

FILED: January 09, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

OREGON OCCUPATIONAL SAFETY & HEALTH DIVISION,
Respondent
Cross-Petitioner,

v.

CBI SERVICES, INC.,
Petitioner,
Cross-Respondent.

Workers' Compensation Board
0900126SH

A147558

Argued and submitted on January 11, 2012.

Carl B. Carruth, South Carolina, argued the cause for petitioner-cross-respondent. With him on the briefs were McNair Law Firm, P.A., and Joel S. DeVore and Luvaas Cobb.

Karla H. Ferrall, Assistant Attorney General, argued the cause for respondent-cross-petitioner. With her on the briefs were John R. Kroger, Attorney General, and Mary H. Williams, Solicitor General.

Before Ortega, Presiding Judge, and Wollheim, Judge, and Sercombe, Judge.

SERCOMBE, J.

Reversed and remanded on petition and cross-petition.

1 SERCOMBE, J.

2 In connection with the construction of a water tower at the Creswell water
3 treatment plant, the Oregon Occupational Safety and Health Division (OR-OSHA) issued
4 a citation to CBI Services, Inc. (employer) pursuant to the Oregon Safe Employment Act
5 (OSEA).¹ The citation alleged that employer had committed two "serious" safety
6 violations involving deficient fall-protection measures.² In item one of the citation,
7 employer was charged with a serious violation of OAR 437-003-0073³ because a worker
8 had not attached the lanyard on his safety harness to the "boom supported elevating work
9 platform[]" (lift) on which he was working. In item two, employer was charged with a
10 serious violation of OAR 437-003-1501⁴ because a worker welding near the top of the

¹ The OSEA is codified at ORS 654.001 to 654.295, ORS 654.412 to 654.423, ORS 654.750 to 654.780, and ORS 654.991.

² ORS 654.086(2) defines a serious violation as one in which 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."

See also OAR 437-001-0015 (similar definition of a "[s]erious violation").

³ OAR 437-003-0073 provides, in relevant part:

"(1) When using boom supported elevating work platforms * * *.

"(2) Workers must use personal fall protection that complies with
Subdivision M of this division, when working in these devices."

⁴ OAR 437-003-1501 provides, in relevant part, that,

1 then-incomplete water tank had stepped up and out of the safety-compliant scaffolding
2 surrounding him without wearing a safety harness and lanyard, thereby putting himself at
3 risk of falling 32 feet from the top of the tank's outer wall to the ground. Following a
4 hearing, an administrative law judge (ALJ) vacated item one and affirmed item two.

5 Employer seeks judicial review of the ALJ's order affirming item two,
6 arguing that the ALJ erred as a matter of law by erroneously interpreting and applying the
7 knowledge element of OR-OSHA's *prima facie* case in finding that employer had
8 constructive knowledge of the violation. OR-OSHA cross-petitions, arguing that the ALJ
9 erred as a matter of law in vacating item one of the citation by misinterpreting OAR 437-
10 003-0073 as incorporating a height requirement for fall protection on lifts. We review
11 the ALJ's order⁵ for legal error, ORS 183.482(8), and, for the reasons set forth below,
12 reverse and remand for reconsideration on employer's petition regarding item two and
13 reverse and remand for reconsideration on OR-OSHA's cross-petition regarding item one.

14 The relevant facts are largely undisputed. On February 2, 2009, OR-OSHA
15 Safety Compliance Officer Brink noticed someone working on the top of a large water
16 tower at the Creswell water treatment plant, drove closer, and stopped to investigate.
17 Upon arrival, Brink saw that the worker, Crawford, was not utilizing fall-protection

"when employees are exposed to a hazard of falling 10 feet or more to a lower level, the employer shall ensure that fall protection systems are provided, installed, and implemented according to the criteria in [29 CFR section] 1926.502."

⁵ Pursuant to ORS 654.290(2)(b), the ALJ's order is deemed to be a final order of the Workers' Compensation Board for purposes of judicial review.

1 equipment despite the fact that he was welding approximately 32 feet above the ground
2 and appeared to be "sitting on the top edge working." Although safety-compliant
3 scaffolding had been erected to protect workers from falls toward the *inside* of the water
4 tank, Brink observed and photographed Crawford with his "feet up on the painter's railing
5 while * * * hunched over welding on the top of the tank" such that he was exposed to a
6 risk of falling toward the outside of the tank.⁶ Brink took several pictures and then
7 approached the work crew's supervisor, Vorhof, who was occupied rigging anchor cables
8 at ground level inside the entrance to the tank. Brink walked up to Vorhof inside the
9 large, open entrance to the tank such that Crawford was approximately 65 feet away and
10 visible from where they stood. After Brink alerted Vorhof to Crawford's potential
11 violation, Vorhof "yelled at [Crawford] to get down on the staging." Vorhof later
12 testified that he had not seen Crawford climb onto the painter's rail and that, from his
13 vantage point, he could not tell whether or not Crawford was up on the edge of the tank.⁷

⁶ Because the top of the tank had not yet been completed, Crawford was working on the tank's "shell"--a large wall with a relatively narrow top edge, scaffolding with guardrails erected on the inside, and a sheer face on the outside. Prior to the violation, Crawford had been standing on "the platform of the scaffold" such that he was protected on the outside by the tank's shell (which was at chest height) and on the inside by the scaffolding's guardrails. The "painter's railing" was a steel beam welded onto the inside of the wall 26 inches from the top. Such rails are commonly used so that, upon completion of the construction, painters can attach "buggies" to them and thereby safely move around the inside of the tank while painting.

