written notice of contest has been filed within the required 15 working days, the OSHA area director forwards it to the Occupational Safety and Health Review Commission, where the case is then assigned to an administrative law judge (ALJ).

OSHA may enter into an informal settlement agreement with the employer, which could involve changes to citations or abatement dates.

It is up to the ALJ to either find the contest legally invalid and disallow it, or set a hearing for a public place near the employer's workplace. The employer and the employees have the right to participate in the hearing.

Once the ALJ has ruled, any party to the case may request a further review by the commission. Any of the three commissioners also may bring a case before the commission for review. Employers and OSHA may appeal commission rulings to the appropriate U.S. Court of Appeals.

Source: OSHA

enforcement efforts were well under way before a task force was set up to develop the ergonomic guidelines for nursing facilities, says Fairfax.

Special OSHA enforcement programs targeting injuries and illness occurring in long term care facilities can be traced back to a seven-state initiative in 1996, says Fairfax. Policy

changes ensued, and the initiative became OSHA's Site-Specific Targeting Inspection Program (SST) in 1998. OSHA later separated the current NEP out of the SST program.

There are five other national NEPs covering industries with hazardous machinery that cause amputations, construction sites where workers are exposed to lead, ship-scraping sites that expose workers to silica, and companies in excavation and trench building.

But Santoleri sees the single-minded focus on SNFs as OSHA's way of advancing its policy on ergonomics. "Skilled nursing has become the poster child for OSHA's ergonomic policy," he says. "In my opinion, OSHA's enforcement practices have been overzealous and counterproductive. They are trying to show that they don't need guidelines to enforce an ergonomic standard because they already have a General Duty Clause."

The Cost Of Compliance

Indeed, the blurred line between a voluntary and a mandatory ergonomic standard is making some providers nervous. In most cases, the voluntary guidelines suggest the use of expensive mechanical lifts for transfers. This can be a costly proposition if OSHA mandates that a facility is required to pur-

Workers' compensation premiums have been increasing at the highest rate in almost a decade.

chase lifts in order to avoid being cited under the General Duty Clause. As a rule of thumb, one lift is required for every five patients, and the devices cost between \$5,000 and \$7,000 each, according to Gig Specht, an Irvine, Calif.-based safety consultant for Lockton Insurance Brokers, a national risk management captive insurance firm.

"The long term care profession has a real fear that OSHA is going to come in and say 'purchase a lift,'" says Specht, who works primarily with facilities that self-insure. "It hasn't happened, but facilities are still afraid it's going to happen."

Specht believes that the most effective safety program is one that is tied to a reduction in operational costs. "When there's a real financial incentive, providers know that when they implement a safety program there is a direct cost benefit," he says, citing the potential to reduce professional liability insurance and workers' compensation rates.

Workers' compensation premiums have been increasing at the highest rate in almost a decade, Robert Hartwig, chief economist at the Insurance Information Institute, told *The New York Times* recently. Nationwide, the average cost of workers' compensation insurance has risen 50 percent in the past three years, Hartwig said.

In California, workers' compensation premiums have doubled in the past three years, the highest rate of increase in the nation, according to David Bellusci, chief actuary of the Workers' Compensation Insurance Rating Bureau in San Francisco.

In Florida, West Virginia, and

Washington state, the respective governors have called special legislative sessions seeking ways to contain workers' compensation costs, according to the *Times*.

Correctly implemented safety policies and procedures can reduce costs, says Specht, noting that facilities that self-insure are highly motivated to keep their policy premiums affordable. The national average for workers' compensation insurance for long term care facilities is \$2.50 per \$100 of payroll. By implementing safety initiatives, employers can reduce their premiums by \$1.00 per \$100 of payroll, Specht says.

Inspection Procedures

In addition to their skepticism toward the NEP, many providers and industry insiders are critical of OSHA's inspection procedures, in which compliance officers (OSHA's name for surveyors) arrive at a facility unannounced. Following an introductory conference—during which the facility is briefed as to why the inspection is being conducted—compliance officers recalculate the facility's LWDII using logs that chronicle the number of occupational injuries and illnesses for 1999, 2000, and 2001 (OSHA-200 logs). If an inspector determines that the LWDII for year 2000 was below 14 per 100, but the 2000 or 2001 rate is at or above eight, then the inspection proceeds.

If the rates for 2000 and 2001 are less than eight, then the officers conduct a review of the records for 2001 and recalculate the LWDII for that year. If the rate for 2001 is still below eight, the compliance officers classify the visit as a "records only" inspection and the session ends.

Although compliance officers have the right to request a facility's occupational injury and illness logs, some OSHA officers have also requested nursing-staff-specific data.

"Compliance officers were requesting that skilled nursing facilities pro-

vide nursing staff specifics,” says AHCA’s Zalen. “Employers were never required to maintain this type of information, and it is not information that is readily available.”

Zalen believes that the officers who seek this nurse-specific information may be trying to build cases against facilities. “The belief is that nursing staff would have a higher incidence of ergonomic-related injuries,” she says. “Therefore, providing that information would help an inspector build a case against a facility. Why should inspectors be establishing a policy when there isn’t one?”

In a recent letter to Fairfax, Zalen sought clarification as to why compliance officers were seeking nurse-specific breakdowns of LWDII data. She asserted that there is no regulatory or statutory requirement for employers to maintain that information.

In his reply, Fairfax agreed that employers do not have to provide such information if it is not available. “OSHA does not consider it inappropriate for a compliance officer to request required injury and illness information by department or job task and to receive the information in this format if it is available,” Fairfax wrote. “However, if the information is not available as requested, the employer is, nevertheless, required to provide the injury and illness data and the employee hours for the facility.”

