

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
INTER-OFFICE MEMORANDUM

To: All Branch Managers & District OSHCOs
From: Jennifer Shishido, Administrator
Subject: Guideline on Handling of Cases to be Proposed for Violation-By-Violation Penalties

Date: October 5, 1994
Revised: March 1, 1996

This instruction establishes guidelines for identifying and handling cases proposed for citation using the additional penalty factors.

This instruction is adopted in its entirety with the exception of using the term "egregious" for violations. HIOSH does not issue egregious citations, but will instead issue a wilful citation.

This GOSH is effective upon receipt.

Definitions in this GOSH are as follows:

OSHA means HIOSH, where applicable

Regional Administrator means Administrator of the Occupational Safety and Health Division

Area Director means the Occupational Safety or Occupational Health Branch Manager.

Solicitor of Labor/Regional Solicitor means Deputy Attorney General.

5(a)(1) means General Duty Clause §12-60-2(a)(3) or §12-110-2(a)(3).

1910.217(c)(1)(i) means §12-80-7(c)(1)(A).

1910.1000(a)(2) means §12-202-4.02(a)(1).

1910.1000(e) means §12-202-12.

1910.1001(c) means §12-202-13(b)(1).

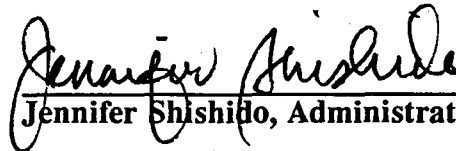
1910.1001(g)(1) means §12-202-13(o)(1).

1910.1001(g)(2) means §12-202-13(o)(2).

1926.21(b)(2) means §12-111-2(b).

The references in OSHA Instruction CPL 2.80 correspond to HIOSH's structure as follows:

- 1. OSHA Instruction CPL 2.45B, June 15, 1989, Revised Field Operations Manual (FOM) means the Field Operations Manual (FOM), January 2, 1992.**
- 2. OSHA Instruction CPL 2-2.38B, August 15, 1988, Inspection Procedures for the Hazard Communication Standard means the Guidelines on Inspection Procedures for the Hazard Communication Standard, Chapter 12-203.1, June 28, 1991.**
- 3. OSHA Instruction CPL 2-2.46, January 5, 1989, 29 CFR 1913.10(b)(6): Authorization and Procedures for Reviewing Specific Medical Records to verify Compliance with 29 CFR 1904 means Guideline on Subsection §12-55-2(f), Authorization and Procedures for Reviewing Specific Medical Records to verify Compliance with Chapter §12-52, April 18, 1989.**


Jennifer Shishido, Administrator

Attachment

Source: OSHA Instruction CPL 2.80, October 1, 1990.

U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210



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OCCUPATIONAL SAFETY & HEALTH
HONOLULU, HAWAII

Subject: Handling of Cases To Be Proposed for Violation-By-Violation Penalties

- A. Purpose. This instruction establishes procedures for identifying and handling cases proposed for citation using the additional penalty factor, provided for in the Field Operations Manual (FOM), Chapter VI, B.2.i. (4). The procedures set forth in this instruction will be adopted into the FOM.
- B. Scope. This instruction applies OSHA-wide.
- C. References.
1. OSHA Instruction CPL 2.45B, June 15, 1989, Revised Field Operations Manual (FOM).
 2. OSHA Instruction CPL 2-2.38B, August 15, 1988, Inspection Procedures for the Hazard Communication Standard.
 3. OSHA Instruction CPL 2-2.46, January 5, 1989, 29 CFR 1913.10(b)(6): Authorization and Procedures for Reviewing Specific Medical Records to Verify Compliance with 29 CFR 1904.
- D. Cancellations.
1. Memorandum from John B. Miles, dated November 20, 1986; Subject: Cases proposed for Citation Using Additional Penalty Factor.
 2. Memorandum from Leo Carey, dated June 15, 1987; Subject: Procedures for Handling Potentially Extensive Recordkeeping Violations: Additional Guidelines.
- E. Action. Regional Administrators and Area Directors shall ensure that the procedures established in this instruction are adhered to in the handling of cases in which the additional penalty factor is proposed.

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- F. Federal Program Change. This instruction describes a Federal Program Change which affects State programs. Each Regional Administrator shall:
1. Ensure that this change is promptly forwarded to each State designee using a format consistent with the Plan Change Two-way Memorandum in Appendix F, OSHA Instruction STP 2.22A, CH-2.
 2. Explain the technical content of this change to the State designee as requested.
 3. Advise the State designees that OSHA has determined that the violation-by-violation citation and penalty policy is an integral part of its nationwide overall compliance strategy and, therefore, States are required to either adopt OSHA's policy or an alternative "at least as effective as" policy for application to the private sector. States may, but are not required to, extend the policy to their public sector programs
 4. Ensure that State designees are asked to acknowledge receipt of this Federal program change in writing to the Regional Administrator as soon as the State's intention is known, but not later than 70 calendar days after the date of issuance (10 days for mailing and 60 days for response). This acknowledgment must include:
 - a. The State's plan for adopting identical procedures for documenting and reviewing violation-by-violation cases, adapted as appropriate to reference State law, regulations and administrative structure;
 - b. The State's plan for developing alternative procedures to those in this instruction which are as effective; or
 - c. The reasons why it is not necessary for the State to adopt the Federal procedures.
 5. Ensure that the State designees submit State plan supplements in response to this instruction, which will be incorporated into the OSHA Field Operations Manual with the next FOM change instruction.

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While States must adopt this change within six months of issuance, plan change documentation, through State FOM plan change supplements, is not required to be submitted more than twice a year in response to OSHA's incorporation of Federal program changes in the FOM.