⁷ Crawford later testified that "he was not sitting on the top [edge] of the tank but rather was leaning against it" such that "the top of the tank was never above waist height[,]" eliminating any potential danger. In other words, he testified that he was essentially sitting on the painter's rail with his back to the tank's shell so that he was protected on all sides by either the shell or the scaffolding's guardrails. However, the

1 Crawford was not wearing a safety harness and lanyard because he was initially working
2 within a fully enclosed area protected by safety-compliant scaffolding. He stated that he
3 only stepped up onto the painter's rail because, while welding, he "kept on getting hot
4 sparks down [his] shirt" and therefore "needed to elevate [himself]." There is no
5 evidence in the record, beyond the fact that Brink had time to "observe[] Crawford at the
6 top of the tank while driving down the road and continued to observe him while
7 approaching the work site[,]" establishing the duration of Crawford's violation.

8 While speaking with Vorhof, Brink saw a second worker, Bryan, situated in
9 a mechanical lift while wearing a safety harness with a lanyard that was not secured to
10 the lift. Although Bryan was working only five to six feet above the ground, he later
11 testified that it was standard practice to attach the lanyard in such a situation but that he
12 had been repositioning himself prior to Brink's arrival and had simply forgotten to
13 reattach the lanyard. Brink's field notes, referenced by the ALJ's order, indicate that
14 Bryan was in the lift without fall protection for approximately 10 minutes. As noted,
15 prior to Brink's arrival, Vorhof was occupied rigging anchor cables just inside the
16 ground-level entrance to the tank and, as with Crawford, was within approximately 65
17 feet of Bryan. When he walked into the tank to approach Vorhof, Brink pointed to Bryan
18 and stated, "Hey, that man is not tied off." Vorhof then asked Bryan whether he was tied

ALJ found that Brink's photographs refuted that statement and noted that there was no evidence that a protective railing or scaffold had been erected on the outside of the tank in order to protect workers from the potential 32-foot fall from the outside of the tank to the ground.

1 off, at which point Bryan noticed his omission and quickly attached the lanyard.

2 At the time of the alleged violations, employer had extensive safety rules,
3 precautions, and training mechanisms in place--including fall-protection training,
4 mandatory worksite safety meetings, and worksite-specific safety and fall-protection
5 plans. Employer's specific fall-protection rules required the use of either protective
6 scaffolding or a lanyard attached to a full-body harness whenever a worker was exposed
7 to a fall hazard of six feet or more. Employer's area safety manager, Hynek, testified that
8 copies of the fall-protection rules were "available on the jobsite for the employees" and
9 noted that supervisors conducted morning meetings regarding safety and then monitored
10 employees more informally throughout the day. He explained that supervisors like
11 Vorhof were required to complete weekly safety checklists and that worksites were
12 visited by upper management on a regular basis to ensure compliance. Vorhof
13 additionally testified, having spent 35 years working in construction, that the crew at the
14 Creswell worksite--including Crawford and Bryan, each of whom Vorhof had known "for
15 at least ten years"--was particularly safety-conscious and had an excellent safety record.

16 Ultimately, on February 18, 2009, Brink issued employer a citation and
17 notification of penalty for serious violations of OAR 437-003-0073(2) (item one, directed
18 at Bryan's failure to reattach his lanyard while working on the lift) and OAR 437-003-
19 1501 (item two, directed at Crawford's lack of fall-protection equipment upon stepping
20 up onto the painter's rail). Crawford, Bryan, and Vorhof--each of whom was a long-term
21 employee with an excellent safety record--were disciplined by employer as a result of the

1 citation.

2 Employer requested a hearing, which was held before the ALJ on June 10,
3 2010. At the beginning of the hearing, and again after the conclusion of OR-OSHA's
4 case-in-chief, employer moved to dismiss the citation in its entirety on the ground that
5 OR-OSHA had not carried its burden of proving employer's knowledge of the alleged
6 violations. The ALJ denied the motions, stating:

7 "Employer argues that continuous observation of employees is
8 neither required [n]or possible and that the conditions existed in such a
9 short window of time such that Vorhof did use reasonable diligence in
10 supervising his crew. However, * * * I find that there was sufficient time
11 for Vorhof to observe either or both of the workers subject to the citations
12 and that constructive knowledge was established by OR-OSHA."

13 Following the hearing, the ALJ issued an opinion and order vacating item one of the
14 citation and affirming item two. With respect to item two, the subject of employer's
15 petition, the ALJ concluded that Vorhof had constructive knowledge of Crawford's
16 violation imputable to employer. With respect to item one, the subject of OR-OSHA's
17 cross-petition, the ALJ construed OAR 437-003-0073(2) as incorporating a predicate
18 height requirement of at least six feet and vacated item one on the basis of his finding that
19 OR-OSHA failed to prove that Bryan was exposed to a fall hazard of six feet or more.

