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. 09-00126SH CA No. A147558 SC S061183

RESPONDENT CBI SERVICES, INC.'S BRIEF ON THE MERITS

On Judicial Review of the Opinion and Order of the
Workers' Compensation Board Hearings Division Dated November 29, 2010
Administrative Law Judge, Chuck Mundorff

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

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RESPONDENT ON APPEAL CBI SERVICES, INC.'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

ORS 654.086(2) states that an employer is not liable for a serious violation of the Oregon Occupational and Safety Act if "the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation."

The Oregon Court of Appeals in this matter held that a supervisor's mere presence on the job site and the theoretical possibility that the supervisor could have seen the violation if he had looked in the right direction at the right time, *without more*, is not sufficient to establish the employer knowledge element of OR-OSHA's prima facie case under ORS 654.086(2). The court remanded the case to the administrative law judge for application of the appropriate legal test.

OR-OSHA effectively asks this court to strike the "reasonable diligence" inquiry of ORS 654.086(2) if a supervisor had a theoretical chance to witness a brief violation occurring for 10 minutes or less, if he had by chance looked up from what he was doing in the direction of the violation during its occurrence but did not do so. Such an interpretation is inconsistent with the plain language of ORS 654.086(2) which, like its identical federal counterpart in 29 USC 666(k), imposes liability based upon fault and not upon luck or chance. OR-OSHA's proposed rule of law would assess liability on the theoretical

possibility a supervisor could have noticed a brief violation if he had only chanced to look in the right direction at the right time. OR-OSHA would impose liability without any effort to assess whether the supervisor's failure to look at that particular moment was due to a lack of reasonable diligence.

The Oregon Court of Appeals correctly ruled that a number of factors should be considered by a fact-finder in determining whether an employer exercised reasonable diligence. Because the administrative law judge ("ALJ") failed to properly consider these factors in finding that Respondent CBI Services, Inc.'s ("CBI") had constructive knowledge of the violations (relying on the presence on the jobsite of CBI's supervisor while the alleged violations were occurring), the Court of Appeals was correct in finding legal error in the ALJ's analysis of constructive knowledge. Accordingly, the Court of Appeals' ruling was correct and should be affirmed.

Questions Presented

Question Presented 1

To prove that an employer had constructive knowledge of a brief ten-minute safety violation, is it sufficient to show that the supervisor could have known of the violation if he had, by mere chance, looked in the right direction at the right time while the brief violation was occurring, or is necessary for OR-OSHA to prove that the supervisor's failure to know of the violation was because of a lack of reasonable diligence?

Proposed Rule of Law 1

To prove constructive knowledge, OR-OSHA must show that the employer's failure to discover the violative condition was due to its lack of reasonable diligence. The determination of reasonable diligence is not determined by chance or fortune. If the condition could have been discovered by looking in the right direction at the right time, OR-OSHA must independently prove that the supervisor's failure to do so was due to a lack of reasonable diligence. The use of the word "could" in the statutory provision must be interpreted in a manner consistent with the context in which it is used. In this provision, the word "could" is used in the context of "with the exercise of reasonable diligence" This concept is commonly expressed in terms of what a party "should have," "would have," "ought to have," or "could have" known, all with the same meaning. Therefore, the mere fact that a supervisor could have, by chance, looked in the right direction at the right time to discover a brief violation, without proof that reasonable diligence required him to do so, is not determinative of constructive knowledge.

Question Presented 2

Did the Court of Appeals correctly state the factors to be considered in assessing reasonable diligence for the purpose of determining an employer's constructive knowledge of a violative condition?

Proposed Rule of Law 2

Yes. As the Court of Appeals correctly stated,

> 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.

Oregon Occupational Safety & Health Div. v. CBI Services, Inc., 254 Or App 466, 295 P3d 660, 669 (2012). These factors correctly recognize that whether an employer is reasonably diligent in discovering a particular violation depends upon the facts and circumstances of that case. As such, the Court of Appeals' use of the phrase "*inter alia*" allows for flexibility for a fact-finder to consider and weight other factors in addition to those expressly set forth.

Summary of Argument

OR-OSHA seeks a *per se* rule that the presence of a supervisor on a job site during the occurrence of a serious violation of the Oregon Safe Employment Act ("OSEA") that the supervisor could have seen if he had chanced to look in the right direction at the right time establishes an employer's

constructive knowledge of that violation. Stated differently, OR-OSHA's position is that a supervisor's mere failure to observe a serious violation of brief duration on a job site where the supervisor is present and could have chanced to looked in the right direction at the right time conclusively shows the employer's lack of reasonable diligence under ORS 654.086(2).

Such a rule is directly contrary to a long-established body of Oregon and federal OSHA law. OR-OSHA seeks an unprecedented strict liability rule, which would establish employer knowledge based on the employer's mere failure by chance to look in a particular direction at a particular time, has no place in an enforcement system long acknowledged in Oregon and federal OSHA to be fault-based.

The Oregon Court of Appeals in this matter correctly ruled that a supervisor's presence on the job site and the theoretical possibility that the supervisor could have seen the violation if he had looked in the right direction at the right time, *without more*, is not sufficient to establish the employer knowledge element of OR-OSHA's prima facie case under ORS 654.086(2). The Court of Appeals drew upon prior Oregon cases as well as federal OSHA cases interpreting ORS 654.086(2)'s identical federal counterpart, setting forth a non-exhaustive and non-weighted list of factors for the ALJ to consider upon remand in determining whether Respondent on CBI was reasonably diligent in the matter at bar.

OR-OSHA attempts to portray the Court of Appeals' conclusion as a departure from prior Oregon precedent regarding employer knowledge. It is not. The Court of Appeals correctly treats the phrase "could not with the exercise of reasonable diligence, know of the presence of the violation" as being predictive or normative in nature of what an employer *should* know in the eyes of the law. However, the court did not in any way change the substance of the inquiry, just as federal courts have not changed the substance of the inquiry based upon 29 USC 666(k) by stating that assessing reasonable diligence is a measure of what employers "should" or "would" have found had they exercised reasonable diligence. The term "constructive knowledge" is a legal term of art denoting "knowledge that one using reasonable care or diligence *should* have...." *Black's Law Dictionary* 950 (9th ed. 2009) (emphasis added).