- a. If the FOM changes are issued on their next target date (April 1 or October 1), the States shall have 6 months from the change instruction issuance date to submit a plan supplement in response to the FOM change.
 - b. If an FOM change is not issued within six months of the date of this instruction, the State shall inform the Regional Administrator of its adoption of this change by submitting documentation describing the State's procedures and implementing instructions. This documentation must be submitted by the close of the calendar quarter following the next FOM change target date which affords the State a 6-month period for implementing the change. However, a formal plan supplement will not be required until issuance of the next Federal FOM change.
6. Advise the State designees to notify their Regional Administrators when they plan to issue violation-by-violation citations and penalties. At the State's request, OSHA will provide assistance in reviewing cases involving violation-by-violation citations and penalties. Regional Administrators will coordinate this review. The review of such cases involving recordkeeping violations similarly may be coordinated with the Bureau of Labor Statistics (BLS) through the Regional Administrator.
 7. Review policies, instructions and guidelines issued by the State to determine that this change has been communicated to State compliance personnel.
- G. Background. Over the past several years, in a limited number of cases OSHA has alleged a separate violation and proposed a separate penalty for each instance of noncompliance with OSHA recordkeeping regulations, with the safety and health standards, and with the General

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Duty Clause [Section 5(a)(1) of the Occupational Safety and Health Act (the Act)]. The resulting large aggregate penalties are part of a compliance strategy which improves the efficiency and effectiveness of the agency and conserves its limited resources. This instruction is intended to serve as the master document covering the procedures applicable in cases where the violation-by-violation citation and penalty provisions are employed.

1. In the context of the Act, penalties are intended to provide an incentive to employers to prevent safety and health violations in their workplaces and to correct such violations which do exist voluntarily.
2. The Act intends that this incentive be directed not only to an inspected employer but also to any employer who has hazards and violations of standards or regulations.
 - a. The large proposed penalties that accompany violation-by-violation citations are not, therefore, primarily punitive nor exclusively directed at individual sites or workplaces; they serve a public policy purpose; namely, to increase the impact of OSHA's limited enforcement resources.
 - b. The criteria contained in this instruction are intended to ensure that when they are proposed, large penalties serve this public purpose.
3. Large proposed penalties result from application of existing FOM penalty calculation guidelines; but, instead of grouping or combining violations for penalty purposes, each instance of noncompliance is considered a separate violation and a penalty applied separately. This procedure is known as the egregious or violation-by-violation penalty procedure.
 - a. Application of these procedures is appropriate in situations where the violations in question constitute willful violations of OSHA standards or regulations or of the general duty clause of the Act and meet certain

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criteria to be discussed later in this instruction at H.2.

- b. Since large penalties are likely to result in litigation and widespread public attention, review at the Regional and National Offices of OSHA and the Office of the Solicitor of Labor (SOL) is currently mandated.
 - c. In all other respects, such cases are handled in accordance with the FOM.
- 4. While this practice of citing each violative instance as a separate violation has been utilized by the agency only since 1986, OSHA is authorized to use this approach by the language of the statute, its legislative history, and the agency's historic role as the sole prosecutor of violations occurring under the Act.
 - 5. In these cases, as in all other cases, violation-by-violation citations and penalties are proposed by the Area Director.

H. Guidance.

- 1. Early Identification of Cases. It is important that the Area Director identify cases which may be appropriate for violation-by-violation treatment as early as possible.
 - a. Meticulous documentation of evidence for each violation and appropriate involvement of such technical specialists as may be required for litigation is essential to the successful pursuit of potential egregious cases.
 - b. Coordination with the Regional and the National Offices must be scheduled in time for comprehensive review before the expiration of the statutory 6-month citation period.
 - c. Early involvement of the Regional Solicitor's office will ensure adequate legal, evidentiary, and resource coordination.
- 2. Criteria. In general, this instruction identifies those conditions which normally constitute a fla-

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grant violation of the Act or OSHA standards or regulations such that violation-by-violation handling is appropriate.

a. The criteria given in the following section shall be used by the Area Director to determine whether to recommend the use of violation-by-violation citations and penalties.

b. Cases under consideration for such treatment must be classified as willful (category (1) below) as well as at least one of the categories given in (2) through (7).

(1) The employer is found in violation of an OSHA requirement:

(a) Of which she/he has actual knowledge at the time of the violation. Such knowledge may be demonstrated through previous citation history, accident experience, widely publicized agency enforcement, direct evidence of specific recognized jobsite hazards or other appropriate factors; and

(b) Intentionally, through conscious, voluntary action or inaction, having made no reasonable effort to eliminate the known violation.

(2) The violations resulted in worker fatalities, a worksite catastrophe, or a large number of injuries or illnesses.

(3) The violations resulted in persistently high rates of worker injuries or illnesses.

(4) The employer has an extensive history of prior violations of the Act.

(5) The employer has intentionally disregarded its safety and health responsibilities.

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- (6) The employer's conduct taken as a whole amounts to clear bad faith in the performance of his/her duties under the Act.
- (7) The employer has committed a large number of violations so as to undermine significantly the effectiveness of any safety and health program that might be in place.

3. Penalty Calculation. Penalties for safety and health violations are to be calculated in accordance with the gravity-based penalty procedures in Chapter VI of the FOM. (Since egregious cases involve willful violations, the procedures of B.7.a. generally apply except as noted below.)

a. A separate gravity-based penalty shall be calculated for each violation.

- (1) In calculating penalties for each violation, the particular factors associated with that discrete violation shall be used conservatively to calculate a gravity-based penalty; e.g., the number of workers exposed will be low since each violation is to be penalized separately.
- (2) The adjustment factor for size shall be applied, if applicable. Factors for good faith and history will normally not be applied.

b. The following additional guidelines are provided to assist in calculating penalties for recordkeeping or similar violations:

NOTE: Only the current and the two previous calendar years are subject to the violation-by-violation penalty procedures in the case of recordkeeping violations (unless the company entered a corporate-wide settlement agreement on recordkeeping). The Regional Administrator

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may further limit the scope based on resource availability.

- (1) How many violations are involved and how extensive is the problem?
 - (a) Where the total number of violations is less than 20% of the total number of OSHA-200 log entries for the year, assign a numerical weight of 1 "for number of employees exposed."
 - (b) Where the total number of violations exceeds 20% but is not more than 50%, assign a numerical weight of 2 for "number of employees exposed."
 - (c) Where the total number of violations exceeds 50%, assign a numerical weight of 3 for the "number of employees exposed."
- (2) How many of the violations were unreported or misrecorded?
 - (a) If the violation results because a record required to be kept was not made, assign a numerical weight of 3 under "frequency of exposure."
 - (b) If the violation resulted because a required record was improperly kept, assign a numerical weight of 1 to 3, under "frequency of exposure," depending on the significance of the violation.
 - 1 For example, if an injury was recorded as an injury without lost workdays when it actually did result in lost workdays, assign a 3.
 - 2 If, on the other hand, an injury was correctly recorded as a lost workday case but the

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number of days was incorrectly recorded, assign a 1.

