

## Wisconsin companies insulated from stiff penalties in worker deaths

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Job foremen across the country fear running afoul of the Occupational Safety and Health Administration, but the federal regulatory agency's power is more image than reality.

A Gannett Wisconsin Media review of 240 workplace fatalities in Wisconsin over 11 years shows OSHA imposes tiny fines on companies whose employees are killed on the job, and often negotiates even smaller penalties than originally issued.

Workers' families are often shocked by the outcome of the investigation, which by law isn't designed to assign blame or impose huge punitive fines. Families also are stunned to realize they have no right to sue employers, even those with serious safety violations.

When fines were levied, nearly two-thirds were reduced through settlements. Ultimately, the median penalty in the 184 worker death cases that resulted in fines was just \$4,200, according to the [analysis of incidents from 2000 to 2010](#).

OSHA's mission is less about punishment and more about education and correcting safety violations, said Rhonda Burke, an OSHA spokeswoman based in Chicago.

"You hope that when you go into a workplace that had a fatality you can help ensure something like that doesn't happen again," Burke said. "There comes a time when we have reticent employers or repeat offenders where the fines are much higher because we find a pattern."

### A case in point

When 26-year-old Brandan Kalmerton was killed on the job in 2010 while repairing a drill head that had failed in a trench near U.S. 41 in Oshkosh, his family and friends suspected immediately that safety rules hadn't been followed.

They were right. Federal safety regulators inspected the scene and filed a final report six months after the incident that cited four violations they called "serious."

Kalmerton and one of his Northwest Cable Construction coworkers — Paul Tijan, 37, of Gale — were working in a trench more than 9 feet deep and 4 and a half feet wide. The safety "trench box" they were in — built to prevent cave-ins — was only 6 feet tall, leaving 3 feet unprotected.

Kalmerton and Tijan heard the wall of gravel and dirt shifting above them. In an instant, tons of earth crashed down, partially burying them both.

The weight crushed Kalmerton, breaking his ribs and fracturing his skull. The Oshkosh man died at the scene.

OSHA issued four fines totaling \$13,200, but Northwest Cable promised to address safety problems and negotiated a deal to reduce the fines to \$9,000.

The company's experience is not unusual. The largest fine in the Gannett Wisconsin Media review was a \$117,000 payment by Lapham-Hickey Steel Corp. of Oshkosh in 2006, issued after a 28-year-old man was crushed by a 2,700-pound bundle of steel. The original fine of \$217,000 was reduced through negotiations.

When OSHA inspectors arrive at a fatal accident scene, such as recent deaths at road construction sites this summer on U.S. 41 near Green Bay and Oshkosh, they are there to inspect, not necessarily investigate the cause and assign blame. That's often left to local officials and insurance companies, if any blame is assigned at all.

"Our principal objective is to determine if there were any OSHA violations that occurred. A lot of times within our

inspection we are able to provide what we think might have caused the accident, but we are not the final say,” said Scott Allen, an OSHA regional spokesman based in Chicago. “Our task is not to determine what ultimately caused the accident.”

The agency’s mission, and the seemingly minor fines it levies, can leave families feeling cheated, said Celeste Monforton, a former OSHA policymaker who now is a national worker safety advocate who lobbies Congress with families of injured and killed workers. She said families expect OSHA to come down hard on companies responsible for a loved one’s death.

“Writing a \$10,000 check means nothing to many large companies; they spend more than that at golf outings,” Monforton said. “People think of the ‘shackles of OSHA’ being burdensome on job creation. But many have no idea of the pittance of penalties.”

Congress is steadfastly opposed to increasing penalties, Monforton said, fearing stiffer fines will hurt businesses.

Unlike other regulatory bodies, such as the Mine Safety and Health Administration or Environmental Protection Agency, OSHA fines have not been increased since 1990.

Serious violations carry a maximum penalty of \$7,000, according to OSHA.

A push was made in the 1990s to update the 1970 OSHA law. Another effort was made in 2010, and again last year with the Protecting America’s Workers Act.

All of those efforts have failed to garner any significant political traction, and are unlikely to in the future, Monforton said.

Jim Schultz, director of the Milwaukee-based Wisconsin Committee on Occupational Safety & Health, or WisCOSH, said inspectors have been issuing fines more liberally in recent years, but the penalties still are inconsequential.

“When a worker gets killed on a job, the most they face for each violation is \$7,000,” Schultz said. “That really tells you how much they value a human life. Nobody wants to talk about how jobs are killing workers because the regulations are so stagnant and watered down.”

Even the maximum fine for a fatality often is reduced. Reductions are granted based on the size of the business, demonstrations of “good faith,” and the company’s history of violations.

Companies with fewer than 26 employees can be granted reductions of up to 60 percent, knocking maximums down to \$4,200. “Willful” or “repeat” violations carry much higher penalties, but are rarely issued after fatalities.

#### Companies under scrutiny

Brent Miller, director of safety and environmental services for the trade group Associated General Contractors of Wisconsin, says OSHA fines are stiff enough to hold employers accountable.

No company wants an employee hurt or killed, he said, and fines are among the least important concerns when it happens.

“People need to realize that it isn’t so much the fine that hurts a business; it is your reputation,” Miller wrote in an email. “Cutting the fines in half wouldn’t increase the number of fatalities. Doubling would probably not change them either.”

Companies with bad safety reputations are shunned by peer contractors who don’t want to work with them, Miller maintains. He said some sub-contractors even will increase bids if they know that a general contractor has a poorly run safety program because they assume more safety precautions will need to be taken.

After an accident, companies face bigger problems than OSHA fines, Miller said. Public scrutiny and low worker morale all can harm a company.

### Limits on lawsuits

Even in the case of a death, however, Wisconsin law strictly limits employees' families from suing employers for wrongful death. Their liability is limited to paying a death benefit and funeral costs.

That comes as a result of the deals cut in the landmark 1911 Wisconsin workers' compensation law, the first in the nation, which provided unprecedented worker protection and rights but conceded the right to sue.

"No matter how evil, nefarious or even negligent an employer is, there is no lawsuit potential," said attorney Tom Domer, of Domer Law in Milwaukee. "The law unfortunately protects employers even against their own negligence."

Families are routinely surprised and saddened when they learn they have no opportunity to sue, even if an employer is found at fault, said Domer, who teaches a workers' compensation course at Marquette Law School.

Families can try to sue a third party, such as a manufacturer of work equipment, but not the employer or coworkers who might have contributed to the fatality.

If an employer is found liable for a safety violation, a \$15,000 maximum penalty can be awarded to beneficiaries. Funeral costs are paid with a \$10,000 maximum, and a death benefit is paid out at four times the worker's annual salary, capped by state law at \$256,000.

Families of a worker making \$10 an hour would receive about \$80,000 in death benefits.