

BEFORE THE WORKERS' COMPENSATION BOARD

STATE OF OREGON

HEARINGS DIVISION

OREGON OCCUPATIONAL SAFETY &)	Docket No. 09-00126SH
HEALTH DIVISION,)	Citation No. M5681-050-09
))
Plaintiff,))
))
vs.))
))
CBI SERVICES, INC.,))
))
Defendant.)	OPINION AND ORDER
_____))

Pursuant to notice, a hearing was convened, recorded, and continued by Administrative Law Judge Claudette Mirassou McWilliams on April 6, 2016 in Eugene, Oregon. Oregon Occupational Safety & Health Division (OR- OSHA) was represented by Kyle J. Martin. CBI Services, Inc. (CBI) was represented by Carl B. Carruth and Eric S. DeFreest. Administrator Michael Wood appeared on behalf of OR-OSHA. The record closed following the presentation of written closing arguments.

PROCEDURAL HISTORY

On February 2, 2009, OR-OSHA issued Citation Number M5681050-09 to CBI for two serious violations of OAR 437-003-0073(2) governing fall protection when working in elevated boom platforms and OAR 437-003-1501 requiring fall protection for employees exposed to a fall hazard of ten feet or more. Following a timely appeal of the Citation, a hearing was conducted by the late Administrative Law Judge (ALJ) Chuck Mundorff on June 10, 2010. ALJ Mundorff issued an Opinion and Order on November 29, 2010, which vacated citation item one regarding fall protection based on his interpretation of OAR 437-003-0073(2) as only requiring the use of fall protection when the fall exposure was at least ten feet. Citation item two was affirmed based on the finding that CBI's

employee was exposed to a fall of 32 feet while welding atop a tank with his feet on the painter's rail without fall protection.

CBI sought judicial review of ALJ Mundorff's decision arguing that he had used an incorrect legal standard to determine whether OR-OSHA satisfied its *prima facie* burden of proving employer knowledge. CBI further contended that ALJ Mundorff misapplied the elements of the unpreventable employee misconduct affirmative defense. OR-OSHA cross-petitioned for judicial review to contest the order vacating citation item one.

In its January 9, 2013 decision, the Oregon Court of Appeals ruled that ALJ Mundorff erred in imposing a height requirement for citation item one. The Court of Appeals further reversed ALJ Mundorff's ruling that CBI could have known of the violation had it been reasonably diligent under ORS 654.086(2). Specifically, the Court held that OR-OSHA had failed to meet its burden to prove that CBI knew, or, with the exercise of reasonable diligence, should have known, of the employees' violations. The case was reversed and remanded to the Workers' Compensation Board for a determination of whether CBI's lack of knowledge was due to a lack of reasonable diligence by the employer.

The Oregon Supreme Court granted review when OR-OSHA appealed the Court of Appeals decision. The decisive issue involved the interpretation of ORS 654.086(2), which provides that an employer is not liable for a serious violation if (1) it exercised "reasonable diligence" but (2) still "could not * * * know" of the violation. Ruling in its December 26, 2014 decision that federal case law was persuasive, but not controlling, the Supreme Court affirmed the Court of Appeals' reversal of the administrative law judge that employer knowledge was proved by proximity of the job site when the foreman did not have actual knowledge. The Court held that the latter provision referred to what an employer was capable of knowing under the circumstances rather than what the employer "should" know. Concerning the first element, the Court ruled that it would defer to OR-OSHA's determination of what constitutes "reasonable diligence" under the circumstances of each case provided the agency's determination is within the limits of its discretion under the policy of the statute. Elaborating, the Court said:

"To recap, then: ORS 654.086(2) provides that an employer is liable for a serious violation of the OSEA and its implementing rules unless the employer 'did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.' That means that

an employer is not liable for a serious violation if the employer had exercised 'reasonable diligence' and still 'could not * * know' of the violation. In reviewing an agency's decision about whether an employer is excused from liability under ORS 654.086(2), there are two components, each of which triggers a different standard of review. First, as a matter of law, the reference in the statute to whether an employer 'could not * * * know' of a violation refers to what an employer was capable of knowing under the circumstances. Second, we will defer to OR-OSHA's determination about what constitutes 'reasonable diligence' under the circumstances of each case as long as the agency's determination remains within the range of discretion allowed by the general policy of the statute.'" *Citing Springfield Education Assn.*, 290 Or at 229. *OR-OSHA v. CBI Services, Inc.*, 356 Or 577 at 591 (2014).

