LAW OFFICE OF
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ISSUE #1
March 7, 2022

Occupational Safety and Health Administration

Court: PPE Violation Requires Proof of Industry Custom or Actual Knowledge of a Violation

By Gary Visscher, Esq.

Courts have held that for OSHA to prove a violation of a general, or performance, standard, OSHA must show that the employer failed to follow industry custom or practice, or that the employer had actual knowledge that the conduct or condition was a violation of the standard. Such "notice" to the employer of what the general standard requires the employer to do is required by constitutional Due Process.

A recent decision by the Court of Appeals for the 11th Circuit not only reaffirmed this earlier line of case law, but also clarified what is meant by "actual knowledge of the violation."

C & W Facility Services (11th Cir. 1/13/2022), involved a citation issued for a violation of OSHA's PPE requirement, 1910.132 (a). The language of the PPE standard requires that employers must provide protective equipment "wherever it is necessary by reason of hazards."

C & W was cited after an employee who was pressure washing a boat dock fell into the water and drowned. The employee was not wearing any type of personal flotation device, which OSHA said was required by the PPE standard.

The Secretary agreed that there was no industry custom that required use of personal flotation devices while pressure washing docks. The question was what is required to show "actual knowledge of the violation." The Commission decision (an unreviewed ALJ

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decision) held that the Secretary only had to show that the employer "was aware of the conditions that made the boat dock hazardous." The ALJ cited and relied on a 2018 decision by the 10th Circuit Court of Appeals, *Jake's Fireworks v. Acosta,* which held that the Secretary need only show that the employer knew of the physical conditions present. The Secretary did not need to show the employer knew that those conditions made the work so hazardous that PPE was required by the standard.

> *Actual knowledge "requires both actual knowledge of the hazard and actual knowledge that the hazard requires the provision and use of personal protective equipment."*

The Court of Appeals said that was not the correct test in the 11th Circuit. Instead, the Court said, the Secretary had to show evidence of the employer's "specific, confirmed knowledge … regarding a hazard warranting a PPE requirement." Actual knowledge "requires both actual knowledge of the hazard and actual knowledge that the hazard requires the provision and use of personal protective equipment."

The Secretary argued that the employer's actual knowledge in this case was shown by (1) a supervisor asking the employee about his ability to swim, and (2) evidence that two other employees who had previously power-washed the boat dock voluntarily wore personal flotation devices while performing the task. However, the Court said, neither of those was specific evidence that the employer knew that a personal flotation device was required by the standard.

Occupational Safety and Health Administration

With E-Recordkeeing Changes Pending, OSHA Updates Guidance on Commuter Injuries

By Adele L. Abrams, Esq., CMSP

Even as OSHA works on updating its 2016 E-recordkeeping rule for the second time, the agency is also clarifying via two Letters of Interpretation (LOI) how recording should be handled when a traffic accident is involved. In a new LOI dated January 4, 2022 (but only released in February), OSHA clarifies the issue of when a worker's traffic accident is considered "work-related" and therefore subject to inclusion on OSHA's mandated logs under 29 CFR Part 1904.

The question posed was whether an employee, injured in a collision while driving to the workplace to respond to an "emergency" after the end of the "normal workday" would be considered to have suffered a recordable injury. The agency response was that, while injuries and illnesses incurred during normal commuting from home to work, or work to home, are not considered work-related, and therefore are not recordable, this changes once the employee arrives at the work environment or starts traveling "in the interest of the employer."

Because in the hypothetical offered, the traffic injury was incurred during a commute past the employee's normal working hours, it would be considered work-related and therefore must be included on the OSHA 300 log of injuries and illnesses. This is because the employee had to return to the workplace outside of his normal commute and traveling was a "condition of employment."

The January 2022 LOI follows a companion interpretation issued by the Biden OSHA in March

2021, where the question was whether a worker who was injured in a traffic accident during their commute, going from home or a hotel during a work trip, suffered a recordable event. In that LOI, OSHA said that "a hotel is considered a 'home away from home' for work safety purposes. Therefore, when such a "home away from home" is established, and the worker is reporting to a fixed worksite, the injuries/illnesses suffered while commuting between this "temporary residence" and the job location are not recordable.