In this matter, the Oregon Court of Appeals merely found that the ALJ's analysis of CBI's reasonable diligence, which considered only the presence of CBI's supervisor at the time of the alleged violations and that the supervisor could have seen the violations had he looked in their direction at the time of their occurrence, was incomplete, and the court provided appropriate guidance for the correct consideration on remand of the constructive knowledge element of OR-OSHA's prima facie case.

Summary of Material Facts

As a result of an inspection of CBI's water tank construction jobsite in Creswell, Oregon conducted by OR-OSHA Safety Compliance Officer (SCO) Craig Brink on February 2, 2009, a Citation and Notification of Penalty ("Citation") was issued to CBI on February 18, 2009. The Citation alleged two violations of Oregon's occupational safety and health standards. Item 1 of the Citation alleged a violation of OAR 437-003-0073's fall protection requirements based on the fact that SCO Brink observed CBI employee John Bryan ascending in an aerial lift without being tied off. Item 2 of the Citation alleged a violation of OAR 437-003-1501's fall protection requirements based on SCO Brink's allegation that CBI employee Jeremy Crawford appeared to be on the top edge of the under-construction water tank without appropriate fall protection.

In the Opinion and Order of ALJ Chuck Mundorff (the "ALJ Opinion"), the ALJ stated that there was a conflict of testimony as to how long Bryan was in the man-lift without tying off but that Brink's field notes indicated that the period could have been approximately ten minutes.[1] (ALJ Opinion at 5). The

[1] Bryan testified that he was in the man-lift with his lanyard unhooked for only "maybe a couple of minutes." (TR 59:18). Bryan testified that that he had entered the man-lift and started to ascend and had only gotten as high as six feet before he was asked whether he had tied off, at which time he attached his safety belt. (TR 58:7-8). It is inconceivable that it took more than a couple of minutes to raise the lift basket six feet. However, SCO Brink's notes introduced into evidence as Exhibit 14 (p. 1) first states that this condition persisted for

ALJ made no specific findings as to the duration of time the violative conduct persisted giving rise to Item Two of the Citation (involving Crawford), and SCO Brink did not testify as to a specific duration that this condition existed (although his notes entered into evidence as Exhibit 14 (p. 2) clearly stated that the duration was approximately ten minutes). Although the duration of the alleged violations was very short, the ALJ concluded that there was sufficient time for CBI to discover "*either or both*"[2] of the alleged violations. (ALJ Opinion at 5 (emphasis added)).

CBI's supervisor, Roy Vorhof, testified that, when SCO Brink approached him, he was inside the tank at the front end of the crane rigging up anchor cables (one of his employment responsibilities in addition to supervising the other site employees). (TR 63:19-20; 64:8). Vorhof testified that he was unaware of either alleged violation when SCO Brink approached him, and that

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"less than" ten minutes and then contradicts itself by stating that the condition persisted for "aprox [sic; approximately]" ten minutes.

[2] As expressed in the disjunctive, it is not clear what "either or both" means. It appears that the ALJ is saying either that the supervisor had sufficient time to observe one of the two violative conditions but not both, or alternatively, that the supervisor might possibly have had time to observe both-but the ALJ was not sure. If the supervisor only had time to observe one, but not both, of the violations, to which alleged violation should constructive knowledge be attributed and how should this determination be made? As will be discussed at length, *infra*, the above-quoted language is one illustration of why chance should not be a factor in determining constructive knowledge and is one of many examples of how the ALJ clearly did not properly address whether CBI was reasonably diligent as required by the OSEA.

he could not determine from his vantage point whether either cited employee was engaging in the violative conduct as SCO Brink was alleging. (TR 64).

Specifically, Vorhof testified that he had not observed Bryan get into the basket without tying off and that he was unaware that Bryan had done so until approached by SCO Brink. (TR 64:4-6). Vorhof testified that when Brink pointed to Bryan in the aerial lift and stated "Hey, that man is not tied off," Vorhof looked at Bryan and could not determine whether he was tied off. Vorhof had to ask Bryan whether he was tied off, and when he did, Bryan responded, "Oh," and tied off. (TR 63-64). Further, Vorhof testified that, from his position, he could not determine whether Crawford was sitting on the edge of the tank and exposed to a fall hazard, or whether he was crouched down and leaning against the shell of the tank as Crawford testified, but that he could tell that Crawford's feet were on the rail. (TR 64 and 72). Crawford denied knowing that Crawford had climbed up onto the painter's rail until Brink pointed out Crawford's position. (TR 73).

SCO Brink testified on direct examination that he estimated that the employees were approximately 65 feet horizontally from Vorhof's vantage point, and that Crawford was additionally approximately 30 feet above Vorhof's elevation. (TR 10:21-22; 11:11-12).

Although the issues before this court are legal in nature, it is important to note that OR-OSHA, in its Brief on the Merits before this Court, misrepresents

the factual testimony of record related to Vorhof's vantage point and actions, and takes liberties by ascribing meaning to Vorhof's words beyond what he actually said. According to OR-OSHA's brief, on page 72 of the hearing transcript, "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." (OR-OSHA Brief at 23).

Vorhof said nothing of the kind, nor did he make any admission in the cited testimony that Crawford was working unsafely. Vorhof testified that he was performing his other job duties (rigging cable for anchor cables) at the front of a crane inside the tank when SCO Brink approached him, and that he could not tell whether Crawford was exposed to a fall hazard by sitting on the edge of the tank as Brink had accused him of or not. (TR 63:19-20; 64:8, 19-20). Vorhof's only admission was that he could see Crawford was standing on, i.e., had his feet on, the painter's rail when he looked up while talking to SCO Brink, but that he could not tell whether Crawford was sitting on the tank's edge and exposed to a fall hazard or crouched down and leaning against the shell of the tank as Crawford himself testified.

OR-OSHA also fails to clearly state the totality of Brink's testimony as to the initial sequence of events. The OR-OSHA Brief characterizes Brink's discovery of the alleged violations as follows:

> 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.

(OR-OSHA Brief at 5). By itself, the above-cited passage from Brink's direct examination creates the misimpression that Brink discovered the alleged violations, stopped his car before entering the site to take pictures, took pictures, got back in his car, drove to the site, then got out and took more pictures before approaching Roy Vorhof. As clarified on cross examination, however, this did not occur.

