THE UNPREVENTABLE EMPLOYEE MISCONDUCT DEFENSE

PREPARING TO PROVE IT

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Introduction

Whether to assert an employee misconduct defense is a decision to make carefully, recognizing OSHA does not like the defense, rarely finds an employer to have met it, and the standards for establishing the defense are stringent. However, where an employer has a strong safety program, both on paper and in practice, an employer should consider asserting the defense. In addition, depending upon where the matter is pending, an employer may argue successfully that the Secretary of Labor bears the burden to prove the employee’s misconduct was foreseeable, rather than the employer having to prove it was unforeseeable.

Employer Knowledge of the Violation

To establish a violation of an OSHA standard, the Secretary must, among other things, prove the employer had actual or constructive knowledge of the violation. New York State Elec. & Gas Corp. v. Secretary of Labor, 88 F.3d 98, 105-06 (2d Cir. 1996); Y.G. Yates & Sons Construction Co., Inc., 459 F.3d 604 (5th Cir. 2006); 29 U.S.C. § 666 (k) (“Serious violation” cannot exist when “the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.”). The Secretary typically proves employer knowledge in one of two ways: 1) where a supervisor has either actual or constructive notice of the violation, e.g., where a supervisor sees a subordinate’s misconduct/safety violation, or the supervisor was in close enough proximity that he should have seen the misconduct; or 2) based upon the employer’s failure to implement an adequate safety program, the rationale being that, in the absence of such a program, the misconduct was reasonably foreseeable. See, e.g., Quinlan v. Secretary, U.S. Dept. of Labor, 812 F.3d 832 (11th Cir. 2016); New York State Elec. & Gas Corp. v. Secretary of Labor, 88 F.3d 98, 105-06 (2d Cir. 1996) (“Knowledge or constructive knowledge may be imputed to an employer through a supervisory agent. Further, constructive knowledge may be predicated on an employer’s failure to establish an adequate program to promote compliance with safety standards.”) (citations omitted). For purposes of imputing knowledge to an employer, the Commission takes a very broad view of who is a “supervisor.” See All Erection & Crane Rental Corp. v. OSHRC, 507 Fed. Appx. 511, 23 OSHC 2169 (6th Cir. 2012) (in rejecting the employer’s argument that an employee was not a supervisor, the Sixth Circuit noted the Commission’s statement, “[t]he fact that Feller was in charge of the crane operations on the site, and as he stated, that he was responsible for the safety of the oiler on the job site is determinative.”); Tempo Shipyards, Inc.15 OSHC 1533, at * 6 (1992) (“An employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer.”).

But what if the employer has a good safety program and the supervisor neither knew nor should have known; or, what if it was the supervisor who engaged in the misconduct. In those circumstances, does OSHA still bear the burden to prove employer knowledge of the violation, or is the burden shifted onto the employer to establish, as an affirmative defense, unpreventable employee misconduct. Unfortunately, the answers to these questions are not entirely clear. As former United States Supreme Court Justice Byron White stated in objecting to his colleagues’ failure to accept for review an OSHA case that raised this issue, “There is a confusing patchwork of conflicting approaches to this issue.” Brock v. L.E. Myers, 818 F.2d 1270 (6th Cir.), cert. denied, 484 U.S. 989 (1987)(White, J., dissenting from denial of certiorari).
The Review Commission and the First, Fifth, Sixth, Eighth, and Eleventh Circuit Courts of Appeal hold that employee misconduct is an affirmative defense the employer must prove. But the Third, Fourth, Ninth, and Tenth Circuits hold the Secretary of Labor must prove the employee’s misconduct was foreseeable to the employer.

**Supervisor Misconduct**

In cases of supervisor misconduct, the Review Commission automatically imputes to the employer knowledge of the supervisor’s violation. The Sixth Circuit Court of Appeals, with little analysis, adopted the Review Commission’s position that a supervisor’s violation of a safety standard is automatically attributable to the employer – it establishes employer knowledge of the violation. But the five other circuit courts that have considered this issue have rejected the Review Commission’s position. They hold the Secretary must prove employer knowledge, not vicariously through the supervisor’s knowledge, but by either the employer’s actual knowledge, or by its constructive knowledge based on the fact the employer could foresee the unsafe conduct of the supervisor – that is, with evidence of lax safety standards. As stated by the most recent circuit court to address this issue, while a supervisor’s knowledge of violative conduct by other employees is generally imputable to the employer, “a different situation is presented when a supervisor is the one personally engaged in the misconduct.” Comtran Group, Inc. v. U.S. Department of Labor, 722 F.3d 1304, 1313-14 (11th Cir. 2013) (citing Power & Light Co. v. OSHA Review Comm’n, 737 F.2d 350, 357-58 & n.9 (3rd Cir. 1984). The court explained:

> When a corporate employer entrusts to a supervisory employee its duty to assure employee compliance with safety standards, it is reasonable to charge the employer with the supervisor’s knowledge, actual or constructive, of noncomplying conduct of a subordinate.” Mountain States, 623 F.2d at 158. It is reasonable to do this because a corporate employer can, of course, only act through its agents – as several of the above-cited cases have recognized – and the supervisor acts as the “eyes and ears” of the absent employer. That makes his knowledge the employer’s knowledge. However, “a different situation is presented” when the misconduct is the supervisor’s own. Id. In that situation, the employer has no “eyes and ears.” It is, figuratively speaking, blind and deaf. To impute knowledge in this situation would be fundamentally unfair. [citation omitted]

*Id.* at 1316-17.

