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

BRIEF ON THE MERITS OF OREGON OCCUPATIONAL SAFETY AND 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.

Continued…

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BRIEF ON THE MERITS OF OREGON OCCUPATIONAL SAFETY AND HEALTH DIVISION

STATEMENT OF THE CASE

Under ORS 654.086(2), an employer commits a serious safety violation if a supervisor (or other agent of the employer) knew or with the exercise of reasonable diligence could have known of the violative condition. The issue in this case is whether that statute means what it says. More specifically, the issue is whether "could" in fact means "could," or whether, as the Court of Appeals held, it means "would" or "should." As explained below, there is no basis for reading the statute to mean anything other than what it says. The Court of Appeals' reading is not only inconsistent with the statutory text, it is also at odds with the statutory context and purpose. As a result, this court should reverse the decision of the Court of Appeals.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented

To prove that an employer had constructive knowledge of a serious safety violation, must OR-OSHA show that a supervisor should have known of the violative condition, or is it sufficient to show that the supervisor, with the exercise of reasonable diligence, "could" have known of the violative condition?

First Proposed Rule of Law

ORS 654.086(2) provides that an employer has constructive knowledge of a violation "unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." Thus, to prove its *prima facie* case of constructive knowledge, OR-OSHA must prove that a supervisor exercising reasonable diligence could have known of the violative condition. In other words, OR-OSHA must prove only that the supervisor was capable of knowing about the violative condition without exercising extraordinary diligence.

Second Question Presented

Does OR-OSHA establish a *prima facie* case of constructive knowledge when it proves that a supervisor in close proximity to a violative condition had sufficient time to observe it?

Second Proposed Rule of Law

Yes. Showing that the supervisor was close enough to see the violative condition and had sufficient time to observe it establishes constructive employer knowledge, because those facts show that the supervisor was capable of knowing about the violative condition without exercising extraordinary diligence.

SUMMARY OF ARGUMENT

Under ORS 654.086(2), an employer commits a serious safety violation if a supervisor (or other agent of the employer) "could" have known of the violative condition with the exercise of reasonable diligence. In other words, the statute imposes constructive knowledge whenever a supervisor is capable of knowing about a violative condition without exercising an extraordinary amount of diligence. The Court of Appeals, however, appears to have interpreted the statute as imputing knowledge only if a supervisor "would" have known of the violative condition with the exercise of reasonable diligence, or, in other words, if the supervisor "should" have known of the violative condition.

The Court of Appeals' interpretation of the statute is contrary to its text, context, and purpose. The statute uses the term "could," and the court erred by replacing that word with the term "would." Further, the legislature did not incorporate the concept of "reasonable diligence" into the statute to impose a burden on OR-OSHA to show that the supervisor "should" have known of the violative condition. Instead, the legislature simply used that term to ensure that knowledge is not imputed every time it is possible to know about a violative condition, which could require extraordinary efforts by the supervisor. The statute imputes knowledge only when it is possible to know of the violative

condition with the exercise of reasonable diligence, or, in other words, when discovery of the violative condition does not require extraordinary diligence.

Here, OR-OSHA met its *prima facie* burden of showing that Roy Vorhof, one of employer's supervisors, could have known of the violative conditions and that such knowledge would not require extraordinary diligence. The violative conditions—two employees failing to use required fall protection—were in plain view and lasted for a sufficient period of time that Vorhof reasonably could have seen them. Alternatively, even if OR-OSHA was required to demonstrate that Vorhof *should* have known of the violative conditions, OR-OSHA met that burden here. Two of the four employees that Vorhof was supervising were working unsafely by not using required fall protection; Vorhof easily could have seen those unsafe conditions had he looked up; and the employees were exposed to those conditions for at least several minutes. OR-OSHA met—indeed, exceeded—its burden of demonstrating that Vorhof could have known of the violative conditions with the exercise of reasonable diligence. This court should therefore reverse the decision of the Court of Appeals.

SUMMARY OF MATERIAL FACTS[1]

A. A safety compliance officer observed two safety violations at employer's job site, for which OR-OSHA cited employer.

On February 2, 2009, employer was performing work on a water tank at the Creswell Water Treatment Plant job site, located on Cloverdale Road in Creswell, Oregon. (ER 30[2]; Ex 7 at 1). At that time, the structure consisted of a 32-foot wall creating a circular enclosure 130 feet in diameter; it did not yet have a roof and had a very large entrance opening. (Ex 7 at 3, 10; Tr 21). Around the inside of the wall, about four feet below its top edge, was a "painter's railing"—a platform with cable rails that protected employees on the platform from falling to the inside of the tank. (ER 30; Ex 7 at 1; Tr 11-12).