On cross-examination, Brink admitted that when he noticed the alleged violation involving Crawford, he drove directly into the job site parking lot adjacent to the tank, got out of his car and took pictures of the alleged violation through the large tank doorway and then approached Vorhof, who was working inside the tank near the doorway. That is, Brink did not stop before entering the site, nor did he take pictures from the road before proceeding directly to the site. (TR 17-19).

OR-OSHA introduced Brink's own notes into evidence in hearing Exhibit 14 (p.2), which contained a notation that the condition involving Crawford was present for "app[roximately] ten minutes." Although the ALJ made no specific findings with respect to how long the alleged violations

involving Crawford existed, the only evidence offered was that the condition existed for only approximately ten minutes.

OR-OSHA offered no evidence that CBI had actual or constructive knowledge of Bryan's acts other than the undisputed fact that CBI's supervisor was present at the jobsite. SCO Brink admitted on direct examination that he made no investigation of whether Vorhof had knowledge of the alleged violative conditions and made no assessment of whether he was exercising reasonable diligence in performance of his supervisory duties, as illustrated by the following exchange:

> Q [OR-OSHA counsel]. One of the requirements on a violation is employer knowledge. How did you come up with your employer knowledge? What did you base that on?
> A [SCO Brink]. That the site supervisor, Roy Vorhof, was on-site at all times.

(TR 17:7-9)

The ALJ's Opinion and Order

In assessing OR-OSHA's prima facie case, the ALJ stated that OR-OSHA had shown that CBI had constructive knowledge because CBI's onsite supervisor had sufficient time to observe "either or both" of the alleged violations but had failed to do so. (ALJ Opinion at 5). As discussed in footnote 2, *supra*, the meaning of this finding by the ALJ is unclear.

The ALJ ultimately vacated Citation Item 1 on the ground that OR-OSHA failed to meet its burden of proving that CBI's employee was exposed to

a hazard under OAR 437-003-0073(2) (which he found should be read in conjunction with the height requirements of OAR 437-003-1501). The ALJ affirmed the second Citation Item, finding that OR-OSHA had met its prima facie burden of establishing a violation and rejecting CBI's assertion of the unpreventable employee misconduct defense on the ground that CBI had constructive knowledge of Crawford's violative conduct.

Appeal Before the Oregon Court of Appeals

OR-OSHA and CBI cross-appealed the matter to the Oregon Court of Appeals. OR-OSHA disputed that OAR 437-003-1501 bore upon the issue of exposure to a hazard under OAR 437-003-0073(2). CBI argued in its petition for review that the ALJ erred at law in finding constructive knowledge based solely on the fact that Vorhof, the job site supervisor, had failed to look up and discover the violations during the brief period in which they had allegedly occurred. Additionally, CBI argued that the ALJ had conflated the constructive knowledge element of OR-OSHA's prima facie case with the elements of CBI's affirmative defense of unpreventable employee misconduct. This error by the ALJ was conceded by OR-OSHA in its brief to the Court of Appeals.

The Court of Appeals agreed with CBI that the ALJ had applied the incorrect legal test for assessing reasonable diligence in its constructive knowledge analysis. The court remanded the case to the ALJ with instruction to

consider the following test for considering whether CBI had been reasonably diligent:

> [W]hen 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.

CBI Services, Inc., 254 Or App at 481, 295 P3d at 669.

The court also agreed with OR-OSHA's argument that the height standards in OAR 437-003-1501 had no bearing on a finding of liability under OAR 437-003-0073(2). The court reversed the ALJ's finding regarding the interpretation of the standard and remanded the case to the ALJ to determine if a violation of the standard as interpreted by the Court of Appeals had occurred and whether such a violation should be classified as serious, other-than-serious or minimal in light of the short fall distance at issue.

Thus, the Court of Appeals reversed and remanded on the basis of each party's cross-appeals. Because the court found that the ALJ had applied the incorrect test for constructive knowledge, it remanded the case to the ALJ for consideration in light of the additional reasonable diligence factors it had set forth.

With respect to CBI's employee misconduct defense, it was conceded by OR-OSHA before the Court of Appeals that the ALJ had erred by conflating the

constructive knowledge element of CBI's prima facie case with the third element of its employee misconduct defense (whether CBI had generally taken steps to discover violations). Because the ALJ did not properly consider this element or any other element of the defense, the case was also remanded for additional findings with respect to the employee misconduct defense.

ARGUMENT

Although OR-OSHA concedes that Oregon's Occupational Safety and Health Act only requires that employers exercise reasonable diligence (and not extraordinary diligence) in discovering violations and does not impose strict liability, that is precisely the result of OR-OSHA's interpretation of constructive knowledge. OR-OSHA's interpretation is blind to the undisputable fact that presuming constructive knowledge if the employer's on-site supervisor theoretically could have discovered the violation if the supervisor had been lucky enough to look in the right direction at the right time to see the violation, regardless of how short in duration it may be, imposes an extraordinary diligence standard rather than a standard of reasonable diligence.

The requirement to be "lucky" is completely foreign to the concept of reasonable diligence and a fault-based system of liability. Such an interpretation would require that every employer provide one-on-one constant supervision of each and every employee to assure that some fleeting violation which "could" be discovered, if the supervisor happened to be looking at that precise time, was

discovered. Such a requirement would not only be unreasonable and require extraordinary diligence, it would impose an impossible burden on employers. Such an interpretation would effectively render the requirement a nullity that the employer have either actual or constructive knowledge of the violative condition before liability would be imposed under the act.

Thus, the Court of Appeals correctly ruled that whether an employer has constructive knowledge of its employees' violative conduct is a function of whether the employer exercised reasonable diligence, and proper determination of reasonable diligence requires more than consideration of whether the employer's supervisor was present on the jobsite when the violations occurred and could have, with luck, discovered the violations. This ruling generally, and the non-exclusive list of factors set forth by the Court of Appeals for assessing reasonable diligence more specifically, are consistent with the fault-based nature of OSHA and with prior cases decided in Oregon and in federal courts.