Because the adjudicator's Opinion and Order lacked any explanation supporting a determination regarding CBI's reasonable diligence, the Supreme Court was unable to review the administrative law judge's conclusion that CBI could have known of the violations if it had exercised reasonable diligence. Consequently, the case was remanded to the Workers' Compensation Board for consideration of the delegative nature of the statutory standard of "reasonable diligence."

CBI contends that the Supreme Court remanded the case to the administrative law judge to determine OR-OSHA's interpretation of "reasonable diligence," the reasonableness of that interpretation and whether a reasonable basis existed in the record for concluding that CBI was not being reasonably diligent to discover and prevent the violations at issue. *Post Hearing Brief of CBI Services, Inc. On Remand*, pgs. 2-3.

On remand, the decision of the administrative law judge must enable the Court to determine whether OR-OSHA's interpretation of "reasonable diligence" falls within the discretion delegated to the agency by law. Following ALJ Mundorff's death, Administrative Law Judge Claudette Mirassou McWilliams assumed responsibility for the proceedings on remand to take evidence concerning OR-OSHA's interpretation of the term "reasonable diligence" as used in ORS 654.086(2).

EVIDENCE

The evidentiary record in this proceeding was limited to the contents of the forum's file, which included the Record for Judicial Review, and the testimony presented on April 6, 2016, by OR-OSHA Administrator Michael Dennis Wood.

ISSUES

1. Whether OR-OSHA's interpretation of "reasonable diligence," as used in ORS 654.086(2), falls within the limits of its discretion.
2. If so, whether CBI had constructive knowledge of the fall protection violations because it could have known about them if it had exercised "reasonable diligence," as interpreted by OR-OSHA.

FINDINGS OF FACT

On February 2, 2009, the employer, a contractor, was performing work on a water tank located at 34276 E. Cloverdale Road in Creswell, Oregon. On that day, Safety Compliance Officer (SCO) Craig Brink was traveling in his vehicle down Cloverdale Road when he saw a worker up at the top of the tank and proceeded to the work site. SCO Brink has been a compliance officer for OR-OSHA for 3 and a half years. He has a 26 year prior employment history in construction and logging. OR-OSHA has a program directive creating a local emphasis program in Oregon to focus inspections on fall protection issues. (Ex. 1).

As he approached the water tank he observed the worker sitting on the top edge of the water tower welding who did not appear to be using fall protection. Brink testified that he took several pictures prior to opening the inspection. He then approached the work site and engaged in a discussion with the supervisor of the project, Roy Vorhof. Brink stated that Vorhof told him he was the site superintendent overseeing the work and that he was on site every day. Brink testified that he and Vorhof were approximately 60 feet from the entrance to the tank and that the worker was visible from where they stood. He said that Vorhof instructed the worker on the edge of the tank to step down.

At that time Brink said he also observed a second worker operating a lift who was wearing a harness with a lanyard but that the lanyard was not attached

to the lift. Brink took photographs of the second employee while talking with Vorhof. Brink took measurements of the tank which showed that the top of the tank to the interior floor measured approximately 130 feet. The tank had a painter's railing on the inside of the tank that would break a worker's fall but there was no such railing on the outside of the tank. Brink measured a fall to the outside of the tank at 32 feet to the ground. (Exs. 7, 8). He then issued the citation listing the two items being 1) that an employee was not using fall protection while welding on the top of the tank and 2) a second employee was not tied off while operating a man lift. (Ex. 12).