The Fourth Circuit was the first to address employer knowledge in supervisor misconduct cases in Ocean Electric Corp. v. Secretary of Labor, 594 F.2d 396 (4th Cir. 1979). In that case, an experienced electrical contractor foreman left open a door to a switch gear unit, which led to
electrocution and death of another employee. The Commission recognized OSHA did not impose strict liability on employers for the negligent acts of their supervisors, but stated liability could be avoided only if the employer has done “everything reasonably possible to assure compliance.” The Commission then rejected that defense finding Ocean “had not carried its burden of proof by showing the adequacy of its safety program.” Id. at 397-98. The Fourth Circuit reversed. After analyzing both Commission precedent and circuit case law in depth, the Fourth Circuit summed up the law: “[I]f a violation by an employee is reasonably foreseeable, the company 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 behind the Act require that a citation be set aside.” Id. at 401. The Fourth Circuit held the Secretary bore the burden to prove the violation was “reasonably foreseeable” by the employer and it was error for the Commission to place that burden on Ocean. The court noted that a supervisor’s violation of a standard that is both unknown to the employer and contrary to its orders does not violate OSHA. Id. at 401.

The Third, Fifth, Tenth, and Eleventh Circuits follow this same approach. In the most recent (2013) of these cases, Comtran, 722 F.3d 1304, the employer assigned a two-man crew: Walter Cobb, the foreman; and Chris Jernigan, a helper, to relocate existing DOT utilities that ran along a road in Lawrenceville, Georgia. The crew dug a trench approximately four feet deep, placed the “spoil pile” for the excavation at least two feet away from the edge of the trench, and erected a silt fence between the pile and the excavation. There was no dispute the excavation was done properly and in compliance with OSHA. The next morning, Comtran’s project manager stopped by to check on the progress. There were no problems, so he left to check on two other projects. Thereafter, Cobb (the foreman) got into the trench and began digging around to find the utilities conduit, but he was unsuccessful. At some point, he took down the silt fence because he had to “dig back” to find the utilities. As he continued to dig, he widened and deepened the trench (to six feet) and the spoil came closer to the edge of the excavation. While Cobb was still in the trench, an OSHA compliance officer drove by and saw the soil pile and only part of Cobb’s head showing out of the top of the excavation. Comtran was subsequently charged with two OSHA violations – one for failing to provide adequate trenching, and the second for failing to maintain the spoil pile properly. The Administrative Law Judge and Commission upheld the citations finding that because Cobb was a supervisor/foreman, his knowledge of his own malfeasance was imputable to Comtran. The Eleventh Circuit reversed, following decisions of the four other circuit courts referenced above. The court declared:

We hold that the Secretary does not carry her burden and establish a prima facie case with respect to employer knowledge merely by demonstrating that a supervisor engaged in misconduct. A supervisor’s “rogue conduct” cannot be imputed to the employer in that situation. Rather, “employer knowledge 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 (that is, with evidence of lax safety standards).” Y.G.

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4 Pennsylvania Power & Light Co. v. OSH Review Comm’n, 737 F.2d 350 (3rd Cir. 1984); Y.G. Yates & Sons Construction Co., Inc., 459 F.3d 604 (5th Cir. 2006); Mountain States Telephone & Telegraph Co. v. OSH Review Comm’n, 623 F.2d 155 (10th Cir. 1980). The Second Circuit has not directly decided this issue, but analyzed and used language suggesting it agrees with these courts that the Secretary bears the burden to prove foreseeability. New York State Elec. & Gas Corp. v. Sec’y of Labor, 88 F.3d 98 (2d Cir. 1996).
Yates & Sons Construction Co., 459 F.3d at 609 n.8. Without such evidence, a supervisor’s misconduct may be viewed as an isolated incident of unforeseeable or idiosyncratic behavior, [citation omitted] which is insufficient, by itself, to impose liability under the Act.

Id. at 1316 (citations omitted). The Eleventh Circuit concluded:

In sum, we hold that if the Secretary seeks to establish that an employer had knowledge of misconduct by a supervisor, she must do more than merely point to the misconduct itself. To meet her *prima facie* burden, she must put forth evidence independent of the misconduct. This could be done, for example, with evidence of lax safety standards. But, the Secretary is the one who must provide such evidence.

Id. at 1318.