20 On judicial review, employer reprises its contention that OR-OSHA failed
21 to prove employer knowledge, arguing that the ALJ erred as a matter of law by
22 incorrectly applying the standard for constructive knowledge in affirming item two.
23 Specifically, employer argues that the ALJ improperly found that Vorhof had
24 constructive knowledge imputable to employer solely on the basis of Vorhof's presence at

1 the time of the violation and a generalized finding that "the violative condition existed for
2 a 'sufficient time for Vorhof to observe'" it.⁸ Relying on the language in ORS 654.086(2)
3 providing that a serious violation may be assessed "unless the employer did not, and
4 could not with the exercise of reasonable diligence, know of the presence of the
5 violation[,] " employer contends that "reasonable diligence does not require continuous
6 supervision by the employer" and that the ALJ's finding implicitly required continuous
7 supervision by Vorhof such that employer was subjected to a strict-liability approach to
8 constructive knowledge contrary to both the purpose of the OSEA and established law
9 construing the standard for "reasonable diligence."⁹ OR-OSHA responds that the

⁸ As noted (and as employer points out and OR-OSHA acknowledges), the ALJ did not make a specific finding as to the duration of Crawford's violation. Rather, he referenced Brink's field notes estimating that Bryan's violation lasted approximately 10 minutes and noted that Brink was able to view Crawford's violation throughout the course of his approach to the worksite.

⁹ Employer alternatively argues that the ALJ erred as a matter of law in addressing its affirmative defense of unpreventable employee misconduct, conflating "reasonable diligence" with an element of that affirmative defense requiring a showing that the employer "has taken steps to discover violations." We agree, and OR-OSHA likewise concedes, that "it was error to use the same evidence to prove the constructive knowledge element of OR-OSHA's *prima facie* case and to disprove [that] element of [employer's] unpreventable employee misconduct defense." However, OR-OSHA argues that "that error does not require reversal of the decision on review." *See Outdoor Media Dimensions Inc. v. State of Oregon*, 331 Or 634, 660, 20 P3d 180 (2001) (setting forth criteria for entertaining alternative bases for affirmance). Because we conclude that the ALJ incorrectly imputed constructive knowledge of Crawford's violation to employer, we need not further discuss employer's second assignment of error. We address it here only to confirm that the unpreventable employee misconduct defense requires findings *independent* of those made in assessing the knowledge element of OR-OSHA's *prima facie* case. *See generally Oregon Occupational Safety & Health v. CC & L Roofing*, 248 Or App 50, 54-55, 273 P3d 178 (2012) ("[E]mployer knowledge is a *prima facie* element of a serious violation, and OR-OSHA retains the burden of persuasion on that issue." (Citation and internal quotation marks omitted.)).

1 reasonable diligence inquiry focuses on whether "the supervisor *could have* discovered
2 the violation through reasonable diligence, not whether a reasonable supervisor would
3 have done so." (Emphasis in original.) That is, OR-OSHA contends that, because "it
4 was possible for Vorhof to have known about the conduct that constituted the
5 violation[,]" the ALJ did not err in finding that Vorhof failed to exercise reasonable
6 diligence and therefore had constructive knowledge of the violation imputable to
7 employer. We agree with employer as to item two, and address OR-OSHA's cross-
8 petition regarding item one separately below.

9 We first address the issue of whether the ALJ properly determined that OR-
10 OSHA carried its burden of proving employer's knowledge of Crawford's violation by
11 imputing Vorhof's purported constructive knowledge to employer. In so doing, we
12 evaluate the ALJ's treatment of the reasonable diligence inquiry set forth in ORS
13 654.086(2). That statute provides that

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

20 (Emphasis added.) OR-OSHA must prove employer knowledge by a preponderance of
21 evidence in order to make out a *prima facie* case of a serious violation, OAR 438-085-
22 0820(3); *see Accident Prevention Div. v. Roseburg Forest Prod.*, 106 Or App 69, 72-73,
23 806 P2d 172 (1991), and, under most circumstances, the knowledge of a supervisory
24 employee to whom responsibility for safe employment has been delegated may be

1 imputed to his or her employer. See [OR-OSHA v. Don Whitaker Logging, Inc.](#), 329 Or
2 256, 263-64, 985 P2d 1272 (1999); OAR 437-001-0760(1)(e)(A) - (C) (providing that all
3 "agents of the employer" are responsible for the safety and safe conduct of "all workers
4 under their supervision"). In combination, those principles dictate that, where a
5 supervisor could not know of a safety violation with the exercise of reasonable diligence,
6 that supervisor cannot have constructive knowledge of the violation imputable to his or
7 her employer. See generally [Oregon Occupational Safety & Health v. CC & L Roofing](#),
8 248 Or App 50, 273 P3d 178 (2012) (citing *Don Whitaker Logging, Inc.*, 329 Or at 263);
9 ORS 654.086(2); OAR 437-001-0015. Accordingly, employer's petition turns on
10 whether Vorhof could have known of Crawford's safety violation with the exercise of
11 reasonable diligence at the worksite.