Randy Hynek, CBI's area safety manager testified at the hearing. He stated that he was not on site but that the company has safety rules in place and they insist that work rules are complied with. He noted that all employees are trained in fall protection and that the supervisor onsite is responsible to ensure the rules are enforced. He stated that in this case the employees cited were disciplined by the company. He noted they were long term well-valued employees with a good safety record and that he audits the work crews approximately once per quarter.

Jeremy Crawford, the employee who was welding on the top of the water tank, testified as well. He stated he is a union boilermaker that erects and welds storage tanks for CBI Services. He was working on the top of the scaffold on the top of the tank welding earthquake bars to the top. He stated he was not sitting on the top of the tank rail but was crouched down with his feet on a railing leaning with his back against the tank. He said the distance from the painter's railing to the top of the tank was 26 inches. He said he stepped up on the railing because he was getting hot sparks down his shirt while welding. He said that he was not tied off because he was not exposed to a fall. He said he never had his rear end on top of the tank and the top of the tank was at his waist or above. He acknowledged that he was disciplined by the employer as a result of the citation.

John Bryan, the employee operating the man lift, testified at hearing. He said that he was repositioning himself and was only 5 to 6 feet off the ground. He said he was wearing his harness but he forgot to reconnect the lanyard in this instance. He said that he normally was very conscientious about fall protection as he had been injured after a fall off a scaffold. He said it was his custom and practice to tie off but he just forgot in this instance. He also acknowledged that he was disciplined by the company as a result of the citation.

The supervisor, Roy Vorhof, also testified. He said he has 35 years in the construction trades and he is one of five superintendents for CBI. He said that he was standing inside the tank when he was approached by Brink who, pointing at Crawford, told him "that man is not tied off." He said that he could not tell if Crawford was leaning against the side of the tank or not. He felt that Crawford's work site was fully enclosed as there was 26 inches from the top of the tank to the painter's rail. He testified that this particular crew was very good and safety conscious. He said they hold weekly safety meetings with site-specific fall protection plans. He was also disciplined as a result of the citation.

SCO Brink testified that considering the potential injuries from the falls and the limited time of the exposures that the citation was determined to be serious with low probability. He noted that the site supervisor had access to the employees and knew or should have known of the violations and that knowledge was imputed to the employer. After utilizing all applicable reductions the base penalties of \$1,800.00 were reduced to \$475.00.

In principle, OR-OSHA construes "reasonable diligence" for purposes of ORS 654.086(2) as meaning that an employer has taken steps to anticipate hazards that will occur on the jobsite, addresses those hazards appropriately through work rules or other mechanism to ensure those hazards are corrected or the risks they represent are mitigated. In theory, "reasonable diligence" as construed by OR-OSHA, means that the employer effectively addresses hazards from an enforcement standpoint.

The theoretical construction of the statutory language differs from the meaning of the term in practical application by enforcement officers. A different interpretation of "reasonable diligence" governs the issuance of citations pursuant to the agency's emphasis upon enhanced enforcement of fall protection violations. The "operation" of agency enforcement officers is "guided" by an interpretation of "reasonable diligence" that means an employer could have discovered the violation with the exercise of due diligence if the OR-OSHA staff can discover the violation. That presumption is overcome in limited circumstances involving unusual, atypical or exceptional activity or unpreventable employee misconduct.¹

¹ Administrator Wood testified that:

"Well, ultimately it can be a case specific determination. But the general principles that we apply are that an employer has exercised reasonable diligence when the employer takes steps to anticipate hazards that will occur on the jobsite, addresses those hazards appropriately through work rules or other mechanisms to ensure that those hazards are

CONCLUSIONS OF LAW AND REASONING

The Supreme Court remanded the case to the Hearings Division because it was unclear how the ALJ interpreted or applied the “reasonable diligence” element of ORS 654.086(2) to determine that CBI had constructive knowledge of Crawford’s violation. Without an explanation substantiating that decision, the Court concluded that the adjudicator failed to consider the delegative nature of “reasonable diligence.” The Supreme Court could not, without an explanatory administrative rule or articulated analysis by the ALJ, determine which of several factors enumerated by the Court of Appeals influence an employer’s constructive knowledge under the authority delegated to OR-OSHA.² On remand, the record could be developed to establish OR-OSHA’s interpretation and application of “reasonable diligence.” Further development of the record for that purpose would enable the Court to ascertain whether the agency’s interpretation comports with the authority granted the agency under the OSEA.