- (3) Did the recordkeeping violation relate directly to the safety and health conditions in the plant? Assign a numerical weight of between 1 and 3 under "employee proximity", depending on the strength of that relationship.
- (4) The following two factors shall be averaged and the result (rounded down to the nearest whole number) entered under "stress."
 - (a) How much does the lost workday injury (LWDI) rate change if the unrecorded cases are included in a recalculation?
 - 1 If the rate doubles (or more) upon recalculation, assign a weight of 3.
 - 2 If, upon recalculation, the rate does not double, assign a weight of 1.
 - (b) Were the unrecorded injuries serious, investigated by the company, or the subject of workers' compensation claims?
 - 1 If the majority were of a serious nature, or the subject of workers' compensation claims, and not thoroughly investigated by the company, assign a numerical weight of 3.
 - 2 If a minority of injuries were of a serious nature, the company did investigate, and workers' compensation was not heavily involved, assign a weight of 1.

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(5) The following factors shall be averaged and the result (rounded down to nearest whole number) entered under "other factors."

(a) What is the character of the company's safety and health history? Does the company's program include training, given to employees and supervisors, regarding compliance with the regulations?

1 Assign a rating of 3 if overall history is weak and training is lacking.

2 Assign a rating of 1 if some evidence exists of training; and the company's history does not reveal a pattern of disregard for safety and health.

(b) Any other significant factors relevant to the violation shall be considered and assigned a value of 1 to 3 depending on their impact on the flagrancy of the violation.

NOTE: No severity factor shall be used in recordkeeping violations.

(6) Following evaluation of the above-mentioned items, an average value or weight of all the factors shall be calculated and rounded down to the nearest whole number, thereby providing the gravity-based penalty to be used in the violation-by-violation penalty calculation.

c. Guidance on penalty calculation for violations of the hazard communication standard is provided in the FOM, Chapter IV, and in OSHA Instruction CPL 2-2.38B.

d. What will constitute separate violations for purposes of applying the violation-by-violation penalty procedures will depend on several factors.

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- (1) In cases involving violations of OSHA standards, the standard language must support citation of separate violations. For example:
- (a) 29 CFR 1926.21(b)(2) is a requirement for the employer to train each employee in safety and health. For each employee not so trained there is a separate violation of the standard.
 - (b) 29 CFR 1910.217(c)(1)(i) is a requirement for a point of operation guard for a mechanical power press. Consequently, each mechanical power press unguarded point of operation found is a separate violation of the standard.
 - (c) 29 CFR 1910.1000(a)(2) limits the exposure of each employee to air contaminants regulated in Table Z-1-A. Thus each employee exposed above the 8-hour time weighted average for a regulated substance constitutes a separate violation of the standard.
 - (d) 29 CFR 1910.1000(e) requires the implementation of engineering and work practice controls to reduce employee exposure to air contaminants. With respect to engineering controls, a separate set of controls must be installed at each identifiable source of air contamination. Thus a separate violation exists for each identifiable source of air contamination to which engineering controls have not been applied irrespective of the number of employees overexposed.

NOTE: Since overexposures and engineering controls are two separate violation types, a vio-

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lation-by-violation citation and penalty may be issued for each.

- (2) Substantially similar violative conditions cannot be penalized on a violation-by-violation basis under two different standards. For example:
- (a) 29 CFR 1910.1001(c) prohibits exposure of any employee to airborne concentration of asbestos in excess of 0.2 fibers per cubic centimeter of air (8 hr TWA). Hence each employee overexposed constitutes a separate violation.
 - (b) 29 CFR 1910.1001(g)(1) requires employers to provide respirators to employees overexposed to asbestos and to ensure their use whenever they are required; e.g., in cases where airborne concentrations of asbestos exceed the PEL.
 - 1 Employees without respirator protection have already been cited for overexposure under 29 CFR 1910.1001(c).
 - 2 Respirators are required for that very reason. Thus violation-by-violation penalties for each overexposed employee would be tantamount to a second penalty for substantially the same violative condition and would be inappropriate.
 - (c) 29 CFR 1910.1001(g)(2) requires that the employer select the appropriate respirator according to Table 1. For the same reason as given in subparagraph (b) 1 above, respirators with the incorrect filters cannot be penalized using violation-by-violation penalty

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procedures when airborne concentrations exceed the PEL.

- (d) When airborne concentrations exceed 50 x PEL and only half-mask respirators are used, the violation is no longer substantially similar and each such respirator may be penalized as a separate violation when provided to an exposed employee for respiratory protection.
- (3) Violations of the general duty clause [Section 5(a)(1) of the Act], if egregious, are to be cited in accordance with the FOM, Chapter IV, A.2.
 - (a) The hazard must be identified with specificity. Multiple citations may not be issued on the basis of missing controls or different sources or causes of the hazard.
 - (b) Each employee exposed to the recognized hazard at the time of the violation constitutes a separate violation.
- e. All violations not recommended for consideration as egregious shall be classified and issued separately in accordance with the FOM, Chapter V. They shall not be grouped with violations recommended as egregious.
- 4. Case Support Requirements. Because these cases involve administrative and legal issues critical to the effective enforcement of the Act, it is essential to ensure that the highest professional standards are met in the conduct of inspections, the issuance of citations, and the prosecution of litigation in such cases.
 - a. Documentation. Whenever a case is proposed for violation-by-violation treatment, as fully detailed responses to the questions listed in Appendix A of this instruction as possible must be developed in writing. Sup-

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porting documentation shall be provided and cross-referenced whenever possible.

- (1) These questions, originally developed for recordkeeping cases, have been adapted as appropriate for safety and health cases.
 - (2) Mandatory use of these questions is intended to provide a consistent format to aid in review of these cases, as well as to ensure as far as possible uniformity of case development across Regions.
- b. Evidence. Documentary support shall ordinarily be planned for and obtained early in the investigation.
- (1) The evidence necessary to support citations being considered for violation-by-violation penalty sanctions shall be included in the case file. Such evidence must be present for each separate violation.
 - (a) Photographs, videotapes, audiotapes, sampling data, and witness statements shall be used whenever possible to provide supporting evidence of violative conditions.
 - (b) Company documents supporting knowledge of the standard and the violative conditions as well as willfulness of the violation shall be diligently sought and obtained by subpoena as appropriate.
 - (c) Examples of such documents are internal audit reports, consultant or insurance company reports, trade association articles, minutes from safety meetings, complaints from employees, memoranda and other correspondence from safety personnel, especially from plant safety to plant management or corporate safety recognizing violations and

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bringing them to the attention of higher management, and notes relating to OSHA activities and industry practice in other companies or industries.