Another problem that industry insiders find with the NEP inspections is that most of the OSHA compliance officers are not trained to conduct surveys at long term care facilities.

“Many of the compliance officers are not that knowledgeable about nursing homes,” says Specht. “Typically, the officers have expertise in other areas such as construction. That’s why you’ll see a lot of electrical outlet violations or janitorial department violations.”

But not all providers are dismayed with the NEP program. Alpha Health Services, Post Falls, Idaho, was the first long term care company to be cited for

issues related to ergonomics. Three Idaho facilities—Park House and Third Street, in Post Falls, and Cassia House in Rathdrum—have agreed to use mechanical lifts for transferring and lifting patients as a result of the OSHA inspection. In addition, the facilities will conduct worksite analysis, occupational health management, and training and education programs, and install hazard-prevention and control policies under the negotiated settlement with OSHA.

“I found the whole experience to be helpful,” says Gretchen Plath, an administrator with Alpha Health Services. “If they suggested something and we replied back that the sugges-

tion wouldn’t work, [OSHA] was willing to amend the plan. I have no complaints.”

GAO’s Findings

But a report released last November by the General Accounting Office (GAO) has added some credence to provider critiques of the NEP. GAO recommended that OSHA strengthen the special enforcement procedures of all SST programs through better data collection and evaluation of the actual impact on workplace safety and health.

The report analyzed all of OSHA’s SST programs, including the NEP.

GAO found that SST processes do not fully ensure OSHA’s effectiveness

For More Information

- Additional information on the National Emphasis Program and on OSHA regulations and compliance can be found on the OSHA Web site at www.osha.gov.

The following AHCA resources can be accessed at www.ahcublicatons.org.

- *Ergonomics Program Long Term Care Edition*. Two videos and one guide provide a program of basic information that helps employers and workers design effective safety programs that prevent work-related musculoskeletal disorders.

- *Body Mechanic Ergonomic Training For Long Term Care Staff*. A 26-minute video on safest techniques for lifting, moving, and transferring patients and reviews the anatomy of the back to illustrate the need for proper body mechanics.

- *OSHA Bloodborne Pathogen Standard Video*. A new 32-minute video on the epidemiology and symptoms of bloodborne diseases and modes of transmission. Can be used

in conjunction with OSHA’s “Bloodborne Pathogen Standard Manual.”

- *Bloodborne Pathogens Self-Assessment Compliant Checklist*. Cross-referenced with OSHA’s enforcement procedures.

- *OSHA Hazard Communication Standard Video*. This 25-minute video explains the hazard communication standard and provides steps to

ensure facility compliance.

- *OSHA Hazard Communication: A Compliance Kit*. Outlines steps that employers can take to comply with the OSHA hazard communication standard. Includes sample training program, hazardous chemical list, and material safety data sheet.

- *Break The Chain Your Role in Preventing the Spread of Infection*. The 29-minute video covers informative topics on how infections spread. A 16-page presenters guide contains a sample inservice outline, a discussion outline, and an audience activity sheet.

in identifying hazardous worksites, measurements do not always demonstrate OSHA's impact on workplace safety, and the effort to enhance compliance officer training has been jeopardized by several factors.

"In about 50 percent of the worksites identified, inspectors were unable

to conduct inspections or did not find any serious violations," according to the GAO report. Further, the report found that injury and illness data might have included incidents that OSHA doesn't cover. Data were "generally two years old before inspectors conducted the inspection. As a result,

employers might have taken actions, such as using OSHA's consultation program, to improve working conditions by the time the inspector arrived," the report said.

In addition, GAO reported, OSHA has jeopardized its own efforts to enhance the training of its inspectors because of a restructuring at local offices. The creation of multidisciplinary teams, comprised of safety and health inspectors, has made it harder for supervisors to review inspectors' processes, which could lead to incon-

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sistencies in citations, GAO said.

GAO further reported that OSHA lacks a comprehensive database to track inspector training or skills, which is needed to assess whether training contributes to agency performance.

The report also found that OSHA compares the most recent injury and illness data to a 1993 through 1995 baseline. For example, OSHA compared the calendar year 2000 nursing facility statistics to the baseline, which produced a 9 percent decline in injury and illness rates from the prior year's comparison to the baseline. But based on data reported by BLS, "a portion of these declines occurred before 1997," the first year of OSHA's five-year strategic plan, which set out to reduce

injury and illness rates by 15 percent, the report said.

“While the agency may well have contributed to improvement before 1997, those downward trends in illness and injury cannot be characterized as an indication of the plan’s effectiveness,” GAO said.

Finally, GAO noted that OSHA’s use of national data on injuries and illnesses is circumspect because OSHA’s SST plans cover only 31 states. The remaining states have their own plans.

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Determining Success Or Failure

In the closing days of the NEP, OSHA will determine the program’s effectiveness by evaluating data compiled from the citations issued. Many providers are doubtful that the NEP will be found to have been effective in improving workplace safety.

“The NEP has failed to date because there were already declining incidence rates,” says Santoleri.

Newly released BLS statistics reveal the 2001 incidence rate for nursing and personal care facilities declined to 7.3 LWDII from the 7.9 LWDII incidence rate for 2000.

Overall, OSHA reported that LWDII rates reached a historic low.

During testimony before the House Appropriations subcommittee on OSHA’s 2004 budget appropriation, Henshaw testified that the LWDII rate was 5.7 per 100 workers, a decrease of 48 percent since 1973.

“The program was issued when rates were already decreasing. So

you have to ask yourself two questions: OSHA issued a lot of citations, did any improve the safety and health of facilities’ workplaces? And did any citation reduce the incidence rates?” says Santoleri. “Your answer has to be no to both. So what was its point?” ■