E-Recordkeeping Update

OSHA's E-recordkeeping rule was amended under the Trump administration, eliminating two critical reporting obligations (submission of the OSHA 300 and 301 logs electronically, for employers with 250 or more workers at a worksite). Litigation followed, and while the changes were upheld initially, the challenge continued. The Biden administration OSHA is now revising the standard again, presumably to restore the Obama version and potentially to clarify some whistleblower protections involving post-accident drug testing and also safety incentive programs. The information submitted by employers is now public-facing and searchable on OSHA's website by employer name for calendar years 2016 through 2020. Submission of 2021 data was due by March 2, 2022.

The revised rule was sent to the OIRA office at the White House for approval in October 2021, but at press time was still awaiting clearance. OSHA had told the court in the pending appeal case that it expected to issue the proposed rule by February 14, 2022. That deadline has passed without any updates.

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Supreme Court Halts OSHA Vaccine ETS

By Josh SChultz, Esq.

The Supreme Court released a decision January 13th, granting a stay of OSHA's COVID-19 Vaccination and Testing ETS, meaning businesses will not have to comply with the rule while challenges proceed through the courts. In the case of *NFIB v. OSHA,* the Court reinstated the Fifth Circuit's stay, ruling that business groups are likely to prevail on their claim that OSHA's mandate exceeds its statutory authority.

In a *per curiam* decision, meaning an opinion issued in the name of the Court rather than specific judges, the Court wrote that the regulation "operates as a blunt instrument," drawing no distinctions based on industry or risk of exposure to COVID–19. In granting the stay, the Court focused on the language of the OSH Act which allows for "emergency temporary standards" such as the regulation in question. The Court noted that OSHA is limited to regulating "work-related dangers," and determined that while COVID– 19 is a risk that occurs in many workplaces, it is not an occupational hazard in most. To illustrate this point, the Court wrote that "COVID–19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases."

In dissent, the court's liberal wing - Justices Stephen G. Breyer, Sonia Sotomayor and Elena Kagan - wrote that the application for the stay was not likely to prevail under "any proper view of the law." The dissent further opined that the rule "perfectly" fits the language of the applicable statutory provision, noting that the ETS provision "commands—not just enables, but commands—" OSHA to issue an ETS where employees are exposed to grave danger and an ETS is necessary to protect employees from such danger.

The dissent found that OSHA was acting within their statutory authority to prevent workplace harm.

Mine Safety and Health Administration

Training that Reaches the "Safety Soul"

By Michael Peelish, Esq.

This time of year, there is a lot of MSHA annual refresher training occurring, especially in the colder regions of the country. As trainers plan beyond the required topics, they try to think "outside the box" and try to find ways to reach the "safety soul" of the miners. What does that mean? Simply put, it means getting miners to believe that they have a duty to watch out for each other by speaking up, or by showing safety leadership by setting the right example so others will follow. The question is how to achieve this result?

The mine operator can only encourage employees to communicate what they see during the workday that may have been a near miss or an unsafe behavior so that such conduct can be eliminated in the future. What really needs to happen is that employees need to take charge of their workplaces because it is the right thing to do, not because someone is telling you to do it.

So, mine operators have to reach an employee's "safety soul". This requires a conversation about life, not about safety. For instance, ask two employees if they give the other employee permission to address their unsafe work behavior or an unsafe condition they were exposed to or a near miss. Most would be embarrassed to say no. Then ask both employees are they willing to listen to the conversation. This is where folks may push back and you need to be prepared to have miners understand the importance of giving and receiving constructive feedback. This is an important skill for miners to have to achieve continuous safety improvement so have employees pair up and role play. Give them scenarios and let them give and receive constructive feedback. It may sound silly, but sometimes you have to break the ice.

