# It Took 12 Years To Determine That's Not Willful?!

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Let's continue our discussion of employer "Willful" behavior. OSHA can be inconsistent in its application of the classification, and it is often up to the employer to establish the distinction between "serious" and "willful" behavior during and after an OSHA inspection.

The U.S. Court of Appeals for the District of Columbia Circuit provided a practical description of the meaning of "Willful" in Dayton Tire v. Secretary of Labor. D.C. Circuit Court decisions affect Federal OSHA throughout the country because Fed-OSHA appeals eventually end up in D.C.

The D.C. Court held that to make out a Willful violation, the Secretary of Labor must be able to demonstrate that "the employer was actually aware, at the time of the violative act, that the act was unlawful, or that [the employer] possessed a state of mind such that if it were informed of the [OSHA] standard, it would not care."

The Court stated that "it takes a lot to be plainly indifferent." The Court then vacated the penalties assessed against Dayton Tire based on the Secretary's failure to "cite a single piece of evidence indicating that [the manager] was actually aware . . . that the act was unlawful."

**The long and winding road to the DC Court decision....**
OSHA initially issued to Dayton Tire 107 Willful violations, 98 of which were for alleged Willful failures to train 98 different Dayton Tire employees to the level of an "authorized employee."

Dayton Tire contested the citations, and the Administrative Law Judge ("ALJ") affirmed the violations, assessing a $518,000 penalty. Although the ALJ found that Dayton Tire's actions were "consistent with a good faith belief and effort to comply with the LOTO standard throughout the Oklahoma City plant," the Judge nevertheless characterized 37 violations as Willful. The ALJ reasoned that Dayton Tire had knowledge that its parent corporation had previously been cited for similar violations of the LOTO standard.

Dayton appealed the case to the Occupational Safety & Health Review Commission (OSHRC), which took TWELVE YEARS and then in 2010, smacked down the employer, upholding all of the violation as Willful, and increasing the penalty to approximately $2 million. Gosh. Nothing unreasonable about that decision! The Commission did not base its finding of Willfulness on the parent corporation's prior violations, but rather, based it on the original finding by Dayton Tire's first safety manager that

prior violations, but rather, based it on the original finding by Dayton Tire's first safety manager that only the outside maintenance contractor's employees were LOTO authorized employees. The Review Commission found that determination to be "plainly erroneous." The OSHRC concluded that when the subsequent safety manager relied on her predecessor's assessment, she "either knew that her predecessor's LOTO analysis was incorrect or chose to avoid such knowledge by refusing to conduct her own assessment."

After probably pondering why the OSHRC took 12 years to make a decision, the DC Circuit overturned the OSHRC decision, finding that past Commission findings of plain indifference have only been upheld where a company made no effort to address repeated warnings from employees or OSHA that they were in violation of safety standards. The incidents referenced by the Commission in Dayton Tire case failed to reach that level. According to the DC Court, the original safety manager's actions showed that she at least made an attempt to respond to concerns that were raised — "while [she] could have done more, she did not do nothing." The Court found that the manager's "responses evince negligence at most," which is insufficient for a finding of Willful.

**Don't Assume that OSHA will consistently follow this definition....**

We think that the Court did a fine job of applying the clear intent of the OSHAct, but the underlying decisions in this case under both Republican and Democratic administrations illustrate that OSHA and ALJ's may not agree. Start at the beginning of the inspection to show that behavior is not willful, and if you are on a multi-employer site, watch out for your fellow employers.

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