SCO Brink was driving down Cloverdale Road and noticed CBI employee Jeremy Crawford working at the top rim of the tank, without any apparent fall protection. (ER 30; Tr 9-10). Brink stopped his car and took pictures of Crawford on the water tank. (ER 30; Tr 10). He then went to the job site, where he located and contacted the supervisor, Roy Vorhof. (*Id.*). Vorhof was at the entrance of the tank; Crawford was 60-65 feet from Vorhof

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[1] Employer has not challenged the ALJ's findings of fact, and they are therefore assumed to be correct for purposes of judicial review. *Meltebeke v. Bureau of Labor and Industries*, 322 Or 132, 134, 903 P2d 351 (1995).

[2] Cites to "ER" are to the Excerpt of Record attached to employer's opening brief in the Court of Appeals.

and visible from where he stood. (ER 30; Tr 10-11, 72). When Brink notified Vorhof that Crawford was on top of the tank without fall protection, Vorhof looked up, saw Crawford, and told him to come down. (ER 30; Tr 11, 64, 72).

At the time of Brink's observations, Crawford was at or near the top of the tank wall, working without fall protection. (ER 30, 33, 36; Tr 10). That is where Brink initially observed Crawford and where he was still working when Vorhof, at Brink's prompting, looked up and saw him. (ER 33; Tr 10). Although the cables might have protected Crawford from falling to the inside of the tank, there was nothing behind him to protect him from falling toward the outside of the tank. (ER 36-37; Tr 12, 76). The distance from the top of the wall to the ground outside the tank was 32 feet. (ER 30, 37; Ex 7 at 3).

At the same time, Brink observed a second employee, John Bryan, operating a lift without fall protection. (ER 30; Ex 8 at 1; Tr 13-14). Bryan was wearing a harness with a lanyard, but the lanyard was visibly not attached to the lift. (*Id.*). When Brink pointed out that Bryan was not "tied off," Bryan attached the lanyard. (Tr 23).

OR-OSHA issued a citation to employer for two violations because (1) Crawford was not using fall protection while working on top of the tank and (2) Bryan was not using proper fall protection while operating a lift. (ER 30).

B. The Administrative Law Judge affirmed OR-OSHA's citation concerning Crawford's conduct but vacated the citation concerning Bryan's conduct.

An Administrative Law Judge (ALJ) held a hearing concerning the alleged violations. After OR-OSHA presented its case, employer moved to dismiss, arguing that OR-OSHA had failed to present sufficient evidence of employer knowledge of either violation. (Tr 25). The ALJ denied the motion to dismiss and determined that employer had "constructive knowledge" of the violative conditions. (ER 32-33). The ALJ adopted OR-OSHA's argument that Vorhof was "within 65 feet of the violative conditions with reasonable time to discover the violations" and held that Vorhof's constructive knowledge could be imputed to employer. (*Id.*).

After employer presented its evidence, including testimony from Crawford and Bryan, the ALJ affirmed the citation as to the violation concerning Crawford's conduct. The ALJ reasoned that Crawford was exposed to a 32-foot fall hazard without using fall protection. (ER 36-37). The ALJ also rejected employer's affirmative defense of unpreventable employee misconduct. (ER 37). In particular, the ALJ concluded that employer had failed to prove one of the elements of the defense—that it "took reasonable steps to discover the violation." The ALJ essentially reasoned that Vorhof would have discovered the violation if he had made reasonable efforts to do so. (*Id.*).

The ALJ vacated the violation involving Bryan's conduct, concluding that OR-OSHA was required to prove that Bryan was exposed to a fall hazard of six feet or more while on the lift, but failed to do so. (ER 35-36).

C. The Court of Appeals reversed the ALJ's decision.

Employer petitioned for judicial review of the ALJ's order as to the violation concerning Crawford's conduct, and OR-OSHA cross-petitioned for judicial review as to the violation concerning Bryan's conduct. The Court of Appeals reversed and remanded as to both violations. *OR-OSHA v. CBI Services, Inc.*, 254 Or App 466, 485, 295 P3d 660 (2013).

The court first held that the ALJ improperly determined that OR-OSHA had carried its burden of proving employer knowledge. In particular, the court reasoned that OR-OSHA could not prove constructive knowledge by demonstrating that Vorhof was in close proximity to the violative conduct and had sufficient time to see it, had he simply looked up. *Id.* at 475. Although the court properly quoted ORS 654.086(2)—which permits a finding of knowledge if the employer or a supervisor "could" have known of the violative condition with the exercise of reasonable diligence—the court apparently reasoned that the appropriate question is whether Vorhof "should" have known of the violative condition. *CBI Services*, 254 Or App at 473-74, 478-79.