Another tip is to ask two employees sitting next to each other to interview the other and then to introduce them to the rest of the group. Inevitably, employees find out something about a person they did not know which makes it more personal. Other techniques such as the "buddy" system are ways to encourage employees to watch out for their co-workers. I realize that employees are apprehensive to "tattle" on someone, but that is not what this is. This is not kids play. We are talking about your actions being the difference between someone getting injured or not. This is where the passion of the facilitator or trainer has to drive home the point. So, as an aid to get miners to think differently about safety, have the miners write down three things they will do more of (such as telling another employee to use their PPE) and three things that they will do less of (such as not jumping off equipment to dismount).

As a manger, the conversation must begin and end with safety. "Good morning, are you feeling safe today? Are you present and ready to work safe?" And then, "how was your safety today? What can we improve on together?"

Occupational Safety and Health Administration

Forklifts & Worker Safety: OSHA Changes Are Coming!

By Adele L. Abrams, Esq., CMSP

More than 100 persons per year die in forklift accidents on the job, representing about a 30 percent increase over the past decade. Moreover, nearly 35,000 workers are injured in industrial forklift incidents each year that result in serious injury, and another 62,000

more receive non-serious injuries. This has focused attention on both prevention of workplace injuries arising from powered industrial trucks used in general industry operations, but also on enhanced enforcement. Now, the federal government has embarked on a new rulemaking to update current standards and powered industrial truck equipment specifications.

The Occupational Safety & Health Administration (OSHA) estimates that about 70 percent of forklift accidents in the United States could be prevented, just by implementing more stringent training policies to ensure proper inspection, maintenance, and operation of forklifts. Situational awareness (or lack thereof) is also a factor in many forklift incidents, and workers can be injured when struck by or crushed by a forklift, sometimes because they are facing away from the moving forklift. In fact, pedestrians (those on foot in the workplace) account for 36 percent of forklift-related deaths!

Equipment design and safety are also considerations, especially since some forklifts can weigh up to 9,000 pounds, three times the weight of many cars, and older forklifts often were sold without installed seat belts. While forklifts are sometimes regarded as slow moving vehicles, and therefore less hazardous, they can travel up to 18 m.p.h. and only have front brakes, making them more difficult to stop in an emergency. Forklifts are also heavier in the rear to compensate for heavy front loads, but uneven weight distribution can create instability and forklift overturns are the primary cause of fatalities involving this equipment (25 percent). Another factor is that front loads can obstruct the view of the driver, including when loads are hoisted to heights or when traveling in areas where workers may be present.

OSHA's Powered Industrial Truck rule (29 CFR 1910.178) came in at #9 in FY 2021 on the agency's list of most-cited standards, and is always on the "Top 10" list. OSHA indicated that there were 1,420 violations cited under this standard in FY 2021. OSHA defines "Powered Industrial Truck" as a human-operated vehicle used to move, raise, lower, or remove large objects or a number of smaller objects on pallets or in boxes, crates, or other containers. Its standard covers fork trucks, tractors, platform lift trucks, motorized hand trucks, and other specialized industrial trucks powered by electric motors or internal combustion engines.

OSHA's current standard requires regular assessment of work assignments involving powered industrial trucks, operator training (and retraining periodically, which must be documented), and inspection of the forklifts regularly. However, the "current" standard isn't very current. In fact, it was promulgated in 1971, and requires that all "new" powered industrial trucks acquired and used by an employer meet the design and construction requirements established in the American National Standard for Powered Industrial Trucks, Part II, **ANSI B56.1-1969**. Yes, 1969!

In an effort to bring forklift requirements into the 21st century, OSHA published a proposed rule on February 16, 2022, which would update the consensus standard reference from the 1969 version of the ANSI B56 voluntary consensus standard to the 2020 iteration of B56.1 and the 2021 version of B56.6. The comment deadline is May 17, 2022. No big deal, right? Not so fast.