- (2) Employers must be asked explicitly:
 - (a) If and when they recognized the hazardous nature of each of the violations;
 - (b) If they knew what OSHA's standards require, and, if so, what steps the company had taken to abate and why the apparent violations had not been corrected;
 - (c) If they knew of the documents identified under subparagraph (1) above and what those documents contained.
- (3) Their responses shall be carefully documented in writing (verbatim if possible). An attempt shall be made to have a second person present as a witness, particularly when dealing with potentially compromising matters.
- (4) Signed employee statements shall be obtained routinely to support each of these violations in as much detail as possible.
- (5) Employee exposure and the nature and extent of injuries or illnesses related to the violations shall be carefully and adequately described.
- (6) The need for subpoenas and medical access orders shall be decided and documents obtained as soon as possible.
- (7) The need for experts shall also be decided and necessary arrangements made early. It is anticipated that experts will be needed for cases involving

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complex violations, such as ergonomics, or abatement methods.

- (8) Particular attention shall be paid to anticipating and preparing for possible employer defenses, in accordance with the FOM, Chapter V, E.

c. Early involvement of the Regional Solicitor is essential to examine and evaluate the documentation and other evidence supporting the violations and to determine whether expert witnesses or depositions will be necessary, as well as to provide sufficient time for the Regional Solicitor to write a legal opinion on the merits of the case.

- (1) The Area Director (through the Regional Administrator) shall seek legal guidance (informally) from the Regional Solicitor periodically throughout the case development process.
- (2) The Regional Administrator shall ensure that such involvement is accomplished at least 4 full months prior to the 6-month issuance date.
- (3) The Regional Administrator shall also ensure that the entire case file, including OSHA-1Bs, documentary evidence, statements, and photographs, is made available to the Regional Solicitor 8 weeks prior to the 6-month date.

5. Citations. The Act authorizes penalties to be proposed for each violation but limits the maximum penalty that can be proposed. In accordance with the FOM, Chapter V, the following procedures shall be adhered to in issuing citations with violation-by-violation penalties:

- a. Each separate violation must have its own Standard Alleged Violation Element (SAVE). (The SAVE must be repeated for each violation instance.)

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- b. Each separate violation must have its own Alleged Violation Description which will describe the particular conditions associated with that violation instance.
 - c. Each separate violation must have its own penalty calculated in accordance with the procedures given in H.3. of this instruction.
6. Regional and National Office Review. The procedures and timetables given below are to be followed in all cases involving violation-by-violation citations.
- a. Documentary Package. It is the responsibility of the Area Director to provide adequate documentation of cases involving violation-by-violation citations.
 - (1) Two copies of the documentation package for all violation-by-violation citations shall be forwarded to the Regional Administrator for review.
 - (2) The package submitted for review shall include, at a minimum:
 - (a) A briefing memorandum summarizing the information obtained under H.4. of this instruction.
 - (b) Copies of all OSHA 1-Bs related to the violations to be proposed for egregious penalty handling. (See NOTE at the end of subparagraph (4) below.)
 - (c) Copies of all critical evidence establishing the willfulness of the violations.
 - (d) Copies of all critical evidence establishing the justification for violation-by-violation citation and penalty.

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sation records, medical records, first aid logs and other sources, shall be included in the package. (See Appendix B.)

- (3) This evidence must support the existence of a violation for both nonrecorded and misrecorded cases. It must include the particular recordability criteria involved: whether the case involved days away from work and/or days of restricted work activity beyond the day of injury or onset of illness as well as evidence that the case was work related.

NOTE: Medical records contained in the case file shall be handled in accordance with OSHA Instruction CPL 2-2.46, K.2.

c. Timetable. It is critical to the development of a uniform national policy that all cases appropriate for violation-by-violation citation be handled as such. Regional Administrators and Area Directors shall adhere as closely as possible to the timetables described below.

- (1) Failure to supply the required documentation by the times designated in the following subsections may preclude issuance of violation-by-violation citations in otherwise appropriate cases.
- (2) Regional Administrators and Area Directors shall take care not to expand the inspection beyond what they can reasonably expect to accomplish within these time frames.
- (3) Within one month after the start of an inspection which appears to be appropriate for consideration for violation-by-violation citation:
 - (a) The Area Director shall notify the Regional Administrator of a potential egregious case. The Regional

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Administrator in turn shall notify the Director of Compliance Programs (Attention: Director, Office of General Industry Compliance Assistance, FTS 523-8041) of the following:

- 1 Establishment name.
 - 2 Area Office of jurisdiction.
 - 3 Six month date.
 - 4 Opening conference date.
 - 5 General type of apparent violations (e.g., safety, health, recordkeeping)
- (b) The Regional Administrator shall notify the Regional Solicitor of the impending case and seek advice as to necessary documentation and involvement of outside experts.
- (4) The Regional Administrator shall establish an appropriate timetable for periodic submission of the case by the Area Director for Regional Office and Regional Solicitor review.
- (a) After 60 days onsite, the Area Director shall ensure that the case is submitted to the Regional Office for information.
- (b) The Regional Administrator shall submit the case to the Regional Solicitor for an interim legal review, evaluation and guidance.
- (c) As the case is being developed and as additional information becomes available, the Regional Administrator shall ensure that this information is submitted to the Regional Solicitor for additional evaluation.

