

## Even When Supervisors Foul Up, OSHA Has to Prove Their Case

Publication

8.21.13

Employers are not guilty until proven innocent. Napoleonic justice is not the law of the land. To make out an OSHA citation, OSHA has the burden to prove four (4) elements: an applicable standard, that a hazard existed, an employee was exposed, and that the employer knew, or should have known of the violation.

Employers learn of violations or hazards through supervisory employees. So what happens when it is the supervisor who breaks the rules?

OSHA may take the position that an employer is automatically liable for violations committed by the supervisor. His knowledge of his own violation is imputed to the employer. So now the burden shifts to the employer to meet the burden of proving the affirmative defense of unpreventable employee misconduct.

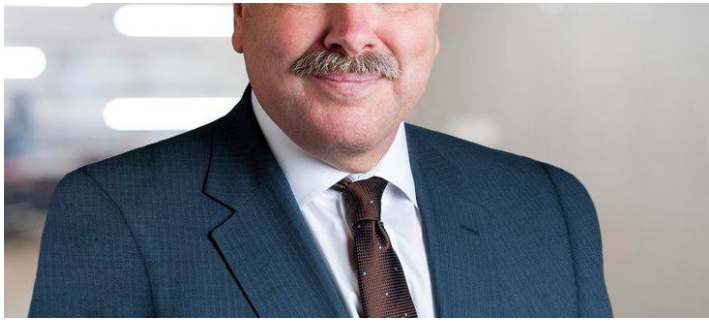
When a supervisory employee has knowledge of a violation, that knowledge is “imputed” to the employer. In addition to proving the employer’s “actual knowledge,” OSHA can prove that, even if the supervisor did not have actual knowledge, he had “constructive knowledge” of the violation, such as where the act occurred in his plain view.

And if OSHA cannot prove actual or constructive knowledge, OSHA can try to prove the “knowledge” element by showing that the employer should have known of the violation with the exercise of due diligence. OSHA can prove this lack of diligence based on the employer’s failure to implement and maintain an effective safety program, “with the rationale being that – in the absence of such a program – the misconduct was reasonably foreseeable.”

This article appeared on August 21, 2013 on *TLNT.com* and also on the Fisher Phillips [Workplace Safety and Health Law Blog](#).

### ***Related People***





**Howard A. Mavity**

Partner

404.240.4204

Email