There have been significant changes to the ANSI standard over the past five decades (12 separate updates), and ANSI has expanded the B56 suite of consensus standards significantly, several of which would be adopted as part of this rulemaking. While the ANSI B56.1 rule covered all types of powered industrial trucks back in the day, it is now limited to high lift and low lift trucks only, while B56.5 (2019 version) was added to address driverless automatic industrial vehicles, and B56.6 was adopted to address rough terrain forklift trucks.

These are the standards concerning which OSHA seeks comment, and some of the individual B56 sections are nearly 100 pages each. Once a consensus standard such as the ANSI B56.6 is incorporated by reference by OSHA, the provisions become enforceable even though the text does not

appear within the Code of Federal Regulations, with penalties of up to $145,027 per exposed worker. These consensus standards were developed over the years by ANSI in tandem with ITSDF, and they can be viewed for free on a temporary membership basis from the group's website (www.itsdf.org), but which must otherwise be purchased from the organization, found at a public library, or by visiting OSHA's area office. Normally, anything enforceable by OSHA is accessible on the agency's website because it is part of the public "law" – but an exception is currently made for such consensus standards.

But wait, there's more. The ANSI/ITSDF B56 rules also include:

- B56.9-2019, covering operator controlled industrial tow tractors,
- B56.10-2019, addressing manually propelled high lift industrial trucks,
- B56.11-2018, covering double race or bi-level swivel and rigid industrial casters,
- B56.11.5-2018, regulating the measure of sound emitted by powered industrial vehicles,
- B56.11.6-2018, establishing conditions, procedures, equipment and acceptability criteria for evaluating visibility from powered industrial trucks,
- B56.11.7-2020, establishing dimensions for LPG fuel cylinders used on powered industrial trucks,
- B56.11.8-2019, providing performance and testing requirements for seat belt anchorage systems in these vehicles, and
- B56.14-2020, defining safety requirements relating to elements of design, operation and maintenance of industrial and rough terrain vehicle mounted forklifts controlled by a riding operator.

While the rulemaking takes its course, employers and workers involved in forklift operations should be aware that they will be under heightened scrutiny from OSHA, especially if a reportable accident occurs (a fatality or incident requiring hospitalization or amputation). Prevention of incidents should be the goal, and near misses and minor injury cases should be investigated as they can be the precursor to more serious accidents. When assessing risks from forklifts and other powered industrial trucks, consider three key risk areas:

1. **Physical Conditions:** Examine the condition of the ground or floors where the equipment is operated, including structural strength, environmental conditions (ice, oil, mud), and load conditions including visibility for the operator. Be attentive to potential tipping hazards!

2. **Pedestrians:** Because workers (or third parties) who are on foot are disproportionately the victims in fatal forklift incidents, it is critical to have pedestrian-delineated areas (where feasible), train workers on situational awareness, and train forklift operators on watching for both obstructions and individuals, ensuring good illumination, and monitoring the load

3. **Loading Docks:** These can be especially hazardous due to the risk of falling off the edge of the dock, wet or icy conditions. You should be sure to maintain a safe distance from the edge, keep working surfaces clean and clear and paint the edges of the loading dock to help with visibility.

OSHA is likely to proceed with updating its consensus standards that are incorporated into 29 CFR 1910.178, but it is critical that those impacted by the rule weigh in on the proposed changes before they become law. In the meantime, avoid injuries and citations by having solid worker training programs (including documentation), maintenance and inspection programs for forklifts, and sound work practices. The cheapest citation to defend is the one that is never issued!

Occupational Safety and Health Administration

Court: Responsibility on Small Business for Lack of Knowledge of OSHA Citation

By Gary Visscher, Esq.

A recent decision by the U.S. Court of Appeals for the Fifth Circuit considered the sufficiency of service of an OSHA citation and proposed penalty on a small business, and whether relief would be granted for the small business' failure to contest the citation within 15 working days of when service was deemed to have been made.