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- (5) No later than 8 weeks before the 6-month date, the entire case file shall be submitted to the Regional Solicitor for final legal analysis and for a written legal opinion as outlined in H.4.c.(3)..
 - (6) At the same time, a copy of the complete briefing package and relevant portions of the case file as described in H.6.a. and b. shall be submitted to the Director of Compliance Programs.
 - (7) No later than 15 days before the 6-month issuance date, at a time to be scheduled by the Director of Compliance Programs, the Regional Administrator shall send appropriate field compliance staff (including the compliance officer(s) conducting the inspection) to the National Office to discuss the proposed citations in detail.
- d. National Office Review. Upon receipt of the documentary package, the Director of General Industry Compliance Assistance shall distribute copies to the reviewers.
- (1) Copies shall be provided within 2 working days of receipt to the appropriate DCP Compliance Assistance Office, the Office of Field Programs and SOL. The Office of Information and Consumer Affairs shall also be notified.
 - (2) At the same time a financial profile of the firm shall be requested from the Directorate of Policy, Office of Data Analysis.
 - (3) Within 10 days of receipt of the documentary package, a National Office technical and legal review shall have been conducted. Following completion of that review, any identified problems or deficiencies shall be conveyed in writing as soon as practicable, but no later

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than 2 days after the review, to the Regional Administrator for response.

- (4) After obtaining any needed additional information, a screening session shall be scheduled with the Deputy Assistant Secretary for presentation of the case. Such screening shall be scheduled no later than 2 weeks before the 6-month issuance date.
 - (a) Prior to presentation of the case to the Assistant Secretary or the Deputy Assistant Secretary, the case shall be prescreened by the Director of Compliance Programs and the Associate Solicitor of Labor.
 - (b) If the case is judged egregious as a result of the prescreening, the case shall normally be presented to the Assistant Secretary or the Deputy Assistant Secretary by the Director of Compliance Programs.
 - (c) The Regional Administrator shall be prepared to present the facts and other evidentiary details of the case.
 - (d) The Regional Solicitor will be prepared to discuss the potential litigation aspects of the case.
- e. The Assistant Secretary or the Deputy will render a decision on the merits of the case and will give appropriate instructions on how the case is to be handled. Such instructions will address the final penalty amount to be proposed, the date of citation issuance, the coordination of any press releases, and the like.
- f. Within 48 hours after issuance, the Area Director shall send a copy of the citation to the Director of Compliance Programs; electronic transmission is acceptable.

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- I. Delegation of Authority. It is agency policy eventually to delegate authority for decisions regarding the use of the violation-by-violation citation and penalty procedures to the Regional Administrator. The actual delegation of this authority will be addressed in future changes to this instruction.



Gerard F. Scannell
Assistant Secretary

DISTRIBUTION: National, Regional, and Area Offices
 All Compliance Officers
 State Plan Designees
 NIOSH Regional Program Directors
 7(c)(1) Project Managers

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APPENDIX A

Egregious Cases: Required Information

1. Scope of Inspection.
 - a. Date initiated.
 - b. Latest date for issuance of citations (6-month date).
 - c. Type of inspection (e.g., safety, health, programmed, complaint, referral).
 - d. Nature of employer's business, corporate-wide and at this facility.
 - e. Number of employees (overall; in plant).
 - f. Names of unions representing employees.
2. Inspection History.
 - a. Numbers and dates of previous inspections.
 - b. Previous violation history at this establishment and in the corporation, nationwide.
3. Inspection Methodology.
 - a. Procedures followed in conducting the investigation:
 - (1) Were warrants, medical access orders or administrative subpoenas necessary? Why? Were they obtained and used?
 - (2) What written records or other documents were examined or obtained?
 - (3) What are the names of the compliance officers conducting the inspection?
 - (4) Were experts or other consultants used in the inspection? If so what are their names and qualifications?

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- (5) Have depositions been taken? Are any planned? Who will be deposed?

b. For recordkeeping violations:

- (1) Who has the responsibility for maintaining and certifying the OSHA-200, Log and Summary of Occupational Injuries and Illnesses, and related materials?
- (2) Were medical or injury and illness records reviewed by OSHA physician(s)?

4. Findings.

a. Summary of violations:

- (1) Number and classification.
- (2) Types of violations:
 - (a) Standards or regulations violated.
 - (b) General Duty Clause (Section 5(a)(1) of the Act) violations together with applicable industry standards, NIOSH recommendations, ANSI standards, and other supporting guidelines.

NOTE: In recordkeeping cases violations shall be categorized by year and according to either failure to record or misrecording involvement of days away from work and/or days of restricted work activity, loss of consciousness, job transfer, restriction of work or motion (i.e., restricted work activity on the day of injury/illness only), medical treatment and other.

They shall also be prepared by injury or illness type.

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b. Proposed citations:

- (1) How is the violation-by-violation penalty to be applied?
- (2) How many violations?
- (3) Are there additional violations, not egregious?

c. For recordkeeping violations:

- (1) How many cases were not recorded for the previous 2 years? How many were recorded? Of those not recorded, how many were lost workday cases?
- (2) What is the LWDI rate according to company records? According to OSHA findings?
- (3) What is the LWDI rate among production employees (or among classes of employees affected by the proposed citation) according to company records? According to OSHA findings?
- (4) Were any previous inspections terminated because of a low LWDI rate?

5. Documentation Relating to Additional Penalty Factors.

a. Determination of willfulness:

- (1) What were the firm's guidelines or policies relating to safety and health in general and, in particular, to the subject violation (e.g., recordkeeping, hazard communication, machine guarding, use of respirators, maintenance of pressure vessels)? What was the local facility's safety and health program?
- (2) Do corporate or plant policies or guidelines differ from OSHA requirements, or other relevant standards, regulations or guidelines? What is management's explanation for differences between its policies and OSHA's requirements?

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- (3) Did responsible persons actually know of the requirements of the relevant OSHA standards, guidelines or instructions? Who were they and how did such persons come to know OSHA's requirements?
- (4) Did responsible persons actually know of the existing hazardous conditions? Did they recognize the hazardous nature of these conditions? If so, who were these persons and for how long had they recognized the hazard?
- (5) How did the employer explain the existence of the violations? Did the employer claim that any steps to abate had already been taken? Was any documentation available to support such previous action?
- (6) Had the company done anything toward identifying, evaluating or correcting the hazardous conditions prior to OSHA's visit? Was an abatement program in place or had one been proposed? What progress had been made toward implementing it? Does it seem adequate? What was the company's explanation as to why more progress had not been made?
- (7) Are any memoranda, letters, minutes, accident reports or other documents addressing the hazards, violations or corrective measures available? Describe them. Did management admit knowledge of these documents? Had management responded in any to them? How?

b. Penalty factors:

- (1) How many violations of each standard are involved and how extensive (pervasive) is the problem?
 - (a) What is the nature of the violation?
(How many machines? How many different engineering controls? How many employees exposed?)
 - (b) What does the Regional Administrator propose as the "multiplier" for penalty

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calculation purposes? (See H.3.e.) Why that multiplier?