**Proving Knowledge/Employee Misconduct**

Who bears the burden of proof on foreseeability may well impact the outcome on a citation, but the courts have noted, in such cases, “the Secretary’s *prima facie* case and the employer’s unpreventable conduct defense both involve an identical issue: whether the employer had an adequate safety policy.” *New York State Elec. & Gas*, 88 F.3d at 106; *W.G. Yates & Sons Constr. Co.*, 459 F.3d at 609 n.7 (“the required considerations for [the employee misconduct] affirmative defense closely mirror the foreseeability analysis required to determine if a supervisor’s knowledge of his own misconduct, contrary to the employer’s policies, can be imputed to the employer.”). The affirmative defense of unforeseeable or unpreventable employee misconduct requires an employer to demonstrate it (1) has established work rules/policies to prevent the violative behavior, 2) adequately communicated the rule to its employees, 3) took steps to discover non-compliance, and 4) effectively enforced the rules/policies when violations were discovered. *W.G. Yates & Sons*, 459 F.3d at 609 (citing *Frank Lill & Son, Inc. v. Secretary of Labor*, 362 F.3d 840(D.C. Cir. 2004); *P. Gioioso & Sons, Inc. v. OSHRC*, 115 F.3d 100, 109 (1st Cir. 1997); *New York State Elec. & Gas*, 88 F.3d at 105; *Jensen Constr. Co.*, 7 O.S.H. Cas. (BNA) 1477, 1479 (1979)).

Employers must carefully and critically consider whether they can meet these requirements. For instance, an employer may have good rules and safety policies in place that are well communicated to employees (the first two elements), but the employer must also show it takes reasonable steps to discover potential violations of those rules and, when it finds violations, it enforces the rules (i.e., disciplines employees accordingly). As the First Circuit declared in agreeing with the Commission’s rejection of the employee misconduct defense on a trenching citation:

5 In Canada, violations of occupational health and safety statutes and regulations are quasi-criminal offenses and often entail strict liability. An employer’s due diligence in safety may, in some cases, form a defense. Although employee misconduct is not, itself, a defense to a citation, it may comprise part of an employer’s due diligence defense. A copy of the leading case in Ontario holding employee misconduct is not a defense, *Her Majesty the Queen in Right of Ontario v. Dofasco Inc.*, is attached at the end of this paper.
The mainstay of Gioioso’s argument is that the ALJ unnecessarily required repetitive documentary proof referable to the [employee misconduct] defense. But this is smoke and mirrors; the record reveals quite clearly that the ALJ applied the appropriate legal standard in a wholly unremarkable way and found that the employer failed to carry the devoir of persuasion on both the implementation and enforcement components of the defense. This deficit is fatal. Even if an employer establishes work rules and communicates them to its employees, the defense of unpreventable employee misconduct cannot be sustained unless the employer also proves that it insists upon compliance with the rules and regularly enforces them.

Contrary to the petitioner's insinuations, the ALJ did not presume to establish a per se rule requiring documentation. Rather, he counted the absence of documentation against the proponent of the defense in the circumstances of this case. We cannot fault this approach. Given the nature of the issue, there is no reason why a factfinder must accept an employer’s anecdotal evidence uncritically. And in this instance, we agree with the ALJ that the absence of any vestige of documentary proof was not only a relevant datum but a telling one.


Similarly, the D.C. Circuit upheld the Commission’s rejection of the employee misconduct defense in a fall protection case where it determined:

Although Lill had in place a rule requiring all employees to be tied off when on catwalks, the ALJ expressly found “this rule was not adequately communicated or enforced as there was abundant evidence that employees, including the site manager, did not tie-off while on the catwalks.” Lill field superintendent Steve Billington “appeared confused about the rule, as he testified that employees were in fact permitted to traverse the catwalks without tying off” and “on-site signs directing employees to wear safety harnesses did not also indicate when the employees were required to tieoff.” ALJ Op. 4.2 The ALJ further noted that “while the company showed that it disciplined employees for fall-related safety violations, it presented no proof that it endeavored to enforce its tie-off rule to employees who were not right at the edge.”

Frank Lill & Son, Inc. v. Secretary of Labor, 362 F.3d 840, 845 (D.C. Cir. 2004).

So how does an employer establish this defense (or, as appropriate, oppose the Secretary's claim of employer knowledge)? First, it creates written work rules/policies that address the various workplace hazards/issues in its business/industry. Second, it communicates with and trains employees on these rules and policies, and keeps written confirmation of the communication/training (e.g., employees should sign acknowledgements for the rules and for attending training on them). Third, safety personnel and management must observe employees performing their jobs to see that they are following the rules, and keep written records of such observations. Finally, when an employee violates a safety rule, the employer must respond with some form of coaching or discipline, depending on the nature and seriousness of the rule.
violation, the employee’s work record, or other relevant factors in a given situation. And, any coaching or discipline, even if just a verbal counseling, should be documented.
Employment -- Occupational health and safety -- Offences -- Employer failing to equip cold-rolling steel mill with guard as required by s. 25 of Industrial Establishments Regulations -- Employer not complying with s. 25 by adopting procedure of requiring employees to use push bar to start steel rolling into mill -- Second employee stationed in control booth for mill and charged with raising and lowering pinch roll not constituting "operating control that acts as a guard for a machine not otherwise guarded" within meaning of s. 28 of Regulation -- Fact that injured worker was not using push bar as required by employer at time of accident not relieving employer of liability -- Industrial Establishments Regulations, R.R.O. 1990, Reg. 851, ss. 25, 28.