12 As a preliminary matter, the Supreme Court has intimated that, in deciding
13 cases under the OSEA, we may look to federal case law for guidance *only* where the rule
14 at issue has a "counterpart in the federal Occupational Safety and Health Act (OSHA)."
15 *Don Whitaker Logging, Inc.*, 329 Or at 263; see also, e.g., *OR-OSHA v. Tom O'Brien*
16 *Construction Co., Inc.*, 148 Or App 453, 456, 461, 941 P2d 550 (1997), [aff'd](#), 329 Or 348,
17 986 P2d 1171 (1999) (citing federal case law). Here, ORS 654.086(2) mirrors its federal
18 counterpart, 29 USC section 666(k), which provides that

19 "a serious violation shall be deemed to exist in a place of employment if
20 there is a substantial probability that death or serious physical harm could
21 result from a condition which exists, or from one or more practices, means,
22 methods, operations, or processes which have been adopted or are in use, in
23 such place of employment *unless the employer did not, and could not with*
24 *the exercise of reasonable diligence, know of the presence of the violation.*"

1 (Emphasis added.) Accordingly, because the operative language under the federal OSHA
2 is identical to that under the OSEA, we may look to federal case law, and do so given the
3 dearth of Oregon cases addressing the issue of reasonable diligence.

4 In affirming item two of the citation, the ALJ grounded his ultimate finding
5 of imputable constructive knowledge solely in findings that "there was sufficient time for
6 Vorhof to observe either or both of the workers subject to the citations" and that Vorhof
7 was "within 65 feet of the violative conditions." The order includes no further discussion
8 of the standard governing constructive knowledge and reasonable diligence. Rather, in
9 relying only on time and proximity, it ultimately implies that, because Vorhof was
10 present at the worksite while the violation occurred, and because he was close enough to
11 potentially witness it, he had constructive knowledge of the violation. The ALJ thus
12 imputed constructive knowledge to employer based solely on a finding that Vorhof could
13 have seen the violation had he ceased performing his other duties--in this instance rigging
14 anchor cables--to look up when, or relatively soon after, Crawford stepped up from the
15 area protected by scaffolding (where fall-protection equipment was not required) to the
16 unprotected area near the top of the tank's shell.

17 We have previously rejected a narrow approach to the knowledge
18 requirement predicated on a supervisor's mere proximity to the violation. In *Skirvin v.*
19 *Accident Prevention Division*, 32 Or App 109, 111-13, 573 P2d 747, *rev den*, 282 Or 385
20 (1978), the employer was charged with violation of the OSEA based on an employee's
21 failure to wear a hardhat. On judicial review, we noted that the referee "said, 'While I

1 find [that] the employer's proximity to the employee who committed the act is not proof
2 of actual knowledge, I find [that] it constitutes *prima facie* evidence of constructive
3 knowledge * * *." *Id.* at 112. Addressing that conclusion, we stated:

4 "With all due respect, that reasoning process makes very little sense.
5 It is the equivalent of saying, "The employer must have knowledge of the
6 incident and is chargeable with having knowledge if he (that is, an agent or
7 responsible employee) is near enough to have observed the incident even if
8 it in fact was not observable."

9 *Id.* at 112-13. We reach a similar conclusion in this case. A finding that Vorhof was near
10 enough to observe Crawford as he stepped up onto the painter's rail and worked near the
11 outer edge of the tank without fall protection does not alone permit a determination that
12 Vorhof had constructive knowledge of that violation. The Supreme Court has explicitly
13 stated that the OSEA "is a fault-based system." *Don Whitaker Logging, Inc.*, 329 Or at
14 263. As employer points out, a finding that Vorhof had constructive knowledge of
15 Crawford's violation simply because it occurred within a period of time and in a place
16 that might theoretically have allowed him to see it amounts to imposition of a strict-
17 liability approach to the knowledge requirement whenever an employer affirmatively
18 chooses to place a supervisor at a worksite¹⁰--a safety precaution which, incidentally, is

¹⁰ As employer points out, we rejected the policy implications of that *de facto* strict-
liability approach in *Skirvin*:

""[W]e fail to see wherein charging an employer [with a 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 [objectives] sought by the Congress [in
enacting the federal OSHA]."

32 Or App at 114 (quoting *Brennan v. Occupational Safety & Health Rev. Com'n*, 511

1 not necessarily required. See OAR 437-001-0760(1)(a) (rule providing that employers
2 must take safety precautions "*does not require a supervisor on every part of an operation*
3 nor prohibit workers from working alone" (emphasis added)); *Roseburg Forest Prod.*,
4 106 Or App at 72 (so stating).