An administrative agency’s interpretation of a statute may be entitled to a measure of deference dependent upon the nature of the statutory term at issue. *See generally Springfield Education Assn. v. School Dist.*, 290 Or 217, 223 (1980). The Oregon Supreme Court held in *OR-OSHA v. CBI Services, Inc.*, 356 Or 577 (2014) that the term “reasonable diligence” as used in ORS 654.086(2) is delegative in nature rather than exact or inexact. *Infra*, 356 Or at 591. Given that

corrected or that the risks they represent are mitigated. And then effectively addresses those from an enforcement standpoint. **As a practical matter, we operate and give guidance to our staff that if they’re able to discover a violation then they can presume that the employer could have done so with reasonable diligence** and we disregard that presumption only in cases where the employer’s [sic] able to demonstrate that the particular activity was so unusual or atypical or exceptional that they truly could not have anticipated that it would arise from the employee’s duties or from things closely related to those duties.”

“The other way that the employer can demonstrate that they could not with reasonable diligence have known of the violation is if they have appropriately anticipated it, they’ve anticipated the condition, and then they have, essentially, taken steps to address it that were ineffective in this case only as the result of unpreventable employee misconduct.” (Emphasis added, April 6, 16 Tr. 7-8).

² Those factors include: the foreseeability of the violations, 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.*, *supra*, 356 Or 577, 599.

characterization, deference is given to OR-OSHA's determination about what constitutes "reasonable diligence" under the circumstances of each case as long as the agency's determination "remains within the range of discretion allowed by the general policy of the statute." *Springfield Education Assn. v. School Dist.*, 290 Or 217, 229 (1980); ORS 183.482(8)(b).³

The purpose of the Oregon Safe Employment Act (OSEA) is "to assure as far as possible safe and healthful working conditions for every working man and woman in Oregon." ORS 654.003. To accomplish that goal, the OSEA imposes on every employer the burden of "furnish[ing] employment and a place of employment which are safe and healthful for employees therein." ORS 654.010. Additionally, the OSEA mandates that "[n]o employer shall construct or cause to be constructed or maintained any place of employment that is unsafe or detrimental to health." ORS 654.015. The OSEA and the rules which it authorizes are to be liberally construed to effectuate its preventative purposes. OAR 437-001-0025. Pursuant to statute, OR-OSHA is given the authority, responsibility and discretion for refining and executing the generally expressed legislative policy of the OSEA. The agency is charged with completing and refining the general legislative policy by making delegated value judgments and policy choices for specific application. *Infra*. This includes the authority to "enforce all laws, regulations, rules and standards adopted for the protection of the life, safety and health of employees * * * ." ORS 654.003(4).

At issue here is OR-OSHA's interpretation of the term "reasonable diligence." CBI's liability hinges upon whether it "did not, and could not within the exercise of reasonable diligence, know" of the fall protection violations for which it was cited. Stated otherwise, CBI would not be liable for a serious violation if it exercised "reasonable diligence" and still "could not * * * know" of the violation. ORS 654.086(2).

³ The discretionary function of the agency is to make the choice regarding policy refined. The judicial review function is set forth in ORS 183.482(8)(b), which provides that:

"The court shall remand the order to the agency if it finds the agency's exercise of discretion to be:

- "(A) Outside the range of discretion delegated to the agency by law;
- "(B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency; or
- "(C) Otherwise in violation of a constitutional or statutory provision."

OR-OSHA theoretically interprets “reasonable diligence” to mean that an employer has taken steps to anticipate hazards that will occur on the jobsite, addresses those hazards appropriately through work rules or other mechanism to ensure that those hazards are corrected or that the risks they represent are mitigated. “Reasonable diligence” as construed by OR-OSHA generally, means that the employer effectively addresses hazards from an enforcement standpoint. As applied to specific situations in the enforcement context, like the instant case, OR-OSHA presumes that a violation observed by an enforcement officer could have been discovered by the employer with the exercise of due diligence. That presumption is overcome in limited circumstances involving unusual, atypical or exceptional activity or unpreventable employee misconduct.