The court, relying on federal case law, held that numerous "factors" are relevant to the question of employer knowledge. *Id*. at 477-81. The court

reasoned that the ALJ therefore erred in considering only time and proximity to the violative conditions:

> Rather, in addition to time and proximity, when assessing a supervisor's exercise of reasonable diligence or lack thereof the agency should consider, *inter alia*, the foreseeability of a safety violation or hazardous condition, the general circumstances and level of danger inherent in the work, the potential need for continuous supervision, the nature and extent of the supervisor's other duties, the supervised workers' training and experience, and the extent and efficacy of the employer's safety programs and precautions.

Id. at 481. Because the ALJ had determined that OR-OSHA met its burden by demonstrating that Vorhof was close enough to Crawford's violative conduct to see it and had sufficient time to see it, the court reversed the ALJ's decision.[3] *Id.*

The court also reversed on OR-OSHA's cross-petition, holding that the ALJ erred by imposing a height requirement into the rule requiring use of fall

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[3] Employer also argued that the ALJ erred by conflating employer's affirmative defense of unpreventable employee misconduct with the element of constructive knowledge. *CBI Services*, 254 Or App at 473 n 9. OR-OSHA conceded that the ALJ erred by conflating the two concepts, but argued that the Court of Appeals should nonetheless affirm the ALJ's decision because employer had failed to meet its burden of proving unpreventable employee misconduct. *Id.* The Court of Appeals held that it did not need to reach the issue of the affirmative defense, considering its determination that "the ALJ incorrectly imputed constructive knowledge of Crawford's violation to employer[.]" *Id.* However, the court determined that "the unpreventable employee misconduct defense requires findings *independent* of those made in assessing the knowledge element of OR-OSHA's *prima facie* case." *Id.* (emphasis in original).

protection when using lifts. *Id.* at 485. The court noted that, because of the ALJ's error, the ALJ had not considered whether OR-OSHA had proved constructive knowledge of that violative condition. *Id.* However, the court determined that the ALJ had "erroneously assessed" the knowledge element of OR-OSHA's *prima facie* case when analyzing the motion to dismiss. *Id.* Thus, the court remanded for reconsideration, in light of the standard that it announced for determining constructive knowledge. *Id.*

ARGUMENT

Under ORS 654.086(2), an employer is liable for a serious safety violation whenever a supervisor "could" have known of the violative condition with the exercise of reasonable diligence. By its plain terms, the statute thus 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. Although use of the phrase "reasonable diligence" may tempt the court to analyze what the supervisor "should" have known—as the Court of Appeals erroneously did in this case—the statutory text demands a different reading. As discussed below, the term "reasonable diligence," as used in ORS 654.086(2), simply means that the supervisor need not use extraordinary diligence to discover the violative condition.

A. ORS 654.086(2) requires OR-OSHA to prove only that a supervisor exercising reasonable diligence could have known of the violative condition.

OR-OSHA cited employer for a "serious violation," which is defined by ORS 654.086(2):

> [A] serious violation exists in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations or processes which have been adopted or are in use, in such place of employment *unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.*

(Emphasis added.)

The issue in this case is whether the ALJ correctly held that OR-OSHA met its *prima facie* burden of proving the "knowledge" element of a serious violation. As an initial matter, employer does not dispute that the knowledge of its supervisor is properly imputed to employer. (Ct App Opening Br 14 n 8); *see also* OAR 437-001-0760(3)(c) (2009) ("Any supervisors or persons in charge of work are held to be the agents of the employer in the discharge of their authorized duties[.]")[4]; *OR-OSHA v. Don Whitaker Logging, Inc.*, 329 Or

[4] OAR 437-001-0760 was amended twice after the violative condition occurred—once in 2009 and again in 2012. The ALJ quoted the 2009 version of the rule (ER 32), and OR-OSHA thus also cites the 2009 rule, which is attached as an appendix. The current rule no longer states that supervisors are the agents of their employers, but that concept is embodied in OAR 437-001-0015, which defines "[a]gent of the employer" as "[a]ny supervisor or

Footnote continued…

256, 263, 985 P2d 1272 (1999) (explaining that supervisor knowledge is imputed to employers by administrative rule). Thus, if Vorhof had sufficient knowledge to qualify under the statute, employer also had the requisite knowledge. Determining whether Vorhof had the requisite knowledge requires interpreting the "knowledge" element contained in ORS 654.086(2).