5 The federal courts have likewise rejected a narrow approach to the
6 knowledge requirement and accompanying reasonable diligence inquiry. Further, the
7 body of federal case law that has developed in connection with the federal Occupational
8 Safety and Health Act (OSHA) sets forth numerous pertinent factors--often emphasizing
9 the foreseeability of violations as well as the measures taken to prevent them--to which
10 we look for guidance in determining the proper standard for assessing a supervisor's
11 exercise of reasonable diligence. The Second Circuit recently noted that "'reasonable
12 diligence' for the purposes of constructive knowledge involves, *among other factors*, an
13 employer's 'obligation to inspect the work area, to anticipate hazards to which employees
14 may be exposed, and to take measures to prevent the occurrence.'" *Public Utilities*
15 *Maintenance, Inc. v. Secretary of Labor*, 417 Fed Appx 58, 63 (2d Cir 2011) (citations
16 omitted; emphasis added). Addressing supervisory duties, the court further stated that,

F2d 1139, 1145 (9th Cir 1975)) (first brackets in *Skirvin*). Moreover, in addressing the reasonable diligence inquiry, the federal courts have repeatedly clarified that "Congress quite clearly did not intend * * * to impose strict liability[.]" reaffirming that, "[i]n keeping with this purpose of eschewing a strict liability standard, * * * the Act imposes liability on the employer *only* if the employer knew, or 'with the exercise of reasonable diligence, [should have known] of the presence of the violation.'" *W.G. Yates & Sons v. Occupational Safety & Health*, 459 F3d 604, 606-07 (5th Cir 2006) (citations and some internal quotation marks omitted; emphasis, brackets, and omissions in original); *accord Titanium Metals Corp. of America v. Uesry*, 579 F2d 536, 543-44 (9th Cir 1978).

1 "[d]epending upon the circumstances, close supervision may or may not be reasonably
2 necessary." *Id.* (quoting *New York State Elec. & Gas v. Secretary of Labor*, 88 F3d 98,
3 109 (2d Cir 1996)) (brackets in *Public Utilities Maintenance, Inc.*; emphasis added). In
4 *Public Utilities Maintenance, Inc.*, the employer challenged a citation for safety
5 violations committed in connection with painting towers in close proximity to exposed
6 electric currents. In upholding the ALJ's affirmance of the citation, the Second Circuit
7 noted that the employer's safety plan specifically called for "an observer for each tower
8 on which a crew was working." *Id.* However, at the time of the violation, there was only
9 one observer present for crews working on two towers, and that "designated observer"
10 was "tidying up his truck instead of observing either [work crew]." *Id.* at 63-64.

11 Similarly, in *Kokosing Constr. Co. v. Occupational Safety & Hazard*
12 *Review Com'n*, 232 Fed Appx 510 (6th Cir 2007), the Sixth Circuit upheld a finding of
13 constructive knowledge on the part of a supervisory employee after acknowledging, using
14 language mirroring that relied upon by the Second Circuit in *Public Utilities*
15 *Maintenance, Inc.*, that "[r]easonable diligence involves *several factors*, including an
16 employer's obligation to inspect the work area, to anticipate hazards to which employees
17 may be exposed, and to take measures to prevent the occurrence." *Id.* at 512 (citations
18 and some internal quotation marks omitted; emphasis added). There, when using "wire
19 chokers" to pull heavy equipment at a construction site, the supervisor and another
20 employee were exposed to electric shock while lifting a wire choker from a pile of
21 extension cords and water-discharge hoses. *Id.* at 511. In affirming the agency's finding

1 that the supervisor had constructive knowledge of the violation, the court stated:

2 "[The supervisor] knew there was a possibility that an old and worn choker
3 like this one had abrasions that could pierce an electrical cord, and that such
4 an occurrence would present a hazard. By failing to check for such
5 abrasions or even instruct [the employee] to wear gloves before handling
6 the choker, [the supervisor] failed to take incredibly simple actions to
7 prevent the hazard.

8 "Additionally * * * the damage [to the choker] should have been
9 obvious to anyone who examined [it]. Thus, there is substantial evidence
10 on the record to show that reasonable diligence would have revealed the
11 hazard and, accordingly, [the supervisor] had constructive knowledge of it,
12 which can be imputed to [the employer]."

13 *Id.* at 512; *see also New York State Elec. & Gas*, 88 F3d at 109 ("*Depending upon the*
14 *circumstances*, close supervision may or may not be reasonably necessary to attain
15 compliance with safety rules. *Insisting that each employee be under continual supervisor*
16 *surveillance is a patently unworkable burden on employers.*" (Citation omitted;
17 emphases added.)); *Pennsylvania P. & L. v. Occupational S. & H.R. Com'n*, 737 F2d 350,
18 354 (3d Cir 1984) ("The [OSHA] does not impose strict liability on employers for
19 isolated and idiosyncratic instances of employee misconduct. We have held that the
20 purposes of the Act are best served by limiting citations for serious violations to conduct
21 that could have been *foreseen* and prevented by employers with the exercise of
22 reasonable diligence and care." (Citation omitted; emphasis added.)).

