Oregon OSHA

Employer Knowledge Stakeholder Committee

Meeting Minutes

Oregon OSHA v. CBI Services, Inc. / Supreme Court decision

Wednesday, July 22, 2015

Location: PFO Conference Room
16760 SW Upper Boones Ferry Road, Suite 200, Tigard OR 97224

Attendees:

Alta Schafer	Jim Gibson
Bryon Snapp	Kim Gamble
Chris Ottoson	Marilyn Schuster
Clark Vermillion	Michael Wood
David Douglas	Manish Gooneratne
Dede Montgomery	Peggy Munsell
Eliot Lapidus	Randy Ingraham
Gary Beck	Stan Strickland
George Goodman	Tony Howard
Glenn Curry	

Self-introductions were made.

Michael Wood welcomed everyone to the Employer Knowledge Stakeholder Committee meeting. He discussed the background about why this Employer Knowledge Stakeholder Committee is being formed by Oregon OSHA and how this effort is not an extension of the previous employer knowledge efforts taken a few years back. He provided background information on the Oregon Supreme Court decision on the CBI case as well as a brief discussion of the earlier CC&L decision by the Court of Appeals. He explained that over half of Oregon OSHA citations are based on constructive knowledge rather than actual knowledge.

The Court of Appeals said that if Oregon OSHA cites an employer using constructive knowledge, then Oregon OSHA needs to specifically address a number of items to support the employer knowledge before they can cite. For example, the duration of the violation could not be the only factor. The Oregon Supreme Court rejected the Court of Appeal's reasoning and- remanded the case back to the Board for further proceedings.

The Supreme Court focused on "could have known" versus "should have known." The key phrase in the statute refers to what "the employer could not have known with reasonable diligence.". The court did not tell OSHA explicitly to address the issue by rule, but Oregon OSHA has determined that providing written guidance in either rule or policy is important to ensure as much consistency and clarity as possible.

There are two questions that Michael would like the group to consider:

- To what degree can we spell out "reasonable diligence"?

- Should it be spelled out in a rule or an agency policy?

Michael suggested it will be easier for the group to go from specific scenarios to general principles. We should bring hypothetical situations to the next meeting to discuss. He asked everyone to provide scenarios of real life and hypothetical situations. He is looking for guidance that will cover 90% of situations and that exceptions will exist for the other 10%.

Michael also asked about the "nature of knowledge". Should we look at "burden of proof"? As the court indicated (without ruling one way or the other) Oregon OSHA could argue that Oregon OSHA does not have to prove knowledge until the employer has brought it into question.

George Goodman added that he has done his own research. He believes that the "burden of proof" for employer knowledge is and should remain Oregon OSHA's. He wants to adopt a rule, not a policy because Oregon OSHA complains all the time in court that the judges take a case-by-case bias because he thinks Oregon OSHA is interpreting the rules differently. George handed out a document to all attendees: "Employer Knowledge Rulemaking in Light of the CBI Supreme Court case". He argued that Oregon OSHA is bound under state law to follow federal rules and law, including case law.

George added that "Could have known" together with reasonable diligence would equal "should have known". He restated that he is in favor of a rule instead of a policy.

Michael summarized the purpose of this group from Oregon OSHA's perspective:

We are here to discuss what reasonable diligence is.
Oregon OSHA will move forward with either a policy or a rule.
Oregon OSHA wants the group's advice, not unanimity.
Oregon OSHA will continue to look at what other states have done or attempted to do.
Ultimately it is the department's rulemaking or policy.

Michael said OR-OSHA rules receive deference in court. It is easier to put it in as a policy, but it makes sense to do it in a rule for consistency. We need to provide written guidance and not use a case by case basis only.

George added consistency is helpful for employers. A rule will stop the judges from doing funny things, and if done right, Oregon OSHA can have everything it wants and employers will not be hurt. It would be a win/win.

The group brainstormed examples of employer reasonable diligence as bullet points:

Duration
Safety program
Level of supervision
Hazard assessments
Discipline policy: documentation, esp. prior disciplinary actions
Training and retraining

Safety walkthroughs: the frequency
Unpredictability of site visits
The nature of the work and job specifics
Proximity of the hazard
Expertize of the supervisor
Documented safety program
Document of discipline program
Document of training
Document of available/necessary equipment for the job.