OR-OSHA is empowered to construe the term, “reasonable diligence” to further refine legislative policy regarding what findings determine constructive knowledge. The threshold question is whether the agency’s interpretation under that authority exceeds its delegated discretion.

OR-OSHA’s application of its interpretation of “reasonable diligence” in the field by enforcement officers imputes knowledge to the employer based on nothing more than the occurrence of a violation witnessed by an enforcement officer. Within that context, the Supreme Court’s discussion regarding the OSEA and strict liability is instructive here. Specifically, the Supreme Court commented that:

“Under our construction of ORS 654.086(2), the statute remains fault-based. **Employers are not liable based solely on the fact of a violation.** If they did not know of the violation, and if they could not have known of that violation with the exercise of reasonable diligence, they are excused from liability.” (Emphasis added.)

CBI Services, Inc., infra, 356 Or at 597. Substitution of the “reasonable diligence” interpretation that the OR-OSHA Administrator testified the enforcement officers were “guided” to use produces the following refinement of the Supreme Court’s statement in its 2014 decision:

Under ORS 654.086(2), the OSEA remains fault-based. **Employers are not liable based solely on the fact of a violation.** If they did

not know of the violation, and if they could not have known of that violation with the exercise of reasonable diligence, **meaning that the occurrence of a witnessed violation imputes employer knowledge,** they are excused from liability.

The nonsensical result produced by adding the language of the agency's interpretation demonstrates the inconsistency between the Supreme Court's reading of the OSEA and the OR-OSHA construction of "reasonable diligence." Because the imposition of constructive employer knowledge solely on the basis of a violation witnessed by an enforcement officer renders an employer strictly liable, I conclude that the interpretation of "reasonable diligence" applied by OR-OSHA in the enforcement context exceeds the agency's permissible range of discretion under the OSEA.

CBI challenges the interpretation of "reasonable diligence" offered at the hearing on remand based upon the time at which the employer asserts the interpretation was developed. *Post Hearing Brief of CBI Services, Inc. On Remand*, pg. 11. CBI maintains that the OR-OSHA Administrator's "interpretation" was clearly derived after the decision of the Oregon Supreme Court was issued "so that it could not have been a factor when the citations were issued" but were "clearly an after-the-fact attempt to justify citations which should not have been issued in the first place." *Infra* at 11-12.

I disagree because I do not find that Brink's earlier testimony regarding more specific factors influencing employer knowledge contradicts the testimony regarding how the agency construes and guides enforcement officers regarding "reasonable diligence." As the person responsible for all enforcement activities taken under the Oregon Safe Employment Act, as well as development of rules, education and consultation programs and provides interpretive guidance and interpretive decision-making related to the rules, Wood was in a superior position to explain the agency's interpretation of statutes and rules. I also find it noteworthy that this theory went untested during cross-examination of Administrator Woods.

Nonetheless, because I find OR-OSHA's interpretation and application of "reasonable diligence" under ORS 654.086(2) to be outside the range of discretion delegated to the agency under the OSEA, I further conclude that OR-OSHA has failed to satisfy its burden of proof regarding employer

knowledge regarding both Crawford and Bryan essential to affirmation of the February 18, 2009 Citation.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED THAT: the February 18, 2009 Citation is vacated.

NOTICE TO ALL PARTIES: You are entitled to judicial review of this Order. Proceedings for review are to be instituted by filing a petition in the Court of Appeals, Supreme Court Building, Salem, Oregon 97301-2563, within 60 days following the date this Order is entered and served as shown hereon. The procedure for such judicial review is prescribed by ORS 183.480 and ORS 183.482.

Entered at Eugene, Oregon on **December 5, 2016**

Workers' Compensation Board

/S/

Claudette Mirassou McWilliams
Administrative Law Judge