1. Statutory text and context demonstrate that OR-OSHA must prove only that a supervisor is capable of knowing about the violative condition with the exercise of reasonable diligence.

When construing a statute, this court's "paramount goal" is to discern the legislature's intent. *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009). "[T]here is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes." *Id.* (internal quotation marks omitted). As a result, the first step in analyzing a statute is to examine the statutory text, giving terms of common usage their "plain, natural, and ordinary meaning." *Id.* at 171, 175. The court also "considers the context of the statutory provision at issue, which includes other provisions of the same statute and other related statutes." *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993).

(…continued)
person in charge or control of the work or place of employment including, but not limited to, any manager, superintendent, foreperson, or lead worker."

ORS 654.086(2) provides that an employer does not commit a serious violation if the employer "did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." Thus, OR-OSHA must demonstrate the contrary in its *prima facie* case: that the employer "did, or could with the exercise of reasonable diligence, know of the presence of the violation." "Could" is a past tense form of "can," which means "to be able to do, make, or accomplish." *Webster's Third New Int'l Dictionary* 323, 517 (unabridged ed 2002).[5] Thus, the statute imputes knowledge to a supervisor when, as in this case, a supervisor exercising reasonable diligence would "be able to" know of the violative condition.

As the Court of Appeals noted, some federal courts have interpreted the identical phrase in the federal OSHA statute as imputing knowledge only when a supervisor "should" have known of the violative condition. *CBI Services*, 254 Or App at 478-79 (citing cases). Further, the Court of Appeals, without expressly stating that it was adopting such a test, appears to have done so in this case. The court reasoned that OR-OSHA had not met its *prima facie* burden of proving employer knowledge when it showed that Vorhof was close enough to the violative conditions to see them and had sufficient time to do so. *Id.* at 481.

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[5] The dictionary contains several other definitions of "can," none of which is relevant here.

Instead, the court held, the ALJ should have considered—and, thus, OR-OSHA was required to prove or disprove—several factors to determine whether Vorhof acted with "reasonable diligence." *Id.* Thus, the court's analysis effectively requires OR-OSHA to prove not only that Vorhof could have seen the violative condition with the exercise of reasonable diligence, but that any supervisor acting with reasonable diligence would have done so.

As an initial matter, neither the Court of Appeals, nor any of the federal courts cited by the Court of Appeals, explained why the court strayed from the statutory text, which requires only that the supervisor "could" have known of the violative condition. *See, e.g., American Wrecking Corp. v. Secretary of Labor*, 351 F3d 1254, 1264 (DC Cir 2003) (quoting statutory text of "could," but stating, without explanation, that the Secretary must prove that the employer "knew or should have known" of the violation). The legislature used the word "could," and this court should not omit that term, nor insert the term "should" in its place. *See* ORS 174.010 (court should not "insert what has been omitted" or "omit what has been inserted").

Although not expressly stated in its opinion, the legislature's use of the term "reasonable diligence" is likely what led the Court of Appeals to ignore the plain text of the statute and impute knowledge only when a supervisor should have known of the violative condition. That is in keeping, after all, with how constructive knowledge is often understood in other contexts: a person is

presumed to know what a reasonably diligent person *would* or *should* have known under the circumstances. *See, e.g.*, *Forest Grove Brick v. Strickland*, 277 Or 81, 86, 559 P2d 502 (1977) (noting, in the context of determining when a person knows of an injury such that the statute of limitations begins running, that "[a] person is charged with knowledge that 'a reasonably diligent inquiry *would* disclose' * * *.") (Emphasis added.). The trouble with that reasoning, however, is that it assumes that the legislature intended to impose the traditional constructive-knowledge standard while ignoring what the legislature actually did. In fact, the standard established by the legislature is different than a traditional constructive knowledge standard.

One can think of the term "reasonable diligence" from two perspectives. The term can be used to describe a person who is performing adequately or reasonably, as opposed to shirking his or her duties. That is how the term is understood in the context of traditional constructive knowledge: an individual who is exercising reasonable diligence *would* know of some fact, whereas an individual who is shirking his or her responsibilities would not. As a result, the individual *should* know of the fact. Importantly, however, the term "reasonable diligence" also contrasts with the concept of extraordinary diligence. When one speaks of what a person "*could* know" with the exercise of "reasonable diligence"—as ORS 654.086(2) does—it no longer makes sense to understand the term in the traditional sense. Instead, the term "reasonable diligence"

simply denotes the amount of diligence that is typical or that reasonably may be expected under the circumstances; exercising anything beyond "reasonable diligence" in this sense is going above and beyond what is reasonable.