A. It is settled that Oregon's Occupational Safety and Health Act is a fault-based system.

This court has explicitly held that "OSHA is a fault-based system." *Oregon Occupational Safety & Health Division v. Don Whitaker Logging, Inc.*, 329 Or 256, 263, 985 P2d 1272, 1276 (1999). In the case of an alleged serious violation, the employer fault element of OR-OSHA's prima facie case is articulated in ORS 654.086(2), which states in pertinent part that

> 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). That is, an employer will be held liable for a safety violation only if it actually knew of such violation or if its failure to know was due to a lack of reasonable diligence.

ORS 654.086(2) is a verbatim enactment of federal OSHA's serious violation provision, 29 USC 666(k). It has always been a black-letter principle of federal OSHA law that employer liability is fault-based, and that such liability may not be imposed upon employers who do not know of the existence of a violation (whether such knowledge is actual or constructive). "It would seem to go without saying that an employer cannot discharge his responsibility for compliance unless he knows what constitutes compliance and knows when he is not in compliance. Knowledge is essential to compliance whether an alleged violation is classified as *de minimis* or as anything else." *Sec'y of Labor v. Cam Indus., Inc.*, 1 OSH Cas (BNA) 1564 (OSHRC 1974), *overruled on other grounds by Sec'y of Labor v. General Electric Co.*, 3 OSH Cas (BNA) 1031 (OSHRC 1975).[3]

[3] It should be noted that federal OSHA considers fault to be an inherent element in OSHA's prima facie proof burden that is not exclusively imposed by Section 666(k) (ORS 654.086(2)'s federal counterpart). As the Review Commission in

The fault-based nature of OSHA was acknowledged in Oregon long before *Don Whitaker Logging*. More than 20 years prior, the Oregon Court of Appeals, in *Enoch Skirvin & Sons, Inc. v. Accident Prevention Division*, 32 Or App 109, 573 P2d 747 (1978), *rev den* 282 Or 385 (1978), expressly rejected the notion that employers were subject to strict liability under OSHA.

> [W]e fail to see wherein charging an employer with a non-serious violation because of an individual, single act of an employee, of which the employer had no knowledge and which was contrary to the employer's instructions, contributes to achievement of the cooperation (between employer and employee) sought by the Congress.
>
> It is well-settled under Federal law that in order to establish a violation, OSHA must prove that the employer had knowledge of the violative condition. *See Brennan v. OSHRC (Alsea Lumber Co.)*, 511 F.2d 1139, 2 BNA OSHC 1646 (9th Cir. 1975); *Dunlop v. Rockwell International*, 4 BNA OSHC 1606 (6th Cir. 1976). In *Secretary of Labor v. Green Construction Company*, 4 BNA OSHC 1808, 1809 (No. 5356, 1976), Chairman Barnako of the Federal Occupational Safety and Health Review Commission stated in his concurring opinion as follows:
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> > We have consistently held that employers are not to be held to a standard of strict liability, and are responsible only for the existence of conditions they can reasonably be expected to prevent (citations omitted). Clearly, an employer cannot reasonably be expected to prevent or eliminate a condition of which it has no knowledge. Accordingly, such a condition is unpreventable, and is not a violation of the Act.

Id. at 114-15, 573 P2d at 750 (quoting *Brennan v. OSHRC (Alsea Lumber)*), 511 F2d 1139, 1145 (9th Cir 1975)).

Cam Industries pointed out, employer knowledge is an element of OSHA's prima facie burden no matter the classification of the violation. *See id.*

The quotation from *Alsea Lumber* is derived from the legislative history of the Occupational Safety and Health Act, which clearly established that OSHA was intended to be a fault-based system. *See* 116 Cong Rec 38377 (Nov. 23, 1970); HR Rep No 91-1291 (stating that the employer's duty to assure worker safety was "not absolute" and limiting liability to preventable dangers, which do not include those of which the employer has no knowledge).[4]

OR-OSHA argues that its view of constructive knowledge does not impose strict liability on employers because of the availability of affirmative defenses to OSEA liability, stating, "But the statute does not impose strict liability for two reasons.... [because] [s]econd, even after OR-OSHA proves constructive knowledge, the employer may raise the affirmative defense of unpreventable employee misconduct." (OR-OSHA Brief at 19-20). This assertion is erroneous on two fundamental grounds.

First, the availability of affirmative defenses does not transform strict liability to fault-based liability. *See generally Estate of Schwarz ex rel. Schwarz v. Philip Morris Inc.*, 348 Or 442, 235 P3d 668 (2010); *Hernandez v. Barbo Machinery Co.*, 327 Or 99, 957 P2d 147 (1998); *Ellis v. Ferrellgas*, 211 Or App 648, 156 P3d 136 (Ct. App. 2007) (each case addressing potential affirmative

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[4] Although the legislative history on this point was made during a discussion of the general duty clause (29 USC 654(a)(1) of the federal OSH Act), the employer knowledge requirement has consistently been held to apply equally to all violations, including violations of specific standards. *Cam Indus., Inc.*, 1 OSH Cas (BNA) 1564.

defenses for products liability claims grounded in strict liability). The same is true of criminal strict liability as well. *See generally State v. Olmstead*, 310 Or 455, 800 P2d 277 (1990) (finding that an affirmative defense was available to the strict liability crime of driving under the influence of intoxicants).

The final sentence of OR-OSHA's argument on this point illustrates the second fundamental error of its analysis. OR-OSHA states, "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." (OR-OSHA Brief at 22). This statement once again confuses OR-OSHA's fault-based proof burden with defenses that an employer might assert to avoid liability after OR-OSHA has proven its prima facie case. OR-OSHA is asking this court to adopt a rule that employers are liable until they can prove that they are not. Such burden shifting was long ago rejected in Oregon and has never been the case in federal OSHA cases. *See Enoch Skirvin*, 32 Or App at 112-15, 573 P2d at 747.

Accordingly, OR-OSHA's argument that its novel conception of constructive knowledge cannot be characterized as imposing strict liability because of the availability of affirmative defenses has no merit and no support under Oregon or federal law.

B. The Court of Appeals correctly ruled that a supervisor's presence on a job site, without more, is not sufficient to establish the employer's constructive knowledge of a violation.