23 Moreover, contrary to OR-OSHA's argument that "[t]he issue * * * is
24 whether the supervisor *could have* discovered the violation through reasonable
25 diligence," most federal courts have determined--applying the same statutory language
26 defining a serious violation set forth in ORS 654.086(2)--that the relevant inquiry in

1 proving a serious violation is whether "an employer knew or *should have* known of a
2 hazardous condition." *American Wrecking Corp. v. Secretary of Labor*, 351 F3d 1254,
3 1264 (DC Cir 2003) (citation omitted; emphasis added); *see St. Joe Minerals v.*
4 *Occupational Safety & Health*, 647 F2d 840, 847 (8th Cir 1981) (an employer is liable
5 for a serious violation "only if [it] knew or *reasonably should have known* of the
6 hazardous condition" (emphasis added)); *Bunge Corp. v. Secretary of Labor*, 638 F2d
7 831, 834 (5th Cir 1981) (similar). We too have framed the inquiry using that language,
8 albeit in the context of an employer's failure to provide worksite supervision in the first
9 place. *See Roseburg Forest Prod.*, 106 Or App at 72-73 ("To establish a serious
10 violation, there must be a finding * * * that the employer knew, or with reasonable
11 diligence *should have* known, of the violation." (Citation omitted; emphasis added.)).
12 The reasonable diligence inquiry has even been expressly likened to assessment of
13 negligence. *See U.S. v. Ladish Malting Co.*, 135 F3d 484, 490 (7th Cir 1998) (explaining
14 that section 666(k) of the OSHA "defines a 'serious' violation * * * and allows the
15 employer to defend by showing that it 'did not, and could not with the exercise of
16 reasonable diligence, know of the presence of the violation'--*which is to say, that it was*
17 *not negligent*" (emphasis added)); *Bunge Corp.*, 638 F2d at 834 (characterizing the
18 reasonable diligence inquiry as a "negligence-type limitation").

19 Thus, to the extent that federal case law dictates that foreseeability be
20 considered in evaluating whether a supervisor exercised reasonable diligence, the ALJ's
21 inquiry in this case was critically shortsighted. Vorhof had no reason to believe that

1 Crawford would decide to step up out of the protective scaffolding and onto the painter's
2 rail. Rather, Crawford's violative action--unlike the violations described above--was
3 entirely unforeseeable, yet the ALJ did not take that factor (or myriad others considered
4 by federal courts as illustrated above) into account in determining that Vorhof failed to
5 exercise reasonable diligence to detect and prevent it.

6 Further, this court has previously quoted with approval--albeit in addressing
7 employer knowledge of safety violations committed by supervisors--federal case law
8 focusing on the adequacy and efficacy of employers' safety programs in evaluating
9 "whether an OSHA violation was reasonably foreseeable and preventable." [OR-OSHA](#)
10 [v. Don Whitaker Logging, Inc.](#), 148 Or App 464, 470-71, 941 P2d 1025 (1997), *rev'd*,
11 329 Or 256, 985 P2d 1272 (1999) (quoting *Pennsylvania P. & L.*, 737 F2d at 358); *see*
12 *CC & L Roofing*, 248 Or App at 53 (highlighting, in affirming a finding that the employer
13 lacked constructive knowledge, that the ALJ "found that [the employer] had done
14 everything that it could to supply, train, and prepare its employees to work in compliance
15 with OR-OSHA's rules and had exercised reasonable diligence to ensure that its workers
16 adhered to company policy and OR-OSHA rules regarding fall protection"); *see also*
17 *Brennan v. Butler Lime & Cement Company*, 520 F2d 1011, 1018 (7th Cir 1975) (stating
18 that "whether a serious violation of the standard was foreseeable with the exercise of
19 reasonable diligence depends in great part on whether [the employees] * * * had received
20 adequate safety instructions"); *Capital Elec. Line Builders of Kansas v. Marshall*, 678
21 F2d 128, 131 (10th Cir 1982) ("When an employee is working 50-60 feet in the air, there

1 is little an employer can do * * * beyond providing adequate training and equipment, and
2 explaining how to perform the job and what general hazards to avoid."). Here, the ALJ
3 failed to take into account employer's extensive safety protocols, including worksite-
4 specific fall-protection planning, in determining that Vorhof had constructive knowledge
5 of Crawford's violation.¹¹

6 Finally, as alluded to above, the ALJ did not address the evidence
7 indicating that Vorhof had no reason to believe that Crawford was exposed to a potential
8 fall hazard at all given the protective scaffolding which, had Crawford not decided of his
9 own accord to step up onto the painter's rail, negated the need for a safety harness and
10 lanyard. That deficiency, in addition to the ALJ's aforementioned failure to account for
11 Vorhof's other duties--*i.e.*, rigging anchor cables at the time of the violation--supports our
12 conclusion that the ALJ improperly failed to consider anything beyond Vorhof's
13 proximity to and opportunity to witness Crawford's violation in finding that he had
14 imputable constructive knowledge of it. As set forth above, such a conclusion--based
15 principally on the simple fact that employer placed a supervisory employee on site--
16 neither addresses nor comports with the principle that OR-OSHA cannot establish the
17 *prima facie* element of employer knowledge where the employer or its agent "did not,
18 and could not with the exercise of reasonable diligence, know of the presence of the

¹¹ Our reliance on federal case law in *Don Whitaker Logging, Inc.* was repudiated by the Supreme Court because the standard at issue there had no counterpart in the federal OSHA; however, the Supreme Court's subsequent decision relied in part on principles relevant here--most importantly that the OSEA is not designed to impose strict liability on employers for the acts of their employees via findings of constructive knowledge. *Don Whitaker Logging, Inc.*, 329 Or at 262-64.

