There are limits – employer liability under OSHA

By Marc K. Shaye

It is well established that in pursuing an employer for violation of a safety standard, the government must make a prima facie case that:

1. the standard applied;
2. the standard was violated;
3. an employee was exposed to the hazard created; and importantly
4. the employer knowingly disregarded the law.

This discussion focuses on the fourth element of the burden placed on the prosecution of a safety violation, without which the burden of proof fails.

On July 24, 2013 the United States Court of Appeals for the Eleventh Circuit (No. 12-10275) addressed the issue in the Petition for Review of a Decision of the Occupational Safety and Health Commission (OSHC –O:11-0646), *ComTran Group, Inc. v. U.S. Department of Labor.*[1]

What if the alleged violator is the supervisor? Can knowledge be imputed to the employer?

To adequately carry the burden of proof regarding the employer's knowledge, the government must show that the employer had either actual or constructive knowledge. If this is shown then knowledge is imputed to the employer. For example, if the supervisor sees an employee's misconduct, his knowledge and tacit acceptance of the conduct will be imputed to the employer. This is viewed as actual knowledge. If the supervisor did not see the violation but was in the vicinity so he or she should have been aware of the circumstances, this is deemed constructive knowledge.

Moreover, if the government can show failure to implement an adequate safety program, misconduct is construed as reasonably foreseeable. While one Administrative Law Judge's opinion did conclude that having a supervisory employee violate a safety standard equates to strong evidence that the safety program is lax, it was not sufficient to preclude a reversal imputing the employer's knowledge.

It is not cut and dried to say that if the supervisor had knowledge, it is therefore imputed to the employer. (Most jurisdictions draw a distinction between imputing a supervisor's knowledge of a subordinate's misconduct and the supervisor's misconduct.) Yet, the well-reasoned opinion in ComTran provides a compelling argument to support employers when supervisory misconduct is involved, so as to not impute knowledge. Keep in mind that the four elements, the burden of the prosecution, must still be satisfied. As to knowledge, the criteria earlier pointed out to establish knowledge are required.

[1] The author has not included references beyond citing the ComTran opinion for the convenience of the reader. Legal citations are found in the ComTran decision for the points addressed.

Assume for this analysis, the supervisor does have full knowledge of his alleged violation. Is it appropriate to impute this knowledge to the employer? It has been held that "an imputation of a supervisor's acts to the company in each instance would frustrate the goals behind the Act". If a violation by an employee is reasonably foreseeable, the employer may be held responsible. But, if the employee's act is an isolated incident of unforeseeable or idiosyncratic behavior, then common sense and the purposes of the Act require that the citation be set aside. Again, the burden is on the government to prove the violation should have been reasonably foreseeable by the employer.

With the obligation embodied in the prima facie burden placed on the government, speculation and conjecture have no place. If there is an isolated violation of a standard that is unknown to the employer and contrary to its orders, a violation of OSHA's general duty clause cannot be sustained.

Regarding the characterization of "supervisor", an employee should be deemed a supervisor by virtue of experience and designation for a particular assignment or job. The supervisor status is reinforced if that individual is more qualified than others working with this individual at the time. Further, did the employer delegate responsibilities relative to safety for the work performed? Employer policy may include the obligation to look out for fellow workers and take action when warranted.

Keep in mind that it is not the obligation of the employer to prove that the violation of a safety standard was unpreventable. Nevertheless, once knowledge is established, the employer then has a burden to show the violation was unforeseeable. Yet, under the circumstances of a malfeasant supervisor, it is not to be assumed that the employer had knowledge nor is it to be imputed. Nor is it sufficient to show that because the government demonstrates misconduct by a supervisor that it has met its burden in establishing a prima facie case. If the prosecution is permitted to establish employer knowledge solely with proof of the supervisor's misconduct, notwithstanding that the employer did not know, and could not have known of that misconduct, then the prosecution is relieved of having to establish knowledge. The requirements of the prima facie case are effectively gutted. This would improperly shift the burden and shift the obligation to the employer to show the conduct was unforeseeable.

It is emphasized that an employer seeking to raise an affirmative defense, its burden, occurs only if the government has successfully established the prima facie case.

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