When viewed in that light, the statutory requirement that a supervisor exercising reasonable diligence "could" have known of the violative condition makes sense. And the resulting standard is something more expansive than traditional constructive knowledge but less expansive than strict liability. The legislature chose not to impute liability any time a supervisor "could" have known of the violative condition because that would essentially create strict liability. Instead, if discovering the violative condition would require extraordinary (rather than reasonable) diligence, then the statute does not impute liability. But any time that a supervisor exercising a reasonable amount of diligence is capable of discovering the violative condition, the statute, by its plain terms, imputes liability to the employer.

In sum, the statutory text demonstrates that liability attaches whenever a supervisor "could" have known of the violative condition with the exercise of reasonable diligence. Liability will not attach, however, if discovering the violative condition would require extraordinary diligence. Nothing in the statutory text requires or permits the Court of Appeals' understanding that OR-OSHA also must prove that a supervisor exercising reasonable diligence would have known of the violative condition.

Statutory context further supports OR-OSHA's argument that this court should read the statute consistently with its plain text. ORS 654.003 explains the purpose of the Oregon Safe Employment Act (OSEA):

> The purpose of the Oregon Safe Employment Act is to assure as far as possible safe and healthful working conditions for every working man and woman in Oregon, to preserve our human resources and to reduce the substantial burden, in terms of lost production, wage loss, medical expenses, disability compensation payments and human suffering, that is created by occupational injury and disease.

Consistently with that purpose, ORS 654.010 places the burden on *employers* to provide a safe working environment:

> Every employer shall furnish employment and a place of employment which are safe and healthful for employees therein, and shall furnish and use such devices and safeguards, and shall adopt and use such practices, means, methods, operations and processes as are reasonably necessary to render such employment and place of employment safe and healthful, and shall do every other thing reasonably necessary to protect the life, safety and health of such employees.

That context demonstrates that the legislature intended to hold employers accountable for ensuring employee safety and thus further demonstrates that the employer should ordinarily be held responsible whenever its supervisors "could" have known of the violative condition.

2. General maxims of construction further support interpreting the statute consistently with its text.

Ordinarily, after considering statutory text in context, this court will consult any pertinent legislative history offered by the parties. *Gaines*, 346 Or

at 172. Here, however, OR-OSHA's review of the legislative history revealed no pertinent discussion of the knowledge element. If the legislature's intent "remains unclear after examining text, context, and legislative history, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *Id.* Because the legislature's intent is clear from the statutory text and context, this court need go no further to interpret the statute. However, general maxims of construction also support OR-OSHA's interpretation.

One such general maxim of construction directs the court "to construe a statute in accordance with what it believes the legislature would have done, had that body specifically addressed the issue at hand." *State v. Gulley*, 324 Or 57, 66, 921 P2d 396 (1996). In determining what the legislature would have done, the court is guided not only by the statute's text and context, but also by its purpose. *Id.*

Because, as discussed above, the purpose of the OSEA is to ensure the safety of employees and to hold employers accountable where safety is compromised, every effort should be made to construe its provisions in a manner that accomplishes those goals. Thus, if a provision of the OSEA can be construed in a manner that protects employees, and it can also be construed in a manner that affords protection to the employer, the construction that protects the employee should win in every instance. Increasing OR-OSHA's burden

beyond what the statute expressly requires—that a supervisor exercising reasonable diligence could have known of the violative condition—would controvert the statutory purpose.

The Court of Appeals reasoned that interpreting the statutory text as written would impose strict liability on employers, contrary to this court's statement in *Don Whitaker Logging* that the OSEA "is a fault-based system." *CBI Services*, 254 Or App at 476. Apparently, then, the court concluded that such an interpretation would controvert the statutory purpose or perhaps create an absurd result. *See State v. Vasquez-Rubio*, 323 Or 275, 282, 917 P2d 494 (1996) (explaining "the statutory maxim that [the court] should avoid a literal application of the statutory text if it will produce an absurd result"). But the statute does not impose strict liability for two reasons. First, as explained above, the statute does not impose liability for *every* violation that occurs on the work site. Instead, if it would be impossible for the supervisor to have known about the violative condition—or if it would have required extraordinary diligence for the supervisor to have known—knowledge will not be imputed. Although the statute does not require a showing of actual knowledge, it does require more than the mere fact that the violation occurred.

Second, even after OR-OSHA proves constructive knowledge, the employer may raise the affirmative defense of unpreventable employee

misconduct. The federal courts appear to have created that affirmative defense as a matter of "fairness" to employers. As the First Circuit explained,

> The OSH Act requires that an employer do everything reasonably within its power to ensure that its personnel do not violate safety standards. But if an employer lives up to that billing and an employee nonetheless fails to use proper equipment or otherwise ignores firmly established safety measures, it seems unfair to hold the employer liable. To address this dilemma, both [the Occupational Safety & Health Review Commission] and the courts have recognized the availability of the [unpreventable employee misconduct] defense.