1 violation." ORS 654.086(2); *see also* OAR 437-001-0015; 29 USC § 666(k).

2 Rather, in addition to time and proximity, when assessing a supervisor's
3 exercise of reasonable diligence or lack thereof the agency should consider, *inter alia*, the
4 foreseeability of a safety violation or hazardous condition, the general circumstances and
5 level of danger inherent in the work, the potential need for continuous supervision, the
6 nature and extent of the supervisor's other duties, the supervised workers' training and
7 experience, and the extent and efficacy of the employer's safety programs and
8 precautions. *See generally Skirvin*, 32 Or App at 112 ("[T]he employer's responsibility is
9 for those occurrences [it] can reasonably be expected to foresee or control and not as a
10 guarantor of employee conduct." (Internal quotation marks omitted; emphases added.)).
11 Accordingly, because the ALJ's finding of constructive knowledge was predicated only
12 on consideration of time and proximity, we reverse the ALJ's affirmance of item two and
13 remand for reconsideration in light of the additional factors that merit consideration in
14 determining whether Vorhof exercised reasonable diligence at the Creswell worksite. To
15 be clear, the violative condition's duration is not immaterial; rather, the fact that one of
16 several workers violated a safety rule during a given period of time does not necessarily
17 give rise to a determination that any on-site supervisor failed to exercise reasonable
18 diligence simply because he or she did not discover the violation within that period. As
19 employer correctly points out, "a substantial number of cases * * * address [the] duration
20 of a violative condition as *one potential factor among many* in determining whether an
21 employer exercised reasonable diligence." (Emphasis added.) As set forth above, we

1 embrace that multifactor analysis.

2 We next address OR-OSHA's cross-petition. As noted, OR-OSHA asserts
3 that the ALJ erred in vacating item one of the citation by improperly incorporating a
4 height requirement for mandatory fall-protection equipment into OAR 437-003-0073.

5 That rule provides:

6 "(1) When using boom supported elevating work platforms * * *.

7 "(2) Workers must use personal fall protection that complies with
8 Subdivision M of this division, when working in these devices."

9 Specifically, OR-OSHA contends that--in reading a height requirement into the above-
10 quoted rule--the ALJ erroneously relied on that rule's cross-reference to Subdivision M of
11 Division 3 of the Oregon Occupational Safety and Health Standards (Subdivision M).
12 Because Subdivision M includes OAR 437-003-1501, which sets forth general height
13 requirements for the mandatory use of fall-protection equipment, the ALJ concluded that
14 OAR 437-003-0073 likewise includes a height requirement.

15 As applied to these facts, OR-OSHA challenges the ALJ's conclusion that,
16 although Bryan was in fact on a "boom supported elevat[ing] work platform[]" at the
17 time of the alleged violation and was therefore subject to the requirements of OAR 437-
18 003-0073, he was only five to six feet¹² above the ground such that no violation could

¹² OAR 437-003-1501, while generally imposing a 10-foot height requirement on fall-protection violations, contains exceptions reducing the height requirement to six feet in certain circumstances. Assuming that one of those exceptions applied to these facts, the ALJ nevertheless found that OR-OSHA "failed in its burden of proof to show that Bryan was exposed to a hazard of 6 feet or more as there was no specific evidence provided to indicate how high the lift was at the time of the alleged violation. The lift

1 have occurred given the height requirement ostensibly imposed by the rule's cross-
2 reference to Subdivision M. Employer responds, first, that the ALJ properly incorporated
3 the aforementioned height requirement into OAR 437-003-0073 and then correctly
4 vacated item one based on the undisputed fact that Bryan was only five to six feet above
5 the ground when his lanyard was not tethered to the lift. Alternatively, employer asserts
6 that (1) OR-OSHA did not carry its burden to prove that employer had knowledge of the
7 alleged violation, (2) the affirmative defense of unpreventable employee misconduct
8 relieves employer of liability, and (3) even if Bryan's failure to reattach his lanyard
9 constituted a violation, it was at most a "minimal" violation.¹³ We agree with OR-OSHA
10 that OAR 437-003-0073 does not incorporate a height requirement and address
11 employer's alternative arguments below.

12 OR-OSHA's cross-petition requires that we interpret OAR 437-003-0073.
13 In construing an administrative rule, we employ the same methodology used to determine
14 the meaning of a statute. [*Protect Grand Island Farms v. Yamhill County*](#), 249 Or App

may have been at 6 feet or it may have been at 5 feet, on this record there is no way to know." Because OR-OSHA does not challenge that finding on judicial review, we determine only whether the rule incorporates the collective height requirements set forth in OAR 437-003-1501 without regard to any specific height requirement applicable to these facts.

¹³ A minimal violation is a violation that "does not have a direct or immediate relationship to the safety or health of employees." OAR 437-001-0015; *see* ORS 654.071(5) (authorizing notices "in lieu of citation[s]" for minimal violations that bear "no direct or immediate relationship to occupational safety or health"). Here, employer argues that Bryan would have impacted the ground in the event of a fall whether or not his lanyard had been secured to the lift.

