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ROGUE SUPERVISOR: FEDERAL COURT REJECTS OSHA'S ATTEMPT TO CREATE STRICT EMPLOYER LIABILITY

By Mark A. Lies II and Kerry M. Mohan

INTRODUCTION

It is well recognized that employer knowledge is required for OSHA to establish a violation. Under most circumstances, this element can be satisfied when a supervisor, manager or foreman, who are agents of the employer, witnesses an employee exposed to a hazard, but does nothing about it. But what happens when the supervisor, manager, or foreman is the individual violating OSHA's regulations (and the Company's rules)? In the past, OSHA has tried to use the supervisor's bad acts to impute strict liability on the employer, arguing that the supervisor's own knowledge of his bad act is sufficient to impute or infer knowledge of that bad deed onto the employer. This article examines a recent Federal Court of Appeals' decision rejecting OSHA's interpretation, and how that decision may affect OSHA's ability to prove a violation in the first place as well as the employer's ability to prove unavoidable supervisor misconduct affirmative defense.

OSHA BURDEN TO PROVE EMPLOYER LIABILITY

In order to prove a violation of an OSHA safety or health regulation (or the General Duty Clause, Section 5(a)(1)), the agency must show by a preponderance of factual evidence at the hearing the following elements:

1. the regulation or a generally recognized industry safety practice or the employer's own safety policy applies to the safety or health hazard (e.g., fall, confined space, machine guarding, etc.) which OSHA observed at the worksite; and
2. the requirements of the regulation or industry practice or employer policy were not met at the worksite (e.g., there was no fall protection, no confined space program, no machine guards in place, etc.); and
3. one or more of the employer's employees were actually exposed to the hazardous condition so that the employee could have been injured by the hazard. NOTE: On multi-employer worksites, an employer may be liable for the exposure of another employer's employee to the hazard if certain conditions are met; and

4. the employer **knew,** or with the exercise of reasonable diligence, **should have known** of the violative conditions.

Thus, "employer knowledge" is a critical element in proving the liability of an employer. Employers are not strictly liable under the Act or a particular OSHA standard simply because a violative condition exists or an accident has occurred. Because many employers are legal entities, such as corporations,it is difficult to determine what a corporation "knows." Therefore, the case law involving OSHA citations has established a general rule that the actual or constructive knowledge of an employer's agent, such as a foreman or supervisor, can be imputed to the employer. In other words, if OSHA can prove that a supervisor or foreman knew or, with the exercise of reasonable diligence, should have known that a violative condition existed, OSHA may be able to satisfy the employer knowledge element of its burden of proof in a contested case.

OSHA'S ATTEMPT TO ESTABLISH EMPLOYER KNOWLEDGE BY A SUPERVISOR'S OWN BAD DEEDS

To satisfy its burden of establishing "employer knowledge," OSHA has often tried to use a supervisor's own bad deeds to impute direct knowledge to the employer. In essence, OSHA's view is that because the supervisor engaged in the dangerous act, his knowledge of that dangerous act is sufficient to establish employer knowledge.

In a recent OSHA Review Commission decision, *ComTran Group, Inc.,* 2011 OSAHRC LEXIS 114 (O.S.H.R.C.A.L.J., Oct. 17, 2011), a supervisor was caught digging in a six-foot deep trench with an unprotected five-foot high "spoil pile" at the edge of the trench. The administrative law judge found that because the supervisor "had dug the excavation and placed the spoil pile at the edge," his knowledge of his own malfeasance was imputed to the employer. As a result, the administrative law judge found that the Secretary had established its *prima facie* violation and affirmed the citation.