The employer was charged under the Occupational Health and Safety Act, R.S.O. 1990, c. O.1 after an employee suffered a serious hand injury while working on a cold-rolling steel mill. In particular, it was alleged that the employer failed to equip the mill with a guard as required by s. 25 of the Industrial Establishments Regulations. Section 25 provides: "An in-running nip hazard or any part of a machine, device or thing that may endanger the safety of any worker shall be equipped with and guarded by a guard or other device that prevents access to the pinch point." The employer did not contest the fact that there was no guard but argued that it had adopted a procedure which
rendered a guard unnecessary. Employees were required to use a ten to 12-foot push bar to start the steel rolling into the mill, and the employer argued that this constituted an "other device". The justice of the peace agreed and acquitted the employer. That acquittal was affirmed on appeal. The Ministry of Labour appealed.

Held, the appeal should be allowed.

The push bar did not constitute an "other device". It was not part of the equipment of the mill nor did it "guard" the mill. It could not, on its own, prevent access to the pinch point. The purpose of guarding under the Regulation is to prevent inadvertent and inadvertent conduct on the part of the employee from resulting in injury and, in particular, to take individual discretion, judgment and degree of concentration and capability out of the equation. The push bar left all of these parameters in play.

A second employee, stationed in the control booth for the mill and charged with raising and lowering the pinch roll, was not an "operating control that acts as a guard for a machine not otherwise guarded", within the meaning of s. 28 of the Regulation. An operating control means a physical control that protects the operator of the control.

The deliberate act of the injured worker in not following the procedure of using a push bar on the occasion in question did not relieve the employer of liability. The worker chose not to follow the procedure because a push bar did not work well with a light gauge of steel stock. To suggest that the responsibility for his injury rested squarely on his shoulders would be unfair because defects in the process for performing the work in question and the absence of a physical guard contributed significantly to the accident. [page162]

The employer did not lead evidence at trial that was capable of supporting a due diligence defence.
Cases referred to


Statutes referred to

Occupational Health and Safety Act, R.S.O. 1990, c. O.1, s. 25

Rules and regulations referred to

Industrial Establishments Regulations, R.R.O. 1990, Reg. 851, ss. 25, 28


Wes Wilson, for appellant.

Christopher G. Riggs, Q.C. and Robert W. Little, for respondent.

BY THE COURT: --

Introduction
[1] This is an appeal by the Ministry of Labour from the judgment of Zuraw J. of the Ontario Court of Justice upholding the acquittal of Dofasco Inc. (the "employer") by Justice of the Peace Welsh of the Ontario Court of Justice, Provincial Offences Court, on three charges under s. 25 of the Occupational Health and Safety Act, R.S.O. 1990, c. O.1 ("OHSA"). The charges against the employer arose when an employee suffered a serious hand injury while working on a cold-rolling steel mill.

[2] This appeal relates to count one on the information. The particulars of that charge provide:

Particulars: The defendant failed to ensure that the pinch point between the upper and lower rollers on the pinch and drive rolls, on the #1-66" Cold Rolling Mill was equipped with a guard as required. A worker, Robert McCormick, was injured.

[3] The employer was alleged to have failed to equip the mill with a guard in violation of s. 25 of the Industrial Establishments Regulations, R.R.O. 1990, Reg. 851 (the "Regulation"), enacted under the OHSA. Section 25 of the Regulation provides:

25. An in-running nip hazard or any part of a machine, device or thing that may endanger the safety of any worker shall be equipped with and guarded by a guard or other device that prevents access to the pinch point.

[4] The justice of the peace concluded that Dofasco's workplace procedures and enhancements allowing "hands-free" loading into the mill dispensed with the requirement for a guard. He stated in his reasons:

. . . it would appear that the prosecution has made a prima facie case regarding this count, and by definition and letter of the law, the fact that there is no guard at the pinch points, a conviction should be registered. The defendant, however, has presented evidence of procedures and enhancements to the No. 1 66-inch Cold Rolling Mill known as
the hands-free loading unit. Further evidence has been
provided that when a difficulty arises with a coil of steel
there are procedures employed known as the push bar and hand-
grippers to assist in feeding the free or lead end of the
coil into the mill. The procedures of the push bar and use of
hand-grippers to assist in the feeding of the coil into the
mill put the employee, at the very least, at arm's length
from any pinch points, and therefore, looking at the intent
of the law, would preclude the need for a guard on a pinch
point as it would be, as it would or should be a non-issue.
As such, on this count the court finds that the prosecution
has failed in proving beyond a reasonable doubt on count one,
and count one is dismissed. An acquittal is entered.

Standard of Review

[5] The Ministry of Labour contends that the employer cannot
comply with the guarding requirement in s. 25 of the Regulation
by developing procedures and enhancements with respect to the
operation of a machine that has the potential to endanger the
safety of a worker.

[6] The central issue in this appeal is the proper
interpretation of s. 25 of the Regulation, a question of law.
In particular, can workplace procedures and enhancements
substitute for a guard under s. 25 of the Regulation? The
standard of review on a question of law is correctness.

[7] Zuraw J. concluded that he was unable to find any "clear
and palpable error in law or fact or mixed law and fact. . .". In applying the standard of review of "clear and palpable
error", he applied an incorrect standard.