Under sections 9 and 10 of the OSH Act, OSHA must issue a citation to the employer "with reasonable promptness" and no later than 180 days after the occurrence of the violation. The proposed penalty for the violation must be sent to the employer by certified mail. In practice, OSHA sends both the citation and proposed penalty together by certified mail. OSHA's usual practice is to ask an employee present during the inspection or investigation for an address to send any citations. Sometimes the address given by the employee is one that is seldom used or monitored, or the person who is responsible for handling mail is away for a period of time. In those situations, the deadline for contesting the citation (15 working days from date of service) may pass before the mail is seen or responded to.

In the Fifth Circuit case, OSHA investigated the employer, D.R.T.G. Builders (DRTG), following a report of a workplace fatality. OSHA subsequently issued a two-item citation and proposed penalty.

The citation and proposed penalty were sent by USPS certified mail to an address that had been provided by employees during the inspection. The address also was the residence address of the person listed as the owner of the small construction business, though he was apparently absent or away during this time. When no one was present to sign for the certified mail, USPS left a delivery slip at the home address, stating that the certified mail would be held at the post office for pick up. No one picked it up from the post office.

Upon learning that the certified mail was not claimed, OSHA sent the citation by UPS Next Day Air. This time the envelope was simply left on the doorstep of the address that had been provided.

OSHA considered the UPS delivery as the date of service, even though it is not clear whether the UPS delivered package was ever seen by anyone from DRTG. When DRTG did not file its contest within 15 working days (by October 16) of the UPS delivery, OSHA considered the citation and penalty to be a final order.

According to the Court DRTG learned of the citation when a "next of kin" letter with a copy of the citation enclosed was sent by OSHA to a relative of the deceased who was also an employee of DRTG. That employee immediately forwarded the citation to DRTG's counsel on October 18, which was after the 15 working days to contest the citation had already passed.

DRTG filed a notice of contest on November 5. OSHA informed the company that it had not been timely filed and the citation was a final order. DRTG filed a motion for relief with the OSH Review Commission. An ALJ rejected DRTG's motion, and the Commission declined review. DRTG then appealed to the Fifth Circuit.

The first issue addressed on appeal was whether OSHA's method of service of the citation and proposed penalty were proper under the OSH Act. The Court said that the test for sufficient service is "whether the service is reasonably calculated to provide an employer with knowledge of the citation and notification of proposed penalty and an opportunity to determine whether to abate or contest." Regarding the requirement in the OSH Act that service (of the

proposed penalty) be by certified mail, the Court cited OSHA's Field Operations Manual, which allows use of mail delivery service to be used in addition to certified mail. The Court held that the service in this case satisfied both the statute and notice requirements: "Because OSHA first sent the notice by USPS certified mail and then took steps that were reasonably calculated to provide DRTG with notice, OSHA properly served DRTG with notice of the citation."

DRTG also sought relief under Federal Rule of Civil Procedure 60 (b), under which final orders may be set aside if the party seeking relief can show "excusable neglect." Claims of "excusable neglect" under Rule 60(b) are evaluated against four factors: the danger of prejudice, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, and whether the movant acted in good faith.

In this case the Court said 3 of the 4 four factors (all except the first) weighed in favor of OSHA and denied DRTG relief. The Court noted that DRTG waited more than two weeks to file its notice of contest even after it learned of the citation (from the next of kin letter) on October 18.

The Court particularly focused on DRTG's lack of showing that it had a system in place to assure that mail (such as the OSHA citation) was seen and responded to. The Court contrasted DRTG's lack of evidence regarding a "standard operating procedure for mail" and evidence that missed mail was not common with the Fifth Circuit's 2019 decision in *Coleman Hammons Constr. Co. v. OSHRC*, where Court said the employer did show that it had a process and system in place to receive, open and respond to mail, and the missed citation had been attributable to a single instance of unforeseen human error. In *Coleman Hammons* the Court of Appeals did grant relief on the basis of excusable neglect.

The decision is a good reminder that even though most business and communication may be done electronically, OSHA citations are paper-based, and need to be timely acted on. It is also a good reminder for employers to ensure that when an OSHA inspection takes place, that the inspector is given an address where any citations resulting from the inspection will be timely seen.