In *Enoch Skirvin*, the Court of Appeals rejected a referee's opinion that the supervisor's mere proximity to an offending employee was, in and of itself, sufficient evidence of constructive knowledge for overcoming a motion to dismiss, finding that the referee's reasoning made "very little sense." [5] *Id.* at 112, 573 P2d at 749. Thus, the Court of Appeals' rejection of this same argument in the matter presently at bar is wholly consistent with prior Oregon precedent. Although OR-OSHA attempts to paint the Court of Appeals' decision in this case as an expansion of the knowledge requirement and a departure from precedent, it is neither. Its ruling merely reaffirms a long-established rule that OR-OSHA bears the burden of proving employer knowledge, which requires showing more than that an on-site supervisor failed to notice the presence of a violation to establish a lack of reasonable diligence and therefore the existence of constructive knowledge.

The Court of Appeals' ruling in this matter wholly comports with federal precedent as well. "[T]he employer's duty is to take reasonably diligent measures to inspect its worksite and discover hazardous conditions; so long as

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[5] CBI does not dispute that knowledge can be imputed to the employer by establishing the knowledge of a supervisory employee. *Precision Concrete Construction*, 19 BNA OSHC 1404 (No. 99-0707, 2001); *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994); *see also Pride Oil Well Service*, 15 BNA OSHC 1809 (No. 97-692, 1992) (providing further discussion of constructive knowledge).

the employer does so, *it is not in violation simply because it has not detected or become aware of every instance of a hazard.*" *Texas A.C.A. Inc.*, 17 BNA OSHC 1048, 1050-1 (No. 91-3467, 1995) (emphasis added); *see also Ragnar Benson Inc.*, 18 BNA OSHC 1937 (No. 97-1676, 1999) (stating same rule).

As explicitly stated by the federal OSHA Review Commission, "the Secretary has the burden of proving lack of reasonable diligence." *Ragnar Benson Inc.*, 18 BNA OSHC 1937 (No. 97-1676, 1999). Thus, it is well accepted that when an employer does not have actual knowledge of its employees' alleged violative conduct, OSHA then must demonstrate constructive knowledge by showing that the employer failed to exercise reasonable diligence. The failure of the supervisor to notice a violation that occurred when he was present does not establish a lack of reasonable diligence; it merely establishes lack of actual knowledge.

Under OR-OSHA's erroneous view that failure to notice a violation establishes constructive knowledge, employers could hope to escape a finding of constructive knowledge only if they constantly supervised every employee at every worksite where a supervisor was present every moment during the work day. "Reasonable diligence" in no way contemplates a burden of constant supervision, and federal courts in OSHA matters have expressly held so. *N.Y. State Elec. & Gas Corp. v. Secretary of Labor*, 88 F3d 98, 110 (2d Cir. 1996); *Ragnar Benson Inc.*, 18 BNA OSHC 1937 (No. 97-1676, 1999) (holding that a

per se rule requiring constant supervision of all employees is unreasonable because it imposes absolute, i.e., strict, liability upon employers).

The Oregon Court of Appeals recognized that the ALJ and OR-OSHA had turned the constructive knowledge test on its head. Instead of assessing the evidence or lack of evidence as to CBI's reasonable diligence, the ALJ took the very condition precedent for a fact finder's consideration of constructive knowledge (i.e., the lack of actual knowledge) as conclusive evidence that CBI had failed to be reasonably diligent. In other words, under OR-OSHA's erroneous view, if a supervisor is on a jobsite when a violation occurs, only two conclusions about the employer's knowledge are possible: 1) the employer had actual knowledge of the violative condition; or 2) if it was not impossible for the supervisor to have discovered the violations, the supervisor's failure to notice the violation demonstrates lack of reasonable diligence, charging the employer with constructive knowledge. Because the fault element is always satisfied under OR-OSHA's view, it is impermissibly attempting to impose strict liability on CBI and on other employers who employ full-time site supervisors. Thus, the Court of Appeals was correct in finding legal error in the ALJ's constructive knowledge analysis and properly reversed.

It appears that OR-OSHA may be basing its proposed "failure to look up at the right moment" theory of constructive knowledge on a small body of federal OSHA case law that charges an employer with constructive knowledge

if the violative condition was so close to the supervisor and so obvious as to create a legal inference that the employer had constructive knowledge (and, in one case, in which a supervisor was directly observing the cited employee). These cases are wholly inapposite to the present matter, as each involves the presence of a supervisor standing within a few feet of the offending condition under circumstances where it was difficult to imagine that the supervisor did not have actual knowledge of the alleged violations. *See A.L. Baumgartner Constr., Inc.*, 16 OSH Cas (BNA) ¶ 1995 (OSHRC Sept. 15, 1994) (addressing a supervisor standing next to employee using a cut extension cord while the two parties were working on the same project immediately after a GFCI outlet had tripped as a result of the cord's use, indicating a possible ground fault or short in the cord); *Hamilton Fixture*, 16 OSH Cas. (BNA) ¶ 1073 (O.S.H.R.C. Apr. 20, 1993) (addressing constructive knowledge when the supervisor was standing less than ten feet from the alleged violative condition and watching the employee work who had failed to don appropriate protective equipment).

Where, as here, OR-OSHA's own compliance officer testified that the supervisor was on the ground approximately 65 feet horizontally away from the two employees in question who both were on a different vertical plane (one approximately 30 feet above the supervisor and the other between five and ten

feet above the supervisor[6]), and further where the uncontradicted evidence demonstrated that the supervisor was performing other job tasks that focused his attention elsewhere, OR-OSHA is not entitled to such a legal inference.

CBI's case is much more analogous to *Capital Electric Line Builders of Kansas, Inc. v. Secretary of Labor*, 678 F2d 128 (10th Cir. 1982), in which the Tenth Circuit Court of Appeals addressed a situation in which an employee was electrocuted because of his failure to wear the protective gloves provided by the employer while working on suspended electrical transmission lines. In that case, the supervisor, who was on site at the time of the accident, did not see the employee working without gloves and had failed to remind the employee to don appropriate protective clothing immediately before the employee ascended in the bucket lift to begin line work. In reversing the Review Commission's finding that the employer had constructive knowledge of the employee's violation, the court stated the following:

> When an employee is working 50-60 feet in the air, there is little an employer can do to insure that the employee makes the proper judgment beyond providing adequate training and equipment, and explaining how to perform the job and what general hazards to avoid.