The Employer's Obligation Under Section 25(1) of the OHSA

[8] The justice of the peace made a finding at trial,
otherwise in the context of the procedures put in place by
Dofasco, that the accident which caused the injury to Robert
McCormick, and ". . . the subsequent pain, and suffering and
rehabilitation falls fully and [page164] completely on [him]
and his actions and not on the employer. . .". The Ministry of
Labour takes no issue with this finding, but states that whether the injured employee is at fault or not is irrelevant to the breach of s. 25 of the Regulation. We agree.

[9] Section 25(1) of the OHSA provides that, "An employer shall ensure that, . . . (c) the measures and procedures prescribed are carried out in the workplace. . . ." As such, the regulation imposes a "strict duty" on the employer. This has been held to be in the nature of the obligation of an insurer and to be non-delegable: see R. v. Wyssen (1992), 10 O.R. (3d) 193, [1992] O.J. No. 1917 (C.A.), at p. 198 O.R. However, it has been held by the Supreme Court of Canada that this duty falls short of "absolute liability": see R. v. Sault Ste. Marie (City), [1978] 2 S.C.R. 1299, [1978] S.C.J. No. 59, 40 C.C.C. (2d) 353, at p. 373 C.C.C.

[10] In his reasons, the justice of the peace made a specific finding that Dofasco did not provide a guard. Dofasco does not contest that finding. Rather, Dofasco claims that it was not obliged to provide a guard because it complied with s. 25 of the Regulation through other means. In the alternative, Dofasco says it should be excused from liability based on the circumstances.

Issues Raised on This Appeal

[11] The issues raised on this appeal are as follows:

(1) Did Dofasco comply with s. 25 of the Regulation by providing an operating control, pursuant to s. 28 of the Regulation, that "acts as a guard for a machine not otherwise guarded"?

(2) Alternatively, did use of the "push bar" to feed the steel into the mill meet the requirements of s. 25 of the Regulation?

(3) In the further alternative, did the deliberate conduct of the worker in not following company procedures for performing the work exonerate the employer? In other words, is it a defence for the employer to say that the
accident was the employee's own fault?

(4) Finally, is the defence of due diligence available to the employer?

Analysis

(i) The principles of statutory interpretation


The OHSA is a remedial public welfare statute intended to guarantee a minimum level of protection for the health and safety of workers. When interpreting legislation of this kind, it is important to bear in mind certain guiding principles. Protective legislation designed to promote public health and safety is to be generously interpreted in a manner that is in keeping with the purposes and objectives of the legislative scheme. Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided.

[14] Bearing these principles in mind, in our view, the justice of the peace erred in his interpretation of s. 25 of the Regulation and there is no merit in the submissions advanced by Dofasco.

(ii) Section 28 of the Regulation and the requirement for "an operating control that acts as a guard"

[15] Based on s. 28 of the Regulation, the respondent argued that s. 25 of the Regulation does not require a physical guard. Section 28 of the Regulation provides as follows:
28. An operating control that acts as a guard for a machine not otherwise guarded shall,

(a) be in a location where the safety of the operator is not endangered by moving machinery;

(b) be arranged so that it cannot be operated accidentally; and

(c) not be made ineffective by a tie-down device or other means.

[16] Relying on the words "an operating control that acts as a guard", Dofasco points to the second employee on the team, Mr. Kerr, who was stationed in the pulpit (the control booth for the mill that is located about 20 feet away from the steel coil) and whose job it was to raise and lower the pinch roll as the "operating control". Dofasco contends that Mr. Kerr constituted the "operating control" in that he was in a position at all times to prevent any injury to his co-worker by operation of the machine controls. We reject this argument.

[17] It is clear from the wording of s. 28 of the Regulation that an operating control means a physical control that protects the operator of the control. The subsections of s. 28 reinforce this in referring to the operating control location, that it be arranged so that it cannot be operated accidentally and cannot be made [page166] ineffective by tie-down devices or other means. These provisions must be read conjunctively. In our opinion, it is apparent that the drafters had in mind a physical "operating control" protecting the operator of the machine. In this case, the fact that the accident occurred with Mr. Kerr in the pulpit demonstrates the flaw in the theory underlying Dofasco's argument. In our view, s. 28 of the Regulation has no application to the present circumstances.

(iii) Section 25 of the Regulation and the use of a "push bar"

[18] Dofasco's second argument depends on an interpretation
of the words "other device" in s. 25 of the Regulation. Dofasco submits that the push bar, a 10-12 foot device to be used by the employee to start the steel rolling into the mill, constituted an "other device" which prevented access by the employee to the pinch point of the mill. Dofasco protocols and procedures required use of a push bar, which, when used by the employee, kept the employee a safe distance from the pinch point. We cannot accept this submission. In our view, to do so would require a strained interpretation of s. 25 of the Regulation and one that is contrary to the purpose of the statute when read as a whole.

