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IN THE SUPREME COURT OF THE STATE OF OREGON

OREGON OCCUPATIONAL SAFETY & HEALTH DIVISION, Respondent Cross-Petitioner, Petitioner on Review, v. CBI SERVICES, INC., Petitioner, Cross-Respondent, Respondent on Review.	Workers' Compensation Board No. 0900126SH CA A147558 SC S061183

REPLY BRIEF OF PETITIONER ON REVIEW, OREGON OCCUPATIONAL SAFETY & HEALTH DIVISION

Petition for Judicial Review of the Final Order of the
Oregon Occupational Safety & Health Division

Opinion Filed: January 9, 2013
Author of Opinion: Sercombe, J.
Before: Ortega, P.J., Wollheim, J., and Sercombe, J.

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STATEMENT OF THE CASE

The issue in this case is the proper interpretation of ORS 654.086(2). Because employer misconstrues OR-OSHA's interpretation of that statute, OR-OSHA files this reply brief to respond to that misconstruction.

ARGUMENT

A. An employer is liable under ORS 654.086(2) if a supervisor was capable of knowing of the violative condition without exercising extraordinary diligence.

Under ORS 654.086(2), an employer is liable for a serious safety violation unless the employer or its agents "could not with the exercise of reasonable diligence[] know of the presence of the violation." Thus, by its plain terms, the statute imposes liability when a supervisor is capable of knowing about a violative condition, unless discovering the violative condition would require an extraordinary amount of diligence. As explained in the opening brief, statutory context and general maxims of construction further support that understanding of the statute. (Pet BOM 12-22).

Employer misconstrues that reading of the statute by arguing that "OR-OSHA has attempted to strike the phrase 'with the exercise of reasonable diligence' from the inquiry so that the word 'could' stands by itself." (Resp BOM 31). In fact, striking the phrase "with the exercise of reasonable

diligence" would create far greater liability than OR-OSHA proposes. An employer would be liable whenever a supervisor was capable of knowing of the violative condition. That would essentially create strict liability, because it is nearly always *possible* to know about a violative condition. The phrase "with the exercise of reasonable diligence" cabins the employer's liability. Liability attaches only when the supervisor is capable of knowing of the violation *without exercising an extraordinary amount of diligence*.

Employer's argument appears to assume that there is only one way in which to exercise reasonable diligence—either a supervisor is exercising reasonable diligence or he is not. In employer's view, Vorhof exercised reasonable diligence and did not know about the violative conditions; employer appears to argue that, as a result, it would have required extraordinary diligence for Vorhof to have known about them. (Resp BOM 24-27). But in any given situation, there may be a range of conduct that constitutes "reasonable" diligence. For example, employer argues that Vorhof was exercising reasonable diligence while performing the task assigned to him rather than watching the employees under his supervision. Assuming that is true, he also would have been exercising reasonable diligence had he looked up from his task at some point during the several minutes that the violative conditions were ongoing; doing so would not have required extraordinary diligence. In other words, a range of conduct can be considered "reasonable" diligence, beginning

with the minimum amount of diligence necessary to avoid neglecting one's duties and ending with the maximum amount of diligence that can be expected without creating an extraordinary burden.

ORS 654.086(2) holds an employer liable whenever the supervisor "could" know of the violative condition with the exercise of reasonable diligence. Thus, the court should look to the entire range of conduct that can be considered "reasonable" diligence. If a supervisor acting with the maximum amount of reasonable diligence would know of the violative condition, then the supervisor is capable of knowing about the condition without the exercise of extraordinary diligence. In other words, it cannot be said in that situation that the supervisor "could not with the exercise of reasonable diligence[] know of the presence of the violation."

Employer would instead have this court replace the term that the legislature used—"could"—with the term "would." That is, employer argues that an employer should be liable only if any supervisor exercising reasonable diligence *would* know of the violative condition. Under that reading of the statute, OR-OSHA would be required to prove that any supervisor exercising even the minimum amount of diligence that can be considered reasonable would know of the violative condition. That interpretation is not only inconsistent with the plain text of the statute, but also with the statutory purpose

of protecting the health and safety of employees in Oregon. This court should reject employer's invitation to rewrite the statute.

In sum, OR-OSHA's reading of the statute is consistent with the statutory text and gives meaning to all the words in the statute, including the phrase "with the exercise of reasonable diligence." Any time that a supervisor is capable discovering the violative condition while exercising a reasonable amount of diligence, the statute, by its plain terms, imputes liability to the employer.

B. In any event, OR-OSHA provided sufficient evidence for the ALJ to determine that a supervisor exercising reasonable diligence would have seen the violative conditions.

As described in the opening brief, even if OR-OSHA was required to demonstrate that a supervisor exercising reasonable diligence *would* have seen the violative conditions, it did so here. (Pet BOM 25-28). OR-OSHA agrees with employer that employers should not be held responsible for all violative conditions simply because a supervisor is on site. But Vorhof was not simply on site. He was in close proximity to two employees in unsafe conditions, the employees were in plain view from where he stood, and the violative conditions lasted several minutes. OR-OSHA exceeded its burden of demonstrating that Vorhof could have known of the violative conditions and demonstrated that he, in fact, should have known about them.

CONCLUSION

For the reasons explained in OR-OSHA's opening brief and reply brief, this court should reverse the decision of the Court of Appeals and remand to the Court of Appeals to consider the issue of whether employer met its burden of proving an affirmative defense.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 9, 2013, I directed the original Reply Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and served upon Joel DeVore, attorney for respondent on review, by using the electronic filing system. I further certify that on October 9, 2013, I directed the Reply Brief to be served upon Carl B. Carruth, attorney for respondent on review, by mailing two copies, with postage prepaid, in an envelope addressed to:

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 916 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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