- (2) For recordkeeping cases:
 - (a) Did the unreported or misrecorded cases tend to hide violative safety and health conditions in the establishment?
 - (b) Were unrecorded incidents investigated by the company?
 - (c) Were the unrecorded injuries or illnesses serious?
 - (d) Were the unrecorded injuries or illnesses the subject of workers' compensation claims?
- (3) What kind of safety and health program exists in the plant? What is management's attitude toward safety and health? What do management officials actually say?
- (4) What training was given to employees and supervisors regarding compliance with the standard or regulation, or abatement of the recognized hazard? If none is given, what did management admit or what explanation did they offer?
- (5) Did the company enforce its own policies and guidelines?
- (6) What were the most serious reasonably predictable injuries or illnesses that could result from exposure to the hazard? Would these potential injuries or illnesses be classified as serious? Did management admit recognition of the potential for these injuries and illnesses?
- (7) What was the company's record (especially relating to workers' compensation claims) for injuries and/or illnesses associated with alleged violations? What kind and how many such injuries or illnesses?

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- (8) Are the abatement methods used by the company sufficient? Are the hazards well known in the industry? What is industry practice with respect to the hazards? Are appropriate methods to correct the hazards well recognized in the industry? What is industry practice with respect to the hazards? Why had the employer not implemented them? Were any interim protection measures in place? If not, why not?

NOTE: All of the above questions are to be directly asked of management personnel and their responses carefully recorded. A second CSHO or other reliable witness shall be present if at all possible. Documentary evidence shall be sought throughout the investigation, using administrative subpoenas promptly and freely, as appropriate.

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Appendix B

Standardized Information and
Optional Recordkeeping Case Outline

Case files for recordkeeping citations to be considered for violation-by-violation penalty procedures shall be set up to group violations, using a numerical code as shown below, followed by the case number of the violation as may be recorded in the optional recordkeeping case outline.

A. Case types are as follow:

INJURY:

- 01--Laceration
- 02--Puncture wound
- 03--Fracture
- 04--Eye injury
- 05--Burn
- 06--Contusion
- 07--Strain/sprain
- 08--Hernia
- 09--Other (major category)
- 10--All other injuries (non-specific)

ILLNESS:

- 11--Dermatitis
- 12--Cumulative trauma disorder
- 13--Hearing loss
- 14--Poisoning
- 15--Respiratory disorder
- 16--Cancer
- 17--Other (major category)
- 18--All other illnesses (non-specific)

B. For burns, there shall be some estimate of the size of the burn. This can be given in the "Detailed Description of Event" column on the suggested recordkeeping case outline.

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C. Using the suggested recordkeeping case outline or some other appropriate format, include the following types of information for each violation under "Detailed Description of Event":

1. Work relationship.

EXAMPLE: "While working as a welder...."

2. Injury.

EXAMPLE: Employee sprained his left wrist.
Employee fractured her right index finger.

3. Basis of recordability: injury or illness.

EXAMPLE: Employee was to take prescription medicine (Naprosyn) for 5 days and received heat therapy on three subsequent visits.

D. Each violation must have:

1. A unique case file number;
2. A way to be identified, either by name or employee clock number;
3. The reason the instance is a violation of the BLS guidelines; and
4. A detailed description of the event (injury or illness).

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E. Five guides are included in this appendix and in Appendix C for use in determining recordability:

1. Chart 1. Guide to Recordability of Cases Under the Occupational Safety and Health Act.
2. Chart 2. Guidelines for establishing Work Relationship.

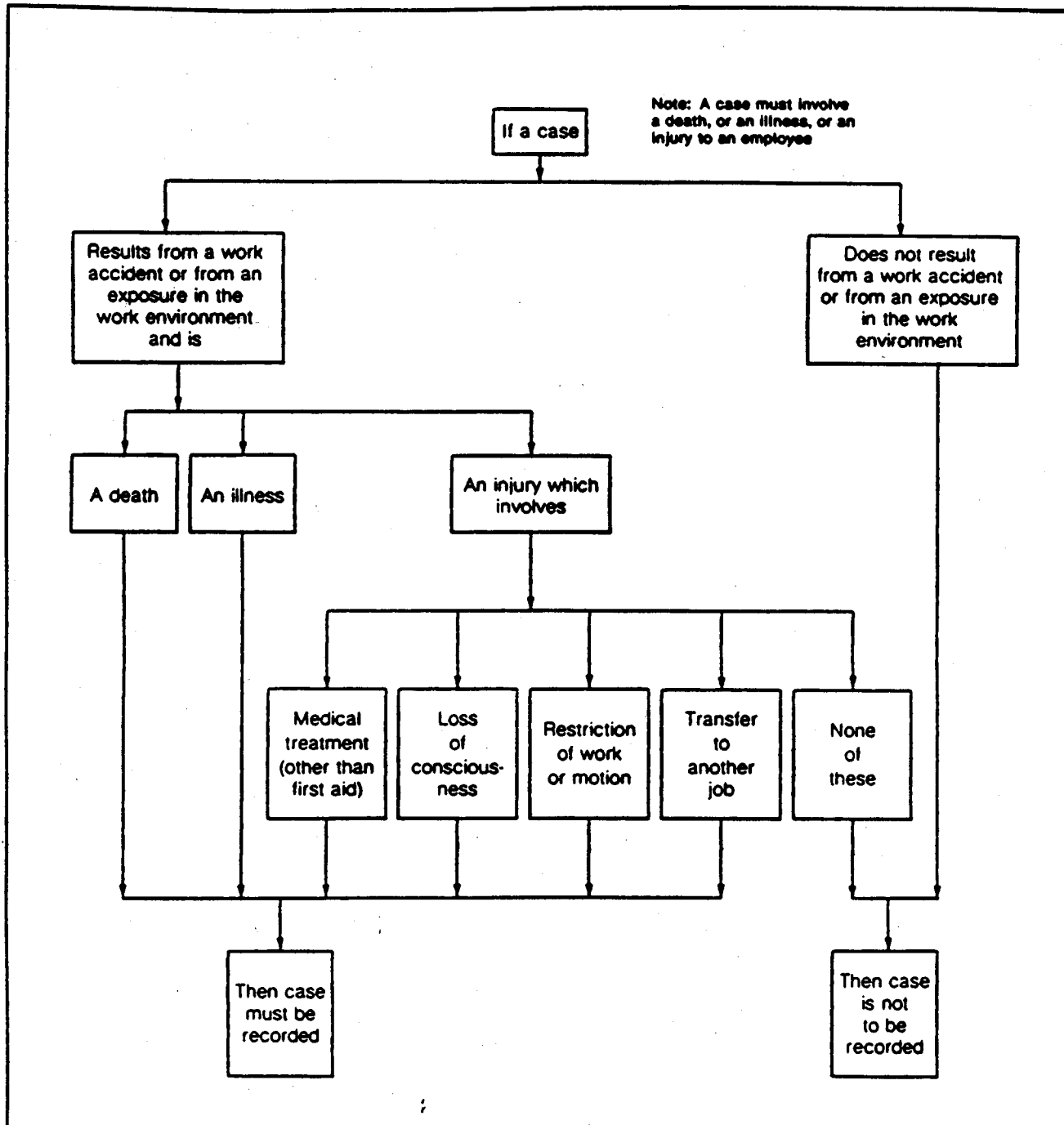
NOTE: The charts are from the BLS September 1986 Recordkeeping Guidelines for Occupational Injuries and Illnesses.