P. Gioioso & Sons, Inc. v. OSHRC, 115 F3d 100, 109 (1st Cir 1997). *See also Brock v. L.E. Myers Co., High Voltage Div.*, 818 F2d 1270, 1277 (6th Cir 1987) (employer may defend by showing that "due to the existence of a thorough and adequate safety program which is communicated and enforced as written, the conduct of its employee(s) in violating that policy was idiosyncratic and unforeseeable").[6]

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[6] Although this court has never expressly adopted the affirmative defense of employee misconduct, it appears to have implicitly done so in *Don Whitaker*. The defense is discussed in some federal case law as a way to cure the purportedly unfair results of imputing supervisor knowledge to an employer when the supervisor personally commits a safety violation. Because supervisor knowledge is imputed to the employer, an employer would always be liable when a supervisor commits a safety violation, regardless of the employer's fault. Some federal circuits resolved that apparent unfairness in favor of the employer by holding that a supervisor's knowledge could not be imputed to the employer unless the Secretary proved that the supervisor's misconduct was foreseeable and the employer failed to properly and adequately implement its safety program. *See, e.g., Mountain States Tel. & Tel. v. Occupational Safety*, 623 F2d 155, 158 (10th Cir 1980). Other federal circuits, however, have

Footnote continued…

An employer may raise the defense of unpreventable employee misconduct when OR-OSHA has proved the employer's constructive knowledge but the employer nonetheless believes that it should not be held responsible for the violation. While employer knowledge focuses on the particular violative condition at issue, the affirmative defense looks to the employer's implementation and enforcement of its safety program related to that type of violative condition. If the employer has done everything reasonably within its power to prevent such violations—by "(1) establish[ing] a work rule to prevent the reckless behavior and/or unsafe condition from occurring, (2) adequately communicat[ing] the rule to its employees, (3) [taking] steps to

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(…continued)
resolved the issue in favor of employee safety and cured the apparent unfairness by permitting the employer to raise the affirmative defense of employee or supervisor misconduct. *See, e.g.*, *P. Gioioso & Sons*, 115 F3d at 109.

In *Don Whitaker Logging*, a supervisor had engaged in a safety violation, and the employer urged the court to adopt the foreseeability test to resolve the apparent unfairness of imputing knowledge in that circumstance. 329 Or at 261. This court rejected the employer's argument and held that OR-OSHA may prove the employer's constructive knowledge by demonstrating that a supervisor personally committed a violation while acting within the scope of his authorized duties. *Id.* at 263. The court then reasoned that, if OR-OSHA presents such evidence, the employer "still may offer relevant evidence that, in the particular circumstances, it should not be held responsible." *Id.* Although this court did not say so expressly, the employer may presumably demonstrate that "it should not be held responsible" by proving the elements of the affirmative defense of unpreventable employee misconduct. Both employer and the Court of Appeals agree that the unpreventable employee misconduct defense is available in Oregon. (Ct App Opening Br 21); *CBI Services*, 254 Or App at 473 n 9.

discover incidents of noncompliance, and (4) effectively enforc[ing] the rule whenever employees transgress[] it"—then the employer may avoid liability even when it has constructive knowledge of the particular violative condition at issue. *P. Gioioso*, 115 F3d at 109. Thus, if an employer is truly not at fault for the violation, it may escape liability by proving the elements of the affirmative defense. In sum, reading the statute consistently with its text, context, and the statutory purpose does not create strict liability.

B. The ALJ properly determined that OR-OSHA met its *prima facie* burden of proving employer knowledge.

OR-OSHA met its *prima facie* burden of proving employer knowledge by demonstrating that Vorhof could have seen the violative conditions and that doing so would not have required extraordinary diligence. The Court of Appeals erred by requiring OR-OSHA to show, in addition, that Vorhof should have known of the violative conditions. However, even if that were the correct standard, OR-OSHA nonetheless proved that Vorhof should have known of the violative conditions. Thus, in all events, this court should reverse the decision of the Court of Appeals.[7]

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[7] The ALJ apparently did not consider whether Vorhof had constructive knowledge of the violative condition involving Bryan (except at the motion to dismiss stage), because he erroneously held that OR-OSHA was required to (but failed to) prove that Bryan exceeded a specific height while on the lift without using required fall protection. (ER 33-36). Thus, the Court of Appeals properly remanded for consideration of that issue. However, the court

Footnote continued…

1. OR-OSHA demonstrated that Vorhof could have seen the violative conditions without the exercise of extraordinary diligence.