[19] We turn first to the language of the section. Section 25 of the Regulation specifically provides that "any part of a machine . . . that may endanger the safety of any worker" must be "equipped with" and "guarded by" the "other device". In our opinion, when s. 25 is interpreted properly, it is clear that the push bar does not come within the definition of "other device". The push bar does not satisfy either of these requirements -- it is not part of the equipment of the mill nor does it "guard" the mill. Further, the push bar could not, on its own, "preven[t] access to the pinch point".

[20] Secondly, the purpose of guarding under the Regulation is to prevent advertent and inadvertent conduct on the part of the employee from resulting in injury to the worker, and in particular, to take individual discretion, judgment and degree of concentration and capability out of the equation. The push bar leaves all of these parameters in play rather than ruling them out as a physical guard is intended to do, and therefore, fall outside the contemplation of s. 25 of the Regulation.

(iv) The deliberate conduct of the worker in not following company procedures

[21] Dofasco's third argument is that an employer cannot be held liable under s. 25 of the Regulation where an employee is injured as the result of his and a co-worker's deliberate conduct [page167] in failing to follow company procedures and protocols. Dofasco emphasizes the statement by the injured worker to his co-worker to the effect that "to hell with it
lets [sic] do it the way we used to" to place the blame for the accident squarely on the shoulders of the injured worker, Mr. McCormick. The justice of the peace adopted this view. We cannot accede to this position. It is contrary to the scheme of the OHSA and the Regulations. In our view, it is also at odds with the relevant jurisprudence and common sense.

[22] On a plain reading of the Regulation, employee misconduct does not go to the actus reus of the offence. Rather, at least in relation to employees carrying out their work, an employer is strictly liable if it fails to comply with its obligations and there is no suggestion that employee misconduct constitutes any form of defence.

[23] Further, Collins J. had this to say about the purpose of the OHSA in R. v. Spanway Buildings Ltd., unreported, April 3, 1986 (Ont. Prov. Ct. (Crim. Div.)), at p. 4:

... one of the purposes of the act is to protect workers in this very hazardous industry from their own negligence. No one in any occupation can work 100 percent of the time without occasional carelessness. However, the potential for serious consequences of momentary negligence is much greater in the construction industry than in almost any other.

This admonition is particularly apposite in the context of the steel industry.

[24] Moreover, as was noted by Laskin J.A. in his decision granting leave to appeal in this case, "... workplace safety regulations are not designed just for the prudent worker. They are intended to prevent workplace accidents that arise when workers make mistakes, are careless, or are even reckless". In our view, this principle also extends to deliberate acts of employees while performing their work.

[25] In our opinion, Dofasco's argument ignores common sense. Employees do not deliberately injure themselves. The requirement for guarding of machinery is to protect employees in the workplace from injuries due to both inadvertent and advertent acts. This is the reason for the requirement for
physical guards. Employees encounter all variations of workplace hazards. Some are inadvertent -- for example, employees may slip, misjudge distances, lose their balance, their timing or dexterity may be off, lose concentration or simply be careless. Physical guards or their equivalent are obviously required to prevent against injury in these situations.

[26] Physical guards or the equivalent are also required to prevent injury from advertent acts by employees exposing themselves [page168] to risk of injury. In this regard there seems to be some confusion as to what meaning ought to be attributed to deliberate acts. This does not mean an act by an employee to intentionally injure oneself. That stretches credulity. It does mean, however, that on occasion an employee may make a conscious decision to disobey an instruction or work practice in order to get his or her work done. Indeed, that is what occurred in the present instance. The statement by Mr. McCormick makes this clear.

[27] But the workers here did not disobey the work instruction to spite or injure the employer. They did so because the work practice specified did not readily accomplish its task with certain light gauges of steel stock such as they were processing on the day in question. The use of the push bar or hand grippers, which were specified, did not work properly on the light steel being processed through the rolling mill on this occasion. The employees could have pulled the roll of steel off of the mill. That was the specified procedure, but it would have meant delays and curtailed production. Instead they chose to use a procedure they had used on a different machine, thereby exposing Mr. McCormick to the risk of injury on this machine. The injury he suffered was as a result of his deliberate act, but it was an act done in furtherance of productivity in the work undertaken for the employer and not for any other reason. To suggest that the responsibility for the injury, pain and suffering rests squarely on his shoulders would be unfair because defects in the process for performing the work in question and the absence of a physical guard contributed significantly to the accident. For all of the foregoing reasons, we do not give effect to this submission.
The defence of due diligence

[28] Dofasco's final argument is raised by way of defence. If we do not accept its other arguments, Dofasco asks that we send this matter back to the justice of the peace for a trial on the issue of due diligence. Relying on the decision of the Supreme Court of Canada in Sault Ste. Marie, Dofasco submits that it led evidence at trial making it clear that it has taken all reasonable steps to ensure that workers would not be endangered by the rollers and/or that it reasonably believed that the rollers did not present a hazard. Accordingly, it submits that the matter should be remitted to the trial court to determine this issue. We cannot accede to this submission. In our view, Dofasco did not lead evidence at trial which is capable of supporting a due diligence defence.

[29] In relation to the first branch of the test, based on our interpretation of s. 25 of the Regulation as outlined above, Dofasco did not lead evidence that it had taken any steps to place a guard or other device at the pinch point as required. In these circumstances, Dofasco cannot show that it took all reasonable steps to avoid the incident.