3. Medical Treatment vs. First Aid Guidelines.
4. A partial list of prescription and nonprescription drugs based on previous recordkeeping investigation history.
5. Physician's Abbreviations Guide.

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Chart 1

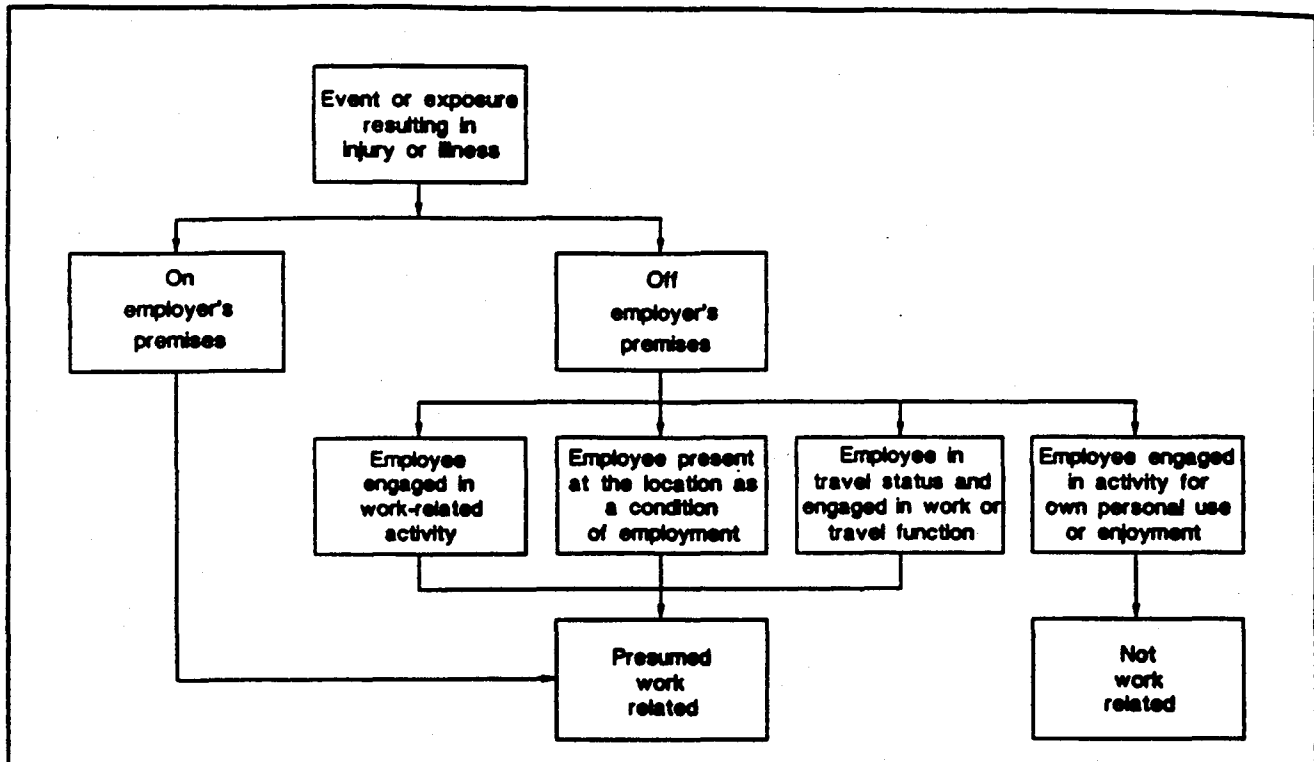
Guide to Recordability of Cases
Under the Occupational Safety and Health Act



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Chart 2

Guidelines for Establishing Work Relationship



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APPENDIX C

Medical Treatment vs First Aid Treatment

The following procedures are generally considered medical treatment. Work-related injuries for which these types of treatment were provided or should have been provided are recordable:

- Treatment of INFECTION;
- Treatment of SECOND OR THIRD DEGREE BURN(S);
- Application of SUTURES (stitches);
- Application of BUTTERFLY ADHESIVE DRESSING(S) or STERI-STRIP(s) in lieu of sutures;
- Removal of FOREIGN BODIES EMBEDDED IN EYE;
- Removal of FOREIGN BODIES FROM WOUND if procedure is COMPLICATED because of depth of embedment, size, or location;
- Use of PRESCRIPTION MEDICATIONS (except a single dose administered on first visit for minor injury or discomfort);
- Use of hot or cold SOAKING THERAPY during second or subsequent visit to medical personnel;
- Application of hot or cold COMPRESS(ES) during second or subsequent visit to medical personnel;
- CUTTING AWAY DEAD SKIN (Surgical debridement);
- Application of HEAT THERAPY during second or subsequent visit to medical personnel;
- Use of WHIRLPOOL BATH THERAPY during second or subsequent visit to medical personnel;
- POSITIVE X-RAY DIAGNOSIS (e.g., fractures, broken bones);
- ADMISSION TO A HOSPITAL or equivalent medical facility FOR TREATMENT.