OR-OSHA met its *prima facie* burden of demonstrating employer knowledge by showing that Vorhof was in a position to see the violative conditions from where he was standing and had sufficient time to do so. As Vorhof himself admitted before the ALJ, Vorhof easily could have seen Crawford—and that he was working unsafely by not using fall protection—had he simply looked up at any time while Crawford was on top of the tank, outside of the protective railing.[8] (ER 30; Tr 72). Indeed, Vorhof "yelled at Crawford to get down or tie off" immediately after SCO Brink brought the violation to his attention, thus demonstrating that, once he looked up, Vorhof immediately

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(…continued)
erred by stating that the ALJ "erroneously assessed" the knowledge element when denying the motion to dismiss. *CBI Services*, 254 Or App at 485.

[8] Although Vorhof testified that he had not seen Crawford climb up on to the painter's rail and that, from his position, he could not see whether Crawford "was sitting on the edge [of the tank] or not," he later admitted that, when he looked up at Crawford, he "could see he was standing on the painter's rail," rather than standing on the platform that was fully protected by the railing and the tank's shell. (Tr 64, 72). Thus, he could see that Crawford was in an unsafe condition without fall protection. Notably, OR-OSHA was not required to prove that Vorhof knew that Crawford's conduct violated a safety rule, only that he knew or could have known that the violative condition—*i.e.* Crawford's standing on top of the painter's rail without fall protection—existed. In any event, that Vorhof immediately yelled at Crawford to get down when he saw him suggests that Vorhof did know that Crawford's conduct constituted a safety violation.

became aware of the violative condition. (ER 37; Tr 64). Similarly, Bryan was approximately 60 to 65 feet from Vorhof, and he was in plain view of Brink and Vorhof when they stood at the entrance of the tank. (Tr 10, 63-64). In sum, Vorhof was capable of seeing the violative conditions from where he stood, had he simply looked up.

The ALJ also correctly found that the violative conditions persisted long enough that Vorhof could have seen them. SCO Brink observed Crawford from a distance, as he was driving down the road. (ER 33; Tr 9). Brink then stopped his car and observed that it did not appear that Crawford had fall protection. (Tr 10). He therefore took "several pictures and proceeded to the work site." (Tr 10; ER 33). After walking to the worksite, he approached Vorhof. (*Id.*). Crawford remained in the position where Brink had initially observed him the entire time. (*Id.*). Thus, Crawford's violative conduct continued long enough for Vorhof to have seen it: it continued while Brink drove down the road, stopped his car, got out and took pictures, walked to the site, approached Vorhof, and talked with Vorhof. Similarly, Bryan's violative conduct lasted for approximately ten minutes, a sufficient amount of time for Vorhof to have seen it. (ER 33; Ex 14 at 1).

Further, nothing in the record suggests that discovering the violative conditions would have required extraordinary diligence. To the contrary, both employees were out in the open where Vorhof easily could have seen them.

They were not hidden away somewhere, nor was anything blocking Vorhof's view. *Compare Capital Elec. Line Builders of Kansas v. Marshall*, 678 F2d 128, 131 (10th Cir 1982) (finding no liability for employee's failure to wear protective gear when employee was in an aerial bucket 50 to 60 feet above the ground and noting that it would be unreasonable to require supervisors "to actually accompany the employees in the aerial bucket or to oversee their work from below"). Because Vorhof could have seen the violative conditions with the exercise of reasonable diligence, the Court of Appeals erroneously reversed the ALJ's final order.

2. Even if this court were to determine that OR-OSHA was required to demonstrate that Vorhof should have seen the violative conditions, OR-OSHA met its burden.

As described above, OR-OSHA was required to prove only that Vorhof "could" have seen the violative conditions. However, even if this court were to interpret the statute as requiring proof that Vorhof "should" have seen the violative conditions, OR-OSHA satisfied that burden as well. OR-OSHA demonstrated that the violative conditions would have been visible had Vorhof looked up, that the violative conditions lasted long enough for Vorhof to see them, and that Vorhof nonetheless failed to notice that two of the four employees that he supervised were working unsafely by not using fall protection.