[30] As for the second branch of the test, Dofasco does not assert that it believed, mistakenly, that it had taken steps to place a guard or other device at the pinch point as required by the Regulation. Instead, it advances a strained interpretation of s. 25 of the Regulation to support a contention in law rather than fact that it complied with the Regulation. This does not meet the second branch of the test in that it is not a mistake of fact but rather a mistaken apprehension as to the requirements of the Regulation and the statutory regime.

Conclusion

[31] For all of the foregoing reasons, we allow the appeal, set aside the acquittal and enter a conviction. Given the concurrence of counsel, we remit the matter to the justice of the peace for sentencing.
Appeal allowed.
The Unpreventable Employee Misconduct Defense: Preparing to Prove It

Melissa A. Bailey, Moderator (Washington, D.C.)
John Illingworth (Toronto)
John F. Martin (Washington, D.C.)
Kenneth B. Siepman (Indianapolis)
OSHA Attitude

- Your safety and health program “failed to catch this.”
- Your company “tolerated the deviation or perhaps even condoned it.”

Employee Misconduct: Elements
Employee Misconduct: Elements

1. Employer established work rules designed to prevent the violative conditions from occurring.
2. Employer adequately communicated those rules to its employees.
3. Employer took steps to discover violations of those rules.
4. Employer effectively enforced the rules when violations were discovered.


Employee Misconduct: Elements

1. Work rule
2. Communicated to employees
3. Employer looks for violations
4. Employer disciplines when rules are broken
Employee Misconduct: Elements

1. Work rule
2. Communicated to employees
3. Employer looks for violations
4. Employer disciplines when rules are broken
Canada OHS 101

- Occupational health and safety is, for the most part, provincially regulated.
- Violations of OHS statutes and regulations are quasi-criminal offences.
- Most offences are strict liability.
- Due diligence defense

Worker Misconduct

- The Prosecutor must prove the *actus reus* of the offense (i.e., the machine is not guarded).
- Burden shifts to defense to prove all reasonable precautions were taken.
- Does worker misconduct have any impact on the act of the offense?
Her Majesty the Queen in Right of Ontario v. Dofasco

[22] On a plain reading of the Regulation, employee misconduct does not go to the actus reus of the offence. Rather, at least in relation to employees carrying out their work, an employer is strictly liable if it fails to comply with its obligations and there is no suggestion that employee misconduct constitutes any form of defence.

Worker Misconduct

- So can worker misconduct ever be a defense?
  - Forms part of reasonable foreseeability on due diligence
    - Ontario (Ministry of Labour) v. Hershey Canada Inc.
    - Employer has established procedure
    - Employees are trained and understand the procedure
    - Employer monitors and disciplines violations
    - Therefore, it was not reasonably foreseeable that the employee would break the rules
      - Example: Passenger riding on bulldozer
    - Unsettled where the Crown does not allege a specific regulatory violation
1. Work Rules
Oral Work Rules?

No drugs or booze on the work floor.

No drugs or food on the work floor.

No rugs or food on the work floor.

If it’s not written down, it does not exist.
Put It in Writing!

No drugs or booze on the work floor.

2. Rule Communicated to Employees
Oral Communication

If it's not written down, it does not exist.
Acknowledgements

Sign-in Sheets
Electronic Sign-in Sheets

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<th>Last name</th>
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3. Take Steps to Discover Violations
Q  Why did you join OSHA?
A  Why did I join OSHA? I was standing in line, would be to say I -- God hates me, I guess.

moment ago. The written health safety program is excellent. It covers most all bases I could see and -- and addresses them in a manner that I think would behoove the company to follow through with to the -- to the gnat.

Q  And that's why you gave the written safety and health program a 3, the highest grade?
A  Yes, sir.
it out in the field. I think they're got written and training and directive and all that well, well, well covered. It's just I think -- I think

It's not the agency's assessment of it. This is mine in here. I just think they need to implement and enforce what they've got written down and --
In Other Words

- Is your program effective?
- Are employees following the rules?

Employees Routinely Ignore Rule
Isolated Incident

4. Discipline When Rules Violated
Coaching
Punishment Must Fit the Crime
Consistency

No One Ever Disciplined
Employee Safety Video?

California’s 5th Element
Employee knew infraction violated company policy

YOU'RE GODDAMN RIGHT I DID!!
Burden of Proof

Whose Burden?

- Employer
- It’s an affirmative defense.
Whose Burden?
Whose Burden?

- “[C]onfusing patchwork of conflicting approaches to this issue”
- “This conflict shows no signs of abating and this issue is central to OSHA’s enforcement efforts”

Supervisor Misconduct
Supervisor Misconduct

- Harder to prove
- If supervisor violates rules, why should employees follow?

Establishing Employer Knowledge Through Rogue Supervisor
Supervisor Misconduct

- Knowledge of rogue supervisor is attributable to employer.
- You lose.
Hypotheticals

Ghostbusters, Inc.

- OSHA issues
  Ghostbusters a GDC violation for risk of “total protonic reversal”
Ghostbusters, Inc.

Who ya gonna call?

Ghostbusters, Inc.