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The following procedures are generally considered first aid treatment (e.g., one-time treatment and subsequent observation of minor injuries) and work-related injuries involving such procedures are not recordable unless they involve loss of consciousness, restriction of work or motion, or transfer to another job.

- Treatment of FIRST DEGREE BURN(S);
- Application of BANDAGE(S) during any visit to medical personnel;
- Use of ELASTIC BANDAGE(S) during first visit to medical personnel;
- Removal of FOREIGN BODIES NOT EMBEDDED IN EYE if only irrigation is required;
- Removal of FOREIGN BODIES FROM WOUND if procedure is UNCOMPLICATED and is, for example, by tweezers or other simple technique;
- Use of NONPRESCRIPTION MEDICATION AND administration of single dose of PRESCRIPTION MEDICATION on first visit for minor injury or discomfort;
- SOAKING THERAPY on initial visit to medical personnel or removal of bandages by SOAKING;
- Application of hot or cold COMPRESS(ES) during first visit to medical personnel;
- Application of OINTMENTS to abrasions to prevent drying or cracking;
- Application of HEAT THERAPY during first visit to medical personnel;
- Use of WHIRLPOOL BATH THERAPY during first visit to medical personnel;
- NEGATIVE X-RAY DIAGNOSIS;
- OBSERVATION OF injury during visit to medical personnel.

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The following procedure, by itself, is not considered medical treatment.

- Administration of TETANUS SHOT(S) or BOOSTER(S).

However, these shots are often given in conjunction with more serious injuries; consequently, injuries requiring these shots may be recordable for other reasons.

Prescription Drugs

The following list is intended to supply a reference list of drugs currently requiring a prescription. The list is not intended to be exhaustive but merely to list some of the more commonly encountered prescription drugs. This list is currently accurate but is subject to change and must be verified if a listed drug is found during an inspection. (See Physicians Desk Reference or contact a druggist or physician.)

Adsorbonac	Motrin
Anaprox	Nalfon
Anapux	Naprosyn
Antivert tablets	Naproxen
Aristocort cream	Neomycin sulfate tablets
Atropine sulfate injection	Neosporin drops
Atropine sulfate ophthalmic ointment 1%	Neosporin ophthal- mic ointment
A-S cream	Neo-decadron ophthalmic
Benadryl capsules - not lotion	Norflex
Butazolidin	Norgesic
Chloramphenicol ophthalmic solution 5%	Norgesic forte
Chloroptic ophthalmic solution	Papase
Clinoril	Parafon forte
Cobisic	Penicillin
Cortisporin	Phenergan
Cortisporin drops	Phisohex
Cortisporin otic solution	Ponstel
Darvocet	Robaxisal
Darvon	Rufen
Decadron phosphate sterile ophthalmic ointment	Silvadene cream
Dolobid	Skelaxin
Duricef	Snyestion
Elavil	Solatene
Elixir of Turpin Hydrate	Soma compound with Codeine

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Feldene
Gantrissin drops
Garamycin ointment
Halcion tablets
Hydrochlorothiazide
Hydrocortisone cream 1%
Indocin

Keflex
Maxitrol
Meclomen
Medrol

Strifon forte
Synalar cream
Synalgos-DC capsules
Tetracycline
Thiamine Hydrochloride
Tobrex
Tobrex ophthalmic
solution
Tolectin
Tylenol #2
Tylenol #3
Valisone cream
Xylocain w/EPT. 2%

Non-prescription Drugs

The following list is intended to supply a reference list of drugs not currently requiring a prescription. The list is not intended to be exhaustive but merely to list some of the more commonly encountered over-the-counter (OTC) drugs, many of which were recently dispensed only by prescription. This list is currently as accurate as possible but is subject to change.

Acetaminophen
Bacitracin
Chlor-Trimeton tablets
Ibuprofen (OTC generic)
Neosporin ointment
Percogesic
Sudafed syrup

Advil
Betadine
Hydrocortisone cream 0.5%
Motrin 1B
Nuprin
Robitussin
Tylenol

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Physician's Abbreviations Guide

Pt	- Patient	b.i.d.	- twice daily
q.l.	- as much as desired	t.i.d.	- thrice daily
q.p.	- as much as you please	q.i.d.	- 4 times a day
QOD	- every other day	q.r.n.	- when necessary
q.h.	- every hour	q.s.	- as much as suffices
q.d.s.	- 4 times a day	Qd	- per day
pp	- post prandial (after eating)		
m	- milligrams	c	- with
a	- same quantity	p	- after
po	- by mouth	pr	- by rectum
IPPB	- Intermittent positive pressure breathing		
Dx	- Diagnosis	Fx	- Fracture
Thx	- Therapy	WT	- Weight
Hx	- History	CBC	- Complete blood count
IV	- Intravenous	UA	- Urinalysis
Phx	- Physical exam	ECG	- See EKG
EKG	- Electrocardiogram	SZ	- Seizure
EEG	- Electroencephalogram	CXR	- Chest X-ray
Rx	- Treatment, treated		
PA	- Posterior-anterior (kind of CXR)		
LAT	- Lateral (refers to X-ray view)		
RUQ	- Right upper quadrant (abdomen)		
LUQ	- Left upper quadrant (abdomen)		
RLQ	- Right lower quadrant (abdomen)		
LLQ	- Left lower quadrant (abdomen)		

VS - Vital signs (there are four vital signs)

BP	= Blood Pressure	T	= Temperature
P	= Pulse	RR	= Respiratory Rate
	or		
HR	= Heart rate		

LBP - Low Back Pain
CTS - Carpal tunnel Syndrome

SMA 20-20 channel chemistry test

Na	- Sodium	K	- Potassium
Cl	- Chloride	BAN	- Blood area nitrogen
Cr	- Creatinine	Ca	- Calcium
Ph	- Phosphate	Gln	- Glucose
Alb	- Albumin		
Chol	- Cholesterol		
SGOT, SGPT, Alkphos, GGTP are Liver Enzymes			
Bili Direct Total-Bilirubin			