The unsafe conditions were ongoing and in plain view from where Vorhof stood. Further, they lasted long enough that Vorhof not only could have seen them, but that he should have seen them in the exercise of his normal supervisory duties. According to Brink's notes, Crawford was exposed to the unsafe condition on top of the tank "for [approximately] 10 minutes."[9] (Ex 14 at 2). In all events, he was exposed long enough for Brink to stop his car, take pictures, walk to the site, and approach and talk to Vorhof. Had Vorhof been properly supervising his crew, he would have looked up at some point during that time. *See* OAR 437-001-0760(3)(c) (2009) (supervisors "are at all times responsible for * * * [t]he safe conduct of their crew while under their supervision).[10]

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[9] The ALJ did not make any particular findings as to how long Crawford was on the tank without fall protection. However, the ALJ did note that Brink's notes indicate that *Bryan* was exposed to an unsafe condition for approximately 10 minutes. (ER 33; Ex 14 at 1).

[10] As discussed in footnote 4, OR-OSHA cites the 2009 version of the rule, as did the ALJ. The current rule is substantively similar and provides:

> Every agent of the employer is responsible for:
>
> (A) The safe performance of the work under the agent's supervision or control;
>
> (B) The safe conduct of all employees under the agent's supervision or control;
>
> (C) The safety of all employees working under the agent's supervision or control.

Footnote continued…

Perhaps the most telling evidence of Vorhof's lack of supervision, however, is the fact that Vorhof failed to notice that two separate employees were working unsafely by not using fall protection, despite both being in plain view and close proximity to him. Only five employees, including Vorhof, were on site that day. (Tr 63; Ex 7 at 1). Thus, two out of the four employees that Vorhof supervised were working unsafely for several minutes—in plain view and in close proximity to Vorhof—but Vorhof neglected to notice. Vorhof should have known of the violative conditions.[11]

(…continued)
OAR 437-001-0760(1)(e). OAR 437-001-0015 then provides that all supervisors are agents of the employer.

[11] The Court of Appeals appears to have held that OR-OSHA is required to prove or disprove various factors before the ALJ may find employer knowledge under the statute. But OR-OSHA may prove employer knowledge "in a variety of ways." *Don Whitaker Logging*, 329 Or at 263. Many of the factors that the court identified will not be relevant in some cases. Further, to the extent that other facts may be relevant, OR-OSHA should not be required to prove or disprove every potentially relevant fact to meet its *prima facie* burden. OR-OSHA meets its burden by proving that the violative condition was visible from where the supervisor stood and that the supervisor had sufficient time to see it. The employer, of course, is free to present additional evidence to try to contradict OR-OSHA's evidence, as employer did here. The ALJ then considers that evidence when making its findings of fact, and the appellate courts review those findings for substantial evidence. Here, substantial evidence supports a finding that Vorhof should have known that Crawford was not using fall protection. Vorhof was in close proximity to two violative conditions, meaning that half his crew was exposed to unsafe conditions; he could easily see the unsafe conditions if he looked up; and the unsafe conditions last several minutes. Under those circumstances, a supervisor exercising

Footnote continued…

OR-OSHA agrees with the Court of Appeals that employers need not provide constant or continuous supervision and that employers should not be held responsible for all safety violations whenever a supervisor is on site. *See CBI Services*, 254 Or App at 476, 481. However, Vorhof was not simply on site. He was in close proximity to two employees in unsafe conditions, he could easily see the violative conditions if he looked up, and the violative conditions last 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. The Court of Appeals erred in ruling otherwise.

CONCLUSION

To prove a "serious violation" of safety standards, OR-OSHA must demonstrate that a supervisor could have known of the violative condition without the exercise of extraordinary diligence. The Court of Appeals' decision, which requires OR-OSHA to prove that any supervisor exercising reasonable diligence would have known of the violative condition, is inconsistent with the statutory text and context, as well as general maxims of statutory construction. Here, OR-OSHA demonstrated that two employees—

(…continued)
reasonable diligence would have known of the violative conditions. Nothing in the evidence that employer provided detracts from those facts.

half of Vorhof's crew—were exposed to unsafe and violative conditions in close proximity to Vorhof and for a long enough duration that Vorhof could have seen them. OR-OSHA therefore met its initial burden of proving employer knowledge, and the Court of Appeals erred in holding otherwise.

Because the Court of Appeals erroneously held that the ALJ improperly imputed constructive knowledge to employer, it declined to address employer's argument that the ALJ erred by rejecting its affirmative defense of unpreventable employee misconduct. This court should therefore reverse and remand to the Court of Appeals for consideration of that issue.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on August 8, 2013, I directed the original Brief on the Merits to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Joel S. Devore, attorney for Respondent on Review, CBI Services Inc., by using the electronic filing system. I further certify that on August 8, 2013, I directed the Brief on the Merits to be served upon Carl B. Carruth, attorney for Respondent on Review, CBI Services Inc., 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 6,986 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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