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[6] In actuality, based on SCO Brink's testimony that Vorhof was approximately 65 feet away from Crawford horizontally and approximately 30 feet below him vertically, the distance between the two was 71.6 feet. The horizontal and vertical distances comprised two sides of a right triangle, with the actual distance between the two people being the hypotenuse of the triangle. Based on the Pythagorean Theorem (the actual distance being the square root of the sum of the squares of the horizontal and vertical distances between the two CBI employees, i.e., $65^2 + 30^2 = c^2$, or 71.6 feet).

Id. at 131. The court found that the employee in question had no history of safety violations, and that the employer had provided adequate safety training and equipment to its employees. *Id.* at 131. Thus, the employer had no notice that additional supervisory efforts were necessary for the exercise of reasonable diligence and thus could not be charged with constructive knowledge.

In the present matter, there was no issue raised regarding whether CBI provided appropriate fall-protection equipment[7] or training to its employees. Because these are two of many other factors that the ALJ failed to appropriately consider in assessing CBI's diligence in the matter at bar, the Court of Appeals appropriately reversed the ALJ and remanded for further consideration.

The OR-OSHA Brief attempts to confuse this inquiry by positing that this court should rule that, to escape a finding of constructive knowledge, CBI should be required to take every action that would not be considered "extraordinary." (*See* OR-OSHA Brief at 23-24)

Once again, OR-OSHA takes the act of "looking up" completely out of the context of all of the other factors that would determine whether the absence of taking this action at a particular moment in time was reasonable or unreasonable. In fact, for a supervisor to notice a <u>particular</u> employee on a

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[7] For example, OR-OSHA's own inspector testified that the scaffolding erected by CBI, had Crawford not allegedly sat on the tank rim or stood on the painter's rail, was fully sufficient as fall protection. (TR 11:15 – 12:12). It was only by Crawford's alleged unforeseeable acts that additional fall protection allegedly became necessary.

multi-employer site engaged in violative conduct for only a brief period of time (ten minutes) would require constant supervision. Constant supervision is extraordinary, not reasonable, diligence, so by OR-OSHA's own terminology, its proposed test for constructive knowledge is erroneous. The Court of Appeals merely ruled that OR-OSHA is not entitled to a legal inference of knowledge without showing more, which is entirely consistent with both Oregon and federal OSHA law.

C. The reasonable diligence factors cited by the Oregon Court of Appeals in this matter are appropriate and consistent with OSHA precedent.

In reversing the ALJ's finding that a supervisor's presence during the time in which an alleged violation occurs imputes constructive knowledge upon an employer, the Court of Appeals provided the following guidance to the ALJ for consideration of the case upon remand:

> [W]hen 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.

CBI Services, Inc., 254 Or App at 481, 295 P3d at 669. In rendering this finding, the Court of Appeals clarified that the duration of violations[8] and their

[8] *Jerry Botchlet Masonry Construction Co.*, 5 BNA OSHC 1506, 1507 (No. 13135, 1977) addresses the issue of duration. There, the federal Review

proximity to a supervisor were probative as to reasonable diligence and constructive knowledge, but that they were not, independent of other factors, conclusive of constructive knowledge. *Id.*

CBI acknowledges, as did the Court of Appeals, that the duration of a violation's existence bears a logical relationship to whether an employer has been reasonably diligent in uncovering the violation. That is, the longer a violative condition exists, the greater the likelihood that it should be discovered. Conversely, the most diligent of employers is unlikely to discover short-duration violations such as are at issue in this matter.

However, the Court of Appeals logically concluded that what constitutes "reasonable diligence" varies with the facts of each case. If, as the uncontradicted evidence of record in this matter demonstrated regarding CBI's Creswell workers, employees on a jobsite are very experienced and well-trained, the reasonable amount of time required for direct observation of those employees' actions may be less than the time required for new or otherwise inexperienced employees. Likewise, based on the factors cited by the Court of Appeals, the proportion of time a supervisor actually does spend upon

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Commission found that, where a site foreman had not witnessed a violative condition that had been present for a duration estimated to be between a few minutes to one hour (termed to be "unquestionably brief" in either event), evidence did not support a finding of constructive knowledge. The Commission stated, "Having the burden of proof, complainant [OSHA] must be charged with these evidentiary deficiencies." *Id.*; *see also Texas A.C.A. Inc.*, 17 BNA OSHC 1048, 1051 (No. 91-3467, 1995).

inspecting a jobsite/directly observing each employee and performing other employment duties is germane as well.

Federal Review Commission cases have specifically addressed the interplay between these factors and OSHA's burden of proving a lack of reasonable diligence, requiring a specific showing of how an employer's diligence was lacking from that which is reasonable. *See, e.g., Texas A.C.A. Inc.*, 17 BNA OSHC 1048, 1051 (No. 91-3467, 1995) (stating that OSHA had failed in its burden of proving lack of reasonable diligence because it had not shown that the jobsite supervisor had given his inspection duties too low a priority under the circumstances); *Centex–Rooney Constr. Co.*, 16 BNA OSHC 2127, 2129–30 (No. 92–0851, 1994) (finding a lack of reasonable diligence upon a supervisor's admission that he had "gotten behind" in his required inspection duties).[9]

In the present matter, OR-OSHA's own compliance officer tacitly admitted that he made no assessment of reasonable diligence by CBI, stating that he considered employer knowledge established merely because "the site

[9] It is very important to note that the Court of Appeals did not impose a rigid structural test for determination of an employer's reasonable diligence. The court clearly intended for the factors to be non-exclusive (thus, its use of the phrase, "*inter alia*"). Additionally, the Court afforded the ALJ flexibility in weighting different factors appropriately based upon the facts of each case. The only explicit requirement given by the Court of Appeals is that the ALJ is obliged to consider reasonable diligence fully and not solely in the context of whether a supervisor is present during the time period in which a violation is occurring.

supervisor... was on-site at all times" while the alleged violations were occurring. (TR 17:9)

Thus, because OR-OSHA did not bother to undertake the appropriate factual investigations as required by the cited safety standards, its only recourse in attempting to impose liability on CBI has been to reshape the well-established law of constructive knowledge.[10] The Court of Appeals correctly ruled that the ALJ had erred in imposing the inference of constructive knowledge on CBI without fully considering whether OR-OSHA had showed that CBI had failed to be reasonably diligent, appropriately reversing and remanding the case for consideration of the diligence factors it set forth.

D. Constructive knowledge is a recognized legal inference; "could with the exercise of reasonable diligence" identifies that which a party should know in the eyes of the law.

