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The Original Roofing Co., LLC v. Chief Admin. Officer of the Occupational Safety and Health Admin., 135 Nev. Adv. Op. 18 (Jun. 6, 2019)

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Recommended Citation

Coggins, Riley, "The Original Roofing Co., LLC v. Chief Admin. Officer of the Occupational Safety and Health Admin., 135 Nev. Adv. Op. 18 (Jun. 6, 2019)" (2019). *Nevada Supreme Court Summaries*. 1237. <https://scholars.law.unlv.edu/nvscs/1237>

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The Original Roofing Co., LLC v. Chief Admin. Officer of the Occupational Safety and Health Admin., 135 Nev. Adv. Op. 18 (Jun. 6, 2019).¹

EMPLOYER COMPLIANCE: SAFETY REGULATIONS

Summary

The Court held that supervisors' knowledge that their own conduct, or that of an employee under their supervision, violates NOSHA safety laws cannot be attributed to the employer unless the impermissible actions were foreseeable.

Background

In 2015, an inspector for Nevada Occupational Safety and Health Administration ("NOSHA") witnessed two employees, one of which was a supervisor, of The Original Roofing Company, LLC ("TORC") working on a steep roof without federally mandated fall protection. The employee and supervisor both admitted that they had received training from TORC on fall protection and knew they were required to use it. The inspector imputed knowledge of the violation to TORC, reasoning that because a TORC supervisor knew that employees weren't using proper fall protection, the company itself knew as well. The inspector subsequently cited TORC for violating federal safety regulation 29 C.F.R. 1926.501(b)(11).

After TORC contested the citation, the Nevada Occupational Safety and Health Review Board ("Review Board") reviewed the citation and determined that NOSHA failed to prove TORC violated the law. The district court later granted judicial review and reversed the Review Board's decision. TORC appealed.

Discussion

NOSHA uses the same standards outlined by federal Occupational Safety and Health Administration ("OSHA") laws.² To demonstrate a violation of OSHA law, the Chief Administrative Officer of NOSHA must prove four elements. The fourth element states that the employer had actual or constructive knowledge of the impermissible conduct. NOSHA did not allege that TORC had actual knowledge, thus the Court must determine whether TORC had constructive knowledge of the conduct.

A supervisor's knowledge of violative conduct is generally enough to impute the employer with knowledge. However, a supervisor's knowledge of the conduct should not be imputed to the employer if the supervisor's conduct was not foreseeable.³ The Court cited several circuit court decisions and held that "an employer's knowledge of violative conduct must be established 'not vicariously through the violator's knowledge, but by either the employer's actual knowledge, or by its constructive knowledge based on the fact that the employer could, under the circumstances of the case, foresee the unsafe conduct of the supervisor.'"⁴ The Court noted that there is no single

¹ By Riley Coggins.

² NEV. REV. STAT. 618.295(8)(2019).

³ See NEV. REV. STAT. 618.625(2) (2019).

⁴ *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1316 (11th Cir. 2013).

type of evidence required to prove constructive knowledge. Ultimately, a supervisor's knowledge that his own conduct is impermissible will not be imputed to the employer if the employer's "safety policy, training, and discipline" are such that the supervisor's conduct is unforeseeable.⁵

Here, considerable evidence supported the Review Board's finding that the supervisor's conduct was not foreseeable. TORC presented substantial evidence of its efforts to meet OSHA standards and promote a culture of safety among its employees. TORC's evidence included proof of considerable amounts of cash spent on its safety programs, company fall protection forms, site inspections, safety meetings, safety audits, and past written notices to nonconforming employees.

NOSHA argued that TORC had constructive knowledge because of similar citations in 2012 and 2013. The Court rejected this argument because those citations involved different supervisors, and it was unforeseeable that this supervisor would violate the safety standards after receiving extensive training from TORC. Based on the evidence provided by TORC, the Court agreed with the Review Board's conclusion that NOSHA failed to demonstrate TORC's knowledge of the violative conduct. The Court reversed the district court's order granting judicial review.

Conclusion

The Court held that TORC's supervisors' knowledge that his own conduct, or that of an employee under his supervision, violated NOSHA safety laws could not be attributed to the employer because the impermissible actions were not foreseeable. The Court reversed the district court's decision.

⁵ W.G. Yates & Sons Constr. Co. v. Occupational Safety & Health Review Comm'n, 459 F.3d 604, 608-09 (5th Cir. 2006).