• MAB Strategy Session
• Should we assert employee misconduct?
1. Work rule
2. Communicated to employees
3. Employer looks for violations
4. Employer disciplines when rules are broken

• MAB Strategy Session (cont’d)
• GREATER HAZARD!
Assan Motors Corporation

- OSHA issues citations to AMC
- Accident inspection
- Employee’s fingers crushed

- If line jams, call maintenance.
- DO NOT attempt to clear jam on your own!!!
Assan Motors Corporation

• Do not stick fingers into line!
• Ever!
• EV-ER!

Assan Motors Corporation

• Goal: Make 15,000 cars in one month
• All employees receive raise
• All employees receive bonus
Assan Motors Corporation

1. Work rule
2. Communicated to employees
3. Employer looks for violations
4. Employer disciplines when rules are broken
The Unpreventable Employee Misconduct Defense: Preparing to Prove It

Melissa A. Bailey, Moderator (Washington, D.C.)
John Illingworth (Toronto)
John F. Martin (Washington, D.C.)
Kenneth B. Siepman (Indianapolis)
Melissa Bailey focuses her practice on occupational safety and health issues, and also serves on the Firm’s Board of Directors. She litigates OSHA cases before federal and state agencies and courts, and also represents employers during government inspections and investigations. Her practice also includes providing compliance advice and conducting privileged audits on complex workplace safety issues. Melissa represents employers in a wide range of industries, including electric utilities, chemical manufacturing/refining, retail, food processing, construction, and drug manufacturing. Melissa also regularly represents clients before OSHA in connection with rulemaking and policy formation. She has testified before Congress regarding OSHA issues, and has advocated for management interests with regard to OSHA enforcement and compliance policies.

Melissa has practiced occupational safety and health law for over 15 years and, as a result, she understands the legal issues as well as the practical issues confronting employers. She routinely assesses both the current and future liability that may result from significant OSHA citations, and identifies the most effective approach – whether that is a strategic settlement or litigation – in each case.

Melissa also represents clients in whistleblower matters under a broad range of statutes, including the Occupational Safety and Health Act, the Surface Transportation Assistance Act, the Toxic Substances Control Act and the Clean Air Act. Her experience ranges from conducting investigations and developing position statements to litigating whistleblower cases before Administrative Law Judges and in court.

Melissa is an active speaker on OSHA and whistleblower issues. She speaks to trade association members and clients regarding a variety of OSHA issues, including strategies to use during an OSHA inspection to minimize liability, conducting privileged audits and accident investigations, and the impact of OSHA’s regulatory and enforcement agenda on particular industries. Melissa is also the Employer Co-Chairperson of the American Bar Association Occupational Safety and Health Committee.
John Illingworth is of counsel in the Toronto office of Ogletree Deakins. His practice includes a broad range of labour and employment issues, with a special focus on labour relations and occupational health and safety.

John has appeared as counsel at all levels of court and represents clients at various administrative tribunals, including the Ontario Labour Relations Board, the Human Rights Tribunal and the Workplace Safety and Insurance Board. He has negotiated various collective agreements and routinely represents unionized companies at grievance arbitration.

John works with employers in the development of safety programs. He conducts safety audits and investigations for clients, and defends companies who are charged with OHS offences. John has spoken on various safety topics throughout Canada and the United States.

John is the president of the Kitchener Waterloo Youth Basketball Association (KWYBA).
John F. Martin
Shareholder  ||  Washington, D.C.

John Martin focuses his practice on occupational safety and health compliance and litigation. He serves as national OSHA counsel for three publicly-traded companies, and has over 20 years of experience in defending employers in federal court and before the Occupational Safety and Health Review Commission (OSHRC). John has defended clients in 30 states and counsels clients on developing safety programs to eliminate and reduce workplace injuries.

John also consults employers and industry groups on federal and state safety regulations and ongoing rulemaking and legislation. He has represented clients in federal and state courts all across the country, up to the Supreme Court of the United States.

John represents a wide variety of employers from small family-owned businesses to Fortune 500 companies, and in a wide range of industries, including construction, oil and gas exploration, drilling, well servicing, restaurants, door and window manufacturing, auto manufacturing, health care, transportation, and retail.
Kenneth B. Siepman
Shareholder  ||  Indianapolis

For nearly 30 years, Ken Siepman has represented and advised employers on a wide array of labor and employment issues, including ADA, ADEA, FLSA, FMLA, Title VII, NLRA, covenant not to compete/trade secret matters, wage claims, and wrongful discharge. Ken regularly serves as lead counsel for employers in federal and state courts, arbitrations, and administrative agencies such as the EEOC, NLRB, OSHA, and the Indiana and United States Departments of Labor. He also has represented employers before the United States Court of Appeals for the Sixth and Seventh Circuits on several occasions.

Ken devotes a significant portion of his practice to litigation avoidance and counseling. He partners with employers to provide training on ADA, FMLA, OSHA, wage-hour, hiring/interviewing, employee terminations, workplace harassment, and positive employee relations. He also assists employers to develop employment applications, contracts, personnel policies and handbooks, non-compete agreements, severance agreements, and other employment-related documents.