Tony said there are employer knowledge items in the Field Inspection Reference Manual (FIRM).
The FIRM lists:

Safety committee record of corrections
Collective bargaining agreements
Reports of prior injuries and accidents
Worker's comp data
OSHA inspection history
Corrective actions taken
Complaints
Employee interviews

Kim Gamble from Anderson added all craft workers that come to work for Anderson have to go through a brief safety orientation training. Craft workers after the meeting when caught doing something wrong, say, "Did you really mean it?" What else are we [Anderson] supposed to do? How can we predict what history and training craft workers from other states have had and how they have previously been disciplined? How can we predict employee misconduct when they have worked for other companies or in other states where safety is not the priority?

Stan asked if this would be used on an upper tier employer contractor, and what is the difference between "actual" and "constructive" knowledge?

Michael advised that no, the rule wouldn't be used on upper tier contractors like generals, with some exceptions (if the general's employees were exposed). An employer seeing a hazardous condition is a actual knowledge, so constructive knowledge would not come up at all in that case. Constructive knowledge is where the employer could have known of the hazard, or potential for the hazard, if they had performed reasonable diligence.

Dave asked as an example, what if a steel worker chooses to stand on a guard rail and not use fall protection?

Michael said they would ask what the previous history of discipline looked like.
George added that discipline is where the rubber meets the road: Counselling, Training, Retraining, Terminated, Etc.

DeDe mentioned that discipline is sometimes happening, but the employee does not always recognize it as discipline.

Eliot asked what about levels of responsibility? General contractors verses subcontractors?

Michael replied that this discussion is not focused on the upper tier employers. It is focused on the immediate employer.

Tony asked what if a supervisor finds out during a meeting that there is uncapped rebar and waits until after the meeting to correct? The employer now has knowledge.

Tony is concerned that a supervisor will not bring up an issue during an Oregon OSHA inspection because of the fear that bringing it up is admitting to the violation. Supervisors do not want to toss themselves into the fire.
Tony provides an example:

> Gary is doing an inspection with the supervisor and a George goes up to weld without PPE but the supervisor doesn't say anything because Gary is there, then after a few minutes, Gary starts taking pictures. What should have happened?

Michael said if the inspector and the supervisor witness a violation at the same time, and the supervisor immediately acts to resolve the hazard, Oregon OSHA should not cite the employer if he is effectively administering a safety plan and corrects the condition (it would be treated using the constructive knowledge tests, rather than relying upon actual knowledge that did not exist prior to the inspection). If the employee looks down at the supervisor and recognizes the supervisor and makes no attempt to change what he is doing, then Gary would be suspicious of what kind of discipline policy the company has and go through the steps and look at constructive knowledge rather than actual knowledge.

George explained that for actual knowledge, the employer must have had the knowledge long enough to take corrective action. Michael agreed.

Stan added a bullet point to the chart:

> Expertise of the supervisor

Bryon added that on an excavation site, if the supervisor is not trained as a competent person for the excavation standard, how can he effectively supervise the employees working in or around the excavation?

Dave asked if OSHA wants to be prescriptive about how supervision should be conducted?

Michael advised that no, we do not, and we probably do not have the authority to be prescriptive. We would not state how many supervisors are required for a set number of employees, for example.

George said Oregon OSHA should expect "Adequate supervision under the circumstances," and Michael agreed.

Tony asked if we can establish what is not actual knowledge?

Michael responded, if a supervisor corrects a violation while in the presence of an inspector, Oregon OSHA will not use that correction as the basis for "actual knowledge."

The next meeting will be focused on scenarios that raise various knowledge issues to see what sort of consensus there may be on what constitutes reasonable diligence as it relates to constructive knowledge.

Meeting adjourned.

Next meeting:
August 26, 2015
OSHA's Portland Office
16760 SW Upper Boones Ferry Rd, Suite 200
Tigard, OR 97224