Mine Safety and Health Administration

MSHA Announces New Initiative Targeting Training

By Josh Schultz, Esq.

With an increase in fatalities and injuries in 2022, MSHA has announced a new safety campaign, titled, "Take Time, Save Lives." The campaign highlights the resources available which employers can use in their training curriculum. These resources include the following topics:

- Powered haulage safety
- Roof and rib falls
- Fire suppression and prevention
- Lockout/tagout
- Fatality updates
- Coronavirus prevention

As with any MSHA initiative, we can expect this campaign will be on inspectors' minds when they visit your sites. Expect a renewed focus on training records, including task training, annual refresher training, and site-specific hazard awareness training.

Occupational Safety and Health Administration

Fourth Circuit Attempts to Clarify Law on Constructive Knowledge/Employee Misconduct

By Gary Visscher, Esq.

Thirty-five years ago, then-Supreme Court Justice White, writing a dissent to the Court's denial of a petition for certiorari, described the issues of "employer knowledge" and "employee misconduct" in OSHA enforcement case litigation, and the overlapping evidence and the different burdens of proof to establish these issues, as a "confusing patchwork of conflicting approaches."

The confusion in this area of OSH law arises from the fact that the evidence for "actual or constructive knowledge of the violative condition" (which is part of OSHA's burden of proof to establish an OSHA violation), and "employee misconduct" (an affirmative defense, and thus the employer's burden to prove), are often similar, if not identical. The Secretary may allege the employer had "constructive knowledge" because its safety program regarding the violative condition was nonexistent or ineffective. And, in alleging employee misconduct, the burden is on the employer to show that it had an effective safety program, including employee discipline for violations of work rules. The additional complication is that OSH law generally applies "agency" law, so that the knowledge of a supervisor is imputed to his or her employer. Thus, where a supervisor is involved in the violative conduct, applying agency law would automatically establish the employer's knowledge of the violation.

Justice White's still-apt description of the state of the law was quoted in a recent decision by the 4th Circuit Court of Appeals, *New River Electrical Corp. v. OSHRC*, (Feb.1, 2022). In the decision, Judge Cullen writing for the unanimous court attempted to clarify how the burdens of proof and evidence fit together, at least in cases in the 4th Circuit.

New River Electrical was cited by OSHA after an electrical accident involving one of its employees. A crew from New River Electrical was engaged in replacing underground electrical cables for a new residential subdivision in Columbus, Ohio. The electric utility was responsible for de-energizing the lines, while New River's standard procedures required its employees to test, tag, and ground all transformers before recabling or replacing them. "As it turned out, no one had tested, tagged, or grounded the transformer that shocked" the New River employee. The employee suffered second- and third-degree burns.

Immediately after the accident, two New River foremen accessed the cable that the employee had been working on and tagged and grounded the transformer. They initially denied, but eventually admitted having done so. The employer, suspecting that their foremen had not been truthful in the initial investigation, fired both.

At the trial, the employer introduced into evidence its safety manual, its disciplinary records for the previous 3 years, its risk assessment for the project, and its job site audit evaluations.

The Administrative Law Judge affirmed the violations, though he grouped them into one citation and a single penalty of $12,934. The Commission did not direct the case for review, and the ALJ's decision became the Commission's final order. On appeal to the court of appeals, the employer had a choice among the 6th Circuit (where the violation occurred), the 4th Circuit (where New River Electric is headquartered) or the D.C. Circuit. The employer appealed to the 4th Circuit, which covers the states of Maryland, Virginia, West Virginia, North Carolina and South Carolina.

The Fourth Circuit's opinion began by noting the different approaches taken by the courts of appeals on

the issue of imputing a supervisor's own misconduct to the employer to establish the employer's knowledge of the violative condition. "The Sixth Circuit has held that a supervisor's own misconduct can be imputed to the employer, whether or not the misconduct is foreseeable…Our precedent requires that a supervisor's misconduct must be foreseeable for a violation to be imputed to the employer."