The OR-OSHA Brief goes into a lengthy analysis of the Court of Appeals' use of the words "should" and "would" in assessing CBI's knowledge of the alleged safety violations at its Creswell site. The thrust of OR-OSHA's

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[10] The factors cited by the Court of Appeals are consistent with federal OSHA cases addressing reasonable diligence and prior Oregon cases. *See, e.g., Oregon Occupational Safety & Health Division v. Don Whitaker Logging, Inc.*, 329 Or 256, 263, 985 P2d 1272, 1276 (1999) and *Enoch Skirvin and Sons, Inc. v. Accident Prevention Division*, 32 Or App 109, 573 P2d 747 (Ct App 1978) (addressing the role of reasonable foreseeability in assessing employer knowledge/liability); *Precision Concrete Construction*, 19 BNA OSHC 1404 (No. 99-0707, 2001), *Ragnar Benson Inc.*, 18 BNA OSHC 1937 (No. 97-1676, 1999), *Texas A.C.A. Inc.*, 17 BNA OSHC 1048, 1051 (No. 91-3467, 1995) and *Pride Oil Well Service*, 15 BNA OSHC 1809 (No 97-692, 1992) (each addressing various diligence factors in the Court of Appeals' analysis in the present matter).

argument is that, by discussing what CBI "should" or "would" have known, the court has departed from the statutory language of ORS 654.086(2), which uses the word "could." This assertion is patently incorrect. The Court of Appeals' treatment of the phrasing of "could not with the exercise of reasonable diligence" correctly recognizes that constructive knowledge is a legal inference of knowledge that exists if an employer fails to exercise reasonable diligence in discovering violations. 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 (i.e., under OR-OSHA's view, the test for knowledge would be the following, with the indicated language stricken from the statutory provision: whether an employer "did not or could not ~~with the exercise of reasonable diligence~~ know of the presence of the violation").

OR-OSHA cites to *Webster's Third New International Dictionary* for its exposition on the word "could," suggesting somehow that the Court of Appeals' (and the federal courts') use of the word "should" in characterizing constructive knowledge imposes a new and heightened proof burden on OSHA. (OR-OSHA Brief at 16). This simply is not true. In fact, it has ever been the case that "could not with the exercise of reasonable diligence" is an inference determining what an employer objectively and, by law, should know (but did not, since actual knowledge was lacking) under the circumstances of each particular case.

An inference is a "conclusion reached by considering other facts and deducing a logical consequence from them." In other words, an inference of constructive knowledge is a determination of what a party *should* have known given due consideration of all relevant facts.[11] *Black's Law Dictionary* 847 (9th ed. 2009).

Examination of the concept of reasonable diligence in the tort of negligence is useful in understanding constructive knowledge in the OSHA context. Negligence assigns liability to parties who have breached a duty of care to another. When the alleged breach centers upon an undiscovered hazard on the defendant's property, the law does not impose liability unless the plaintiff can show that the defendant's failure to discover was attributable to the plaintiff's lack of reasonable diligence. The Oregon Supreme Court has, on multiple occasions, addressed such situations, finding that constructive knowledge is a measure of what a party should have known had it exercised reasonable diligence, and that a plaintiff is not entitled to a legal inference of constructive knowledge unless plaintiff shows that defendant was not reasonably diligent in discovering the condition that harmed the plaintiff.

In *Diller v. Safeway Stores, Inc.*, 274 Or 735, 548 P2d 1304 (1976), this court addressed whether a plaintiff suing a grocery store in a slip-and-fall

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[11] *Black's Law Dictionary* further defines constructive knowledge as "Knowledge that one using reasonable care or diligence *should have*, and therefore that is attributed by law to a given person." *Black's Law Dictionary* 950 (9th ed. 2009).

negligence case was entitled to the legal inference of constructive knowledge for an undiscovered puddle of water on the floor when the store's cleaning log indicated that the store's employees had not swept the floor for over an hour prior to the accident. The court stated that this duration did "not raise an inference that defendant *should have known* the water or ice was there and *should have* removed it in the exercise of reasonable diligence." *Id.* at 738, 548 P2d at 1306 (emphases added).

Diller is one of many cases decided by this court that have articulated the principle that where an undiscovered hazard on a defendant's property gives rise to an accident harming the plaintiff, plaintiff must show, if it could not be shown that the defendant placed the hazard where it ultimately harmed defendant, either "[t]hat the occupant knew that the substance was there and failed to use reasonable diligence to remove it, or ... [t]hat the foreign substance had been there for such a length of time that the occupant ***should***, by the exercise of reasonable diligence, have discovered and removed it." *Cowden v. Earley*, 214 Or 384, 387, 327 P2d 1109, 1111 (1958).[12]

It is important to note that *Cowden* cites to a number of prior Oregon Supreme Court cases as authority for the above-cited test. Although *Cowden* and many other cases in this line of authority use the word "should" in

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[12] *See also Pavlik v. Albertson's, Inc.*, 283 Or 370, 374, 454 P2d 852, 854 (1969) (citing same principle in terms of reasonable care) and *George v. Erickson's Sunnyslope Supermarket, Inc.*, 236 Or 64, 66, 386 P2d 801, 802 (1963).

analyzing constructive knowledge and reasonable diligence, others cited in *Cowden* use the word "could," just as in the statutory provision at issue ORS 654.086(2) (and its identical federal counterpart, 29 USC 666(k)). For example, *Demars v. Heathman*, 132 Or 609, 616-17, 286 P 144, 147 (1930) states the same test as whether the "the defendant or his agents knew, or by the exercise of reasonable diligence *could* have known," of the hazard. In another case, this court addressed reasonable diligence in terms of what the "defendant in the exercise of reasonable diligence *ought* to have known." *Gardner v. Regal Fruit Co.*, 147 Or 55, 57, 31 P2d 650, 651 (1934) (emphasis added).