THE ELEVENTH CIRCUIT REJECTS OSHA'S ATTEMPT TO IMPOSE STRICT LIABILITY BASED ON SUPERVISOR MALFEASANCE

Following the OSHA Review Commission's decision in *ComTran,* the employer appealed the decision to the Eleventh Circuit Federal Court of Appeals. *ComTran Group, Inc. v. DOL,* 2012 U.S. App. LEXIS 15023 (11th Cir. July 24, 2013). On appeal, the Eleventh Circuit addressed the issue of whether it is appropriate to impute a **supervisor's knowledge of his own violative conduct** to his employer under the Act, thereby relieving the Secretary of his burden to prove the "employer knowledge" element of his *prima facie* case. The Eleventh Circuit found against OSHA, holding that if this approach were to apply, the Secretary would only have to meet three of the four evidentiary elements of the *prima facie* case, and would not have to prove the "employer knowledge" element.

> Analyzing prior Federal appellate court decisions, the Eleventh Circuit stated that:
>
> We say that a supervisor's knowledge is "generally imputed to the employer" because that is the outcome in the ordinary case. The "ordinary case," however, is where the supervisor knew or should have known that subordinate employees were engaged in misconduct, and not, as here, where the supervisor is the actual malfeasant who acts contrary to the law.

Id. at *8, n. 2. Also seeming to support the unavoidable supervisory misconduct defense, the Eleventh Circuit found that "[i]f a violation by an employee is reasonably foreseeable, the company may be held responsible. But, if the employee's act is an isolated incident of unforeseeable or idiosyncratic behavior, then common sense and the purpose behind the Act require that a citation by set aside." *Id.* at *20. Finally, the Court stated that a supervisor's **"rogue conduct"** cannot be imputed to the employer merely because the supervisor is the violator. *Id.* at *25. As a result, the Eleventh Circuit remanded the matter back to the Review Commission to require the Secretary to prove the "employer knowledge" element and permit the employer to establish its defenses to the citation.

THE ELEVENTH CIRCUIT'S DECISION AND ITS APPLICATION TO THE UNAVOIDABLE SUPERVISORY MISCONDUCT DEFENSE

The Eleventh Circuit's decision has seemingly breathed new life into the often difficult to prove "unavoidable supervisor misconduct" employer affirmative defense. Under the typical "unavoidable employee misconduct" defense that applies to hourly employees, the employer must prove the following elements:

a. the employer had a safety or health program and work rules which applied to the OSHA regulation contained in the citation (e.g., if OSHA has cited the employer for violations

of the fall protection regulations, the employer had a specific program and work rules relating to fall hazards), and

b. the employees were effectively trained in such safety or health program and work rules (to prove this element the employer will need documentation of training – NOTE: This training requirement is often difficult to establish when employees are illiterate or cannot understand the language, typically English, in which the written and spoken training is being provided), and

c. the employer has effectively enforced these safety or health programs and work rules at previous times or jobs with discipline for violations (to establish this element the employer must be able to produce documentation of verbal or written discipline given to employees for past violations which requires that such documents be generated and maintained), and

d. the employer must prove that on the date when the violation occurred in the citation that the violation occurred in such a fashion (e.g., extremely short time frame, totally unforeseeable circumstances) that the employer could not have learned of and prevented the violation – hence the violation is due to "unavoidable" employee misconduct.

Because supervisors are expected to follow and enforce an employer's safety rules, the "unavoidable supervisory misconduct" defense is often more difficult to prove. Specifically,an employer often must present more evidence to show the propriety of its safety programs, that it monitored and audited the supervisor more frequently than the hourly employees, that the supervisor had no prior history of engaging in any safety violations or unsafe behavior, and that the employer could not have anticipated that the supervisor would have engaged in the unsafe behavior.

Because the Eleventh Circuit's decision rejected OSHA's argument that an employer is strictly liable whenever a supervisor engages in unsafe behavior, an employer now has a more viable argument that it should not be held liable when a trusted supervisor engages in "unforeseeable or idiosyncratic behavior" or "rogue conduct."Since the burden of proof for this affirmative defense will remain on the employer to show that the supervisor's bad deed was in fact "unforeseeable or idiosyncratic," it will be necessary for the employer to conduct audits or other evaluations of supervisor performance to establish the supervisor was compliant in prior situations.

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