In a footnote, that Fourth Circuit noted that several other circuit courts (the Second, Third, Fourth, Fifth, Sixth, Tenth and Eleventh) were in agreement with its approach, that is, that OSHA must show something more than simply the supervisor's misconduct to establish employer knowledge, that the supervisor's misconduct must be shown to be "reasonably foreseeable."

Violations, the Court said, would be "reasonably foreseeable" if the employer failed to use "reasonable diligence." According to the Court, OSHA generally shows that the employer failed to use reasonable diligence in one of three ways: (1) by showing that the employer failed to take proper precautions at the worksite where the violation occurred, (2) by showing prior similar violations by the employer's employees, or (3) by showing that the employer's safety program is inadequate. (Although all three may all bear on an evaluation of the employer's safety program, the Court made clear that it was referring specifically to a 4-part test: the employer established work rules to prevent the unsafe condition or behavior, the rule was adequately communicated to employees, the employer took steps to discover any noncompliance, and the employer effectively enforced the rule when employees transgressed it. These are the same four elements necessary to prove employee misconduct.)

The Court then went on to try to clarify how the evidence and burdens of proof for employer knowledge and employee misconduct might intersect.

- If OSHA relies on the third means of showing the employer failed to use reasonable diligence, that is, that the employer's safety program and enforcement were inadequate, then the adequacy of the employer's safety program is part of the Secretary's case to prove (to show constructive knowledge).
- but, if OSHA relies on the first or second means of showing the employer failed to show reasonable diligence, then the employer may provide evidence of its safety program to prove employee misconduct.
- and, finally, "we recognize that the Secretary may seek to prove constructive knowledge by the inadequacy of a safety program, and the employer may assert an unpreventable employee-misconduct defense. In those cases, the affirmative defense is effectively subsumed by the knowledge element of the Secretary's case-in-chief…In those cases, an ALJ may very well find that the Secretary's success in proving constructive knowledge in his case-in-chief effectively forecloses the employer's unpreventable-employee-misconduct defense. But in reaching that conclusion, the ALJ must still analyze these doctrines separately."

Returning to the New River Electric case itself, the Court said that the ALJ had confused the evidence submitted to prove constructive knowledge with evidence submitted on the employee misconduct defense.

The Court said that in making its case for constructive knowledge, the Secretary had relied on evidence that New River failed to conduct an adequate risk assessment and grounding plan before beginning work. Evidence regarding the adequacy of New River Electric's safety program, according to the Court, had been presented as part of New River Electric's defense, including its affirmative defense of employee misconduct, which the Secretary attempted to rebut.

The Court said that the ALJ had conflated the evidence, and had considered evidence of New River's safety program in judging that OSHA had established the employer's constructive knowledge.

By relying on evidence submitted by the Secretary to disprove the "employee misconduct" defense to show that the employer had constructive knowledge, "the ALJ essentially relieved the Secretary of his burden to prove his prima facie case [of constructive knowledge]." Furthermore, the Court said, since it was not clear that the evidence submitted by the Secretary to rebut the employer's affirmative defense was sufficient to establish the Secretary's prima facie case of constructive knowledge, the Court remanded the case to the Commission "for further proceedings that properly allocate the burdens of proof between the parties."

Whether the Fourth Circuit's extensive treatment and effort to clarify the law was successful is debatable. Despite the Court's careful delineation of the means by which the Secretary may show lack of "reasonable diligence," the evidence for constructive knowledge often consists of a variety of evidence. In fact, the Court noted that the ALJ in this case discussed the employer's failure to take proper precautions at the worksite as a basis for finding constructive knowledge, but nonetheless said the ALJ had primarily relied on the inadequacy of New River's safety program to support constructive knowledge, and therefore remanded the case.

Nonetheless, the Court's decision may create more opportunity for employers to prevail on the employee misconduct defense in cases that are within the jurisdiction of the Fourth Circuit. The Commission and Commission judges must separately consider evidence regarding constructive knowledge and employee misconduct, rather than concluding that if constructive knowledge is established, the employee misconduct defense may be quickly dismissed.