1 223, 230, 275 P3d 201, *rev den*, 352 Or 170 (2012) (citing [Tye v. McFetridge](#), 342 Or 61,
2 69, 149 P3d 1111 (2006)). We examine the text of the rule in context in order to discern
3 and give effect to the intent of the enacting body--here, the Director of the Department of
4 Business and Consumer Services (the director).¹⁴ *Id.* at 230-31; *see also* *PGE v. Bureau*
5 *of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143 (1993); [State v. Gaines](#), 346
6 Or 160, 171-72, 206 P3d 1042 (2009) (setting forth interpretive methodology). As noted,
7 OAR 437-003-0073 provides, in relevant part:

8 "(1) When using boom supported elevating work platforms * * *.

9 "(2) Workers must use personal fall protection that complies with
10 Subdivision M of this division, when working in these devices."

11 First, addressing the operative language "must use personal fall protection
12 that complies with Subdivision M," we conclude that, in context, "personal fall
13 protection" refers not to the attendant circumstances (*i.e.*, the worker's distance from the
14 ground) but rather to the type of equipment or precautions required. In other words,
15 giving the words "their plain, natural, and ordinary meaning[,]" *PGE*, 317 Or at 611,
16 "personal fall protection" patently refers to the "what" (*i.e.*, what particular fall-protection
17 measures and equipment are required) rather than the "when" (*i.e.*, when fall-protection

¹⁴ We afford OR-OSHA's interpretation of OAR 437-003-0073 no deference, as the deferential standard set forth in, among other cases, [Coffey v. Board of Geologist Examiners](#), 348 Or 494, 509, 235 P3d 678 (2010), applies "only when the body interpreting the rule also is the body that promulgated it." *Don Whitaker Logging, Inc.*, 329 Or at 262 n 7. The rule at issue here was promulgated by the director, not by OR-OSHA, and we therefore "assess the correctness of OR-OSHA's interpretation without according any deference to OR-OSHA's proposed interpretation." *Id.* (citing *Dunning v. Corrections Facility Sitting Authority*, 325 Or 269, 277 n 4, 935 P2d 1209 (1997)).

1 measures and equipment are required) associated with the use of fall-protection measures
2 and equipment on lifts. The "when" is supplied by subsection (1): "*When* using boom
3 supported elevating work platforms." (Emphasis added.) It is then reiterated in
4 subsection (2): "*when* working in these devices." (Emphasis added.) Neither iteration of
5 that language provides any indication that the director intended to reference height
6 requirements or other circumstances; rather, the text indicates that the relevant
7 circumstance is simply a worker's presence on a "boom supported elevating work
8 platform" and nothing more.

9 Conversely, the "what" is supplied by subsection (2) via its reference to
10 "personal fall *protection* that complies with Subdivision M" and OAR 437-003-1501's
11 language within Subdivision M providing that "the employer shall ensure that *fall*
12 *protection systems* are provided, installed, and implemented according to the criteria in
13 [29 CFR section] 1926.502." (Emphases added.) In turn, 29 CFR section 1926.502
14 provides specific guidelines for fall-protection *measures and equipment*, including
15 "[g]uardrail systems," "[s]afety net systems," "[p]ersonal fall arrest systems"
16 (encompassing safety harnesses and lanyards), "[w]arning line systems," and other *means*
17 of providing for employee safety. In fact, that regulation is titled "[f]all protection
18 *systems* criteria and practices" and refers specifically to "fall protection *systems*"
19 throughout as illustrated above. 29 CFR § 1926.502 (emphases added). That context
20 further reinforces the director's apparent intent to reference Subdivision M only insofar as
21 it includes the specific requirements pertaining to "personal fall *protection*" on lifts.

1 (Emphasis added.)

2 Accordingly, we conclude that the ALJ erred in reading a height
3 requirement into OAR 437-003-0073. However, in erroneously vacating item one on that
4 basis, the ALJ did not assess whether OR-OSHA met its burden to prove imputable
5 constructive knowledge on the part of Vorhof. That is, while OR-OSHA's cross-petition
6 is well-taken, we agree in part with employer's alternative argument that, "in the event
7 that this court reverses as to the ALJ's OAR 437-003-0073(2) finding, OR-OSHA also
8 failed to meet its burden to show that [employer] had the requisite actual or constructive
9 knowledge of the alleged violation[]." While OR-OSHA did not necessarily fail to meet
10 its burden in that regard, the knowledge element of its *prima facie* case was erroneously
11 assessed as discussed above. We therefore remand for reconsideration in light of both the
12 proper interpretation of OAR 437-003-0073 and the proper standard for assessing a
13 supervisor's constructive knowledge of employees' safety violations.

14 In view of the foregoing discussion, with regard to item two we reverse and
15 remand for reconsideration in light of the broader inquiry required in assessing
16 reasonable diligence set forth in this opinion. We likewise reverse and remand the ALJ's
17 vacation of item one so that the agency can determine, under the proper interpretation of
18 OAR 437-003-0073, whether OR-OSHA met its burden of proving a serious violation on
19 the part of employer--including its burden of proving imputable constructive knowledge
20 consistent with the foregoing discussion of that issue.

21 Reversed and remanded on petition and cross-petition.