OR-OSHA does correctly point out that the constructive knowledge test at issue here is codified in statute. It errs, however, by suggesting that OSEA's stated purpose in ORS 654.003 of assuring "as far as possible safe and healthful working conditions for every working man and woman"[13] somehow transforms the codified common law concepts of reasonable diligence and constructive knowledge into something that they were never intended to be in Oregon or any other jurisdiction. Although the negligence cases cited herein do not bear directly on OR-OSHA matters, they do illustrate that Oregon courts have viewed constructive knowledge in a consistent manner for decades, whether articulated in terms of "could," "should," "would," or "ought," when viewed in

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[13] This language is taken verbatim from the 29 USC 651(b) of the federal OSH Act, which interprets OSHA's constructive knowledge proof burden exactly in the manner argued by CBI and contrary to the strict liability manner advocated by OR-OSHA.

the context of reasonable diligence. And, in fact, this court, in the *Don Whitaker Logging* OSEA case, used the words "could" and "would" interchangeably, stating:

> If OR-OSHA proves those elements, under OAR 437-01-760(3)(c), facts that the supervisor knew or reasonably ***could have known*** are attributable to employer because of their agency relationship. Of course, OR-OSHA may attempt to prove employer knowledge, or what employer, with the exercise of reasonable diligence, ***would have known***, in a variety of ways.

Don Whitaker Logging, 329 Or at 263, 985 P2d at 1276 (emphases added).

Ultimately, the Court of Appeals, consistent with prior Oregon cases and federal OSHA law back to its inception,[14] correctly ruled that the ALJ erred by not considering all of the relevant factors in determining whether CBI had been

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[14] *See, e.g., Jerry Botchlet Masonry Construction Co.*, 5 BNA OSHC at 1507 (emphasis added), in which the federal Review Commission stated that,

> While the duration of the violative condition cannot be fixed with exactitude based on the evidence presented, it was unquestionably brief. This, coupled with the fact that there is no evidence that respondent's foreman witnessed the violation prior to the inspection, compels us to conclude that the evidence is inadequate to support a finding that the foreman ***should have known*** of the condition. Having the burden of proof, complainant must be charged with these evidentiary deficiencies.

There are numerous other federal OSHA cases that discuss the "could not with the exercise of reasonable diligence" in terms of the legal inference of what an employer "should," "could" or "ought" to know. Unlike OR-OSHA's position in this matter, these cases correctly identify the nature of a legal inference and acknowledge that, under OSHA's fault-based system, the legal inference constructive knowledge turns upon an actual showing by OSHA that, under the circumstances of a particular case, the employer lacked reasonable diligence.

reasonably diligent. Its use of the words "should" and "could" were appropriate and in no way indicated a departure from the appropriate test for constructive knowledge established in a long line of OSHA cases.

The Court of Appeals correctly ruled that whether OR-OSHA is entitled to the legal inference that CBI has constructive knowledge turns upon whether CBI exercised reasonable diligence in discovering the alleged violations. *Ragnar Benson Inc.*, 18 BNA OSHC 1937 (No. 97-1676, 1999) (stating "the Secretary has the burden of proving lack of reasonable diligence"). Thus, because the ALJ failed to apply the appropriate test in considering CBI's reasonable diligence, the Court of Appeals' reversal of the ALJ and remand in this matter were appropriate.

OR-OSHA sums up its argument thusly: "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." *Id.* (emphasis added). This is incorrect.

OR-OSHA must prove that CBI failed to exercise reasonable diligence, which cannot be shown merely by the lack of actual knowledge and the mere possibility that a condition could have been discovered by the supervisor if he had happened to look in the direction of the violation at the time of its occurrence as OR-OSHA contends.

E. OR-OSHA seeks a rule that, if interpreted literally, would be more onerous on employers who place full-time supervisors at each jobsite than those whose supervisors are responsible for multiple sites.

Consider the following hypothetical of two employers under the ALJ's ruling. The employers each have six employees and one supervisor, all of whom have the same training and experience and do the same jobs as their counterparts with the other employer. Each employer has identical, comprehensive work rules in place to assure worker safety, and each employer enforces these rules in the same consistent manner. The job description for each employer's supervisor allocates the same amount of time during each work day for the direct observation of employees and inspection of the jobsite for specific hazards.

In fact, there is only one tangible difference between the two employers: one of the two has two jobsites, and the other has a single jobsite. Thus, the supervisor for the two-site employer is on each site for exactly half of every work day.

Logic would indicate that the single-site employer, whose supervisor is on-site at all times during the work day, is exercising greater diligence in discovering workplace hazards. Under the ALJ's analysis of constructive knowledge that OR-OSHA asks this court to adopt in this matter, however, this would not be correct.

Under the ALJ's ruling, which charges an employer with constructive knowledge if the supervisor is present when the violation occurred, the single-site employer will *always* be chargeable with constructive knowledge because it was *capable* of knowing of the presence of the violation. This *per se* legal inference would apply to the two-site employer only if the alleged violation were to occur during the half of the day in which the supervisor was present. Thus, the *more diligent* employer is more likely to face OSEA liability under OR-OSHA's proposed rule. This makes no sense whatsoever.

The Court of Appeals, apparently recognizing this paradox, adopted a non-exclusive multifactor test for reasonable diligence that actually works and that is consistent with decades of Oregon and federal OSHA law. The Court of Appeals' inquiry imposes the legal inference of constructive knowledge on the employer only if the employer is at fault by failing to be reasonably diligent. The lack of such fault showing under the ALJ's ruling is its fatal infirmity. Accordingly, the Court of Appeals order, reversing and remanding this case to the ALJ on the issue of constructive knowledge, should be affirmed.

CONCLUSION

For the reasons set forth in this Brief on the Merits of Respondent CBI Services, Inc., the ruling of the Oregon Court of Appeals in this matter reversing the ALJ and remanding the case to the ALJ for further consideration of constructive knowledge should be affirmed.

DATED this 25th day of September, 2013.

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CERTIFICATE OF COMPLIANCE

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and 9.17(3)(c) and the word-count of this brief (as described in ORAP 5.05(2)(b) is 9,623 words. I certify that the size of the type in this brief in not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed electronically the foregoing RESPONDENT CBI SERVICES, INC.'S BRIEF ON THE MERITS with the Appellate Records Section, State Court Administrator, on September 25, 2013 through the e-filing system of the Oregon Court of Appeals.

I further certify that on the same date I served the same document upon the attorneys for the following parties by conventional means by depositing two (2) exact and complete copies thereof in the United States Postal Service, at the main branch, at Eugene, Oregon, enclosed in a sealed envelope, with postage paid and addressed to:

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