I. INTRODUCTION

When an employee violates both an Occupational Safety and Health Administration (OSHA) standard and his or her employer's safety rules, should the employer be held responsible? The Occupational Safety and Health Review Commission (Commission), the adjudicatory body under the Occupational Safety and Health Act (the OSH Act) whose decisions may be appealed to the federal courts of appeals, has never clearly identified a consistent analytical framework to answer this question. Under established precedent, the Secretary of Labor has the burden of proving that the employer had actual or constructive knowledge of a violative condition. In a minority of the United States Courts of Appeals, the Secretary must also prove that the violative condition was foreseeable and therefore preventable. On the other hand, established Commission precedent requires employee misconduct to be raised as an affirmative defense, placing the burden of proof on the employer. Therefore, an employee's failure to abide by an employer's safety rules and OSHA standards theoretically could be and, indeed, has been analyzed as raising either a lack of knowledge issue or a misconduct issue, with varying results emerging from logically similar fact patterns, depending on the analysis used. United States Supreme Court Justices White and O'Connor have characterized the law in this area as a "confusing patchwork of conflicting
approaches." We have set forth below a description of the present state of Commission law in this area and our suggestion to utilize the minority Circuit Court view to establish a consistent approach.

II. BURDENS OF PROOF OF THE PARTIES

A. The Secretary's Burden—Prima Facie Case

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) there was noncompliance with its terms; (3) employees had access to the violative conditions; and (4) the cited employer had actual or constructive knowledge of those conditions.2

"Knowledge is a fundamental element of the Secretary of Labor's burden of proof for establishing a violation of OSHA regulations. To prove the knowledge element of its burden, the Secretary must show that the employer knew, or with exercise of reasonable diligence could have known of the non-complying condition."3 If the Secretary cannot establish either actual or constructive knowledge, the citation will be dismissed.

1. Actual Knowledge

The Commission has long recognized that "[b]ecause corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation."4 Under Commission precedent, "where a supervisory employee has actual or constructive knowledge of [a] violative condition[], that knowledge is imputed to the employer, and the Secretary satisfies his burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program."5 However, the United States

3. Id. (citing Trinity Indus., Inc. v. Occupational Safety & Health Review Comm’n, 206 F.3d 539, 542 (5th Cir. 2000) (citation omitted)).
5. Sec’y of Labor v. Dover Elevator Co., Inc., No. 91-862, slip op. at 11 (Occupational
Courts of Appeals for the Third, Fourth, Ninth and Tenth Circuits require that where the Secretary seeks to impute a supervisor's acts or omissions to a corporate employer, it must also show that the supervisor's conduct was reasonably foreseeable and therefore preventable by the employer.  

2. Constructive Knowledge

To prove constructive knowledge, the Secretary must show that the employer could have discovered the violative condition with the exercise of reasonable diligence. Whether an employer was reasonably diligent involves a consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations.

B. The Employer's Burden—Unpreventable Employee Misconduct

If the Secretary meets its burden of proof, the employer may raise the affirmative defense of unpreventable employee misconduct. To prevail on [this defense], [the] employer must show that it has (1) established work rules designed to prevent the violation, (2) adequately communicated these rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations have been discovered.

Because supervisory "involvement in...[asserted] misconduct is strong evidence that the employer's safety program is lax" and because "it is the supervisor's duty to protect the safety of employees under his supervision," the employer's burden of proof is "more rigorous and the defense is more difficult to establish" when an employer defends against an alleged violation on the ground of unpreventable supervisory misconduct. The employer must establish that it took all feasible steps to prevent the accident, including adequate instruction and supervision of its supervisory

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Safety & Health Review Comm'n July 16, 1993).


8. Id. at 5–6.


employee[s].”

In accord with Commission precedent, “[t]he majority of the Circuits have held that unpreventable employee misconduct is an affirmative defense that an employer must plead and prove.” This defense is at best difficult to prove and usually succeeds only where the employer is able to show that a supervisor engaged in idiosyncratic and unforeseeable behavior. As discussed below, the defense may be essentially unavailable if the Secretary has established either that the employer had constructive knowledge of the violation or, under the additional requirement imposed by the minority of Circuits in imputed supervisor knowledge cases, that the violation was reasonably foreseeable.

III. NEW YORK STATE ELECTRIC & GAS CORP.

A. New York State Electric & Gas Corp.

The citations at issue in this case arose when an OSHA compliance safety and health officer (CSHO) observed Raymond Price, an equipment driver and operator employed by the New York State Electric & Gas Corporation (NYSEG), using a jackhammer without wearing protective eyewear. “Price and Jim Webb, a gas fitter, first class, formed NYSEG’s two-member work crew at the site.” The CSHO approached the two men, identified himself and presented his credentials to Webb, who was described by both NYSEG employees as being the “crew leader.” Upon closer inspection, the CSHO “determined that Price had also not been wearing steel-toed safety boots or protective shoe covers while operating the jackhammer.”

Based on the CSHO’s observations at the work site, OSHA issued NYSEG a serious citation alleging violation of the Act’s general personal protective equipment (PPE) standard, for failing to ensure use of protective

11. Id. at 7.
14. Id.
15. Id.
16. Id.
footwear and eyewear. The citation was amended to allege that the failure to wear protective eyewear violated the Act’s general duty clause, rather than the PPE standard. The Administrative Law Judge (ALJ) affirmed the amended citation, but the Commission reversed in part, upholding the original citation because the cited conditions were covered under the PPE standard rather than the general duty clause. The Commission revised the amended citation “sua sponte to restore the eye protection charge to its original form.” The Commission observed that, because its amendment did nothing more than change the legal theory under which the protective eyewear violation was alleged, remand was not required.

The Commission agreed with the ALJ’s finding that NYSEG had constructive knowledge of Price’s misconduct. However, it declined to rule on the judge’s finding that Webb was a supervisory employee. Instead, the Commission held that the Secretary had proven the knowledge element of its case regardless of whether Webb was characterized as a supervisor:

If Webb was a supervisor, as the Secretary contends, then the judge was correct in imputing his constructive knowledge of the violations to NYSEG. If, however, Webb was merely a co-worker, as NYSEG contends, then NYSEG could have known of the violative conditions if it had exercised reasonable diligence by providing adequate supervision.

Although NYSEG presented evidence establishing three of the four elements of its defense of unpreventable employee misconduct, the Commission found that the company had failed to establish that it had enforced its safety rules through adequate monitoring of its employees, again, regardless of whether Webb was a supervisor. The Commission also rejected NYSEG’s argument, based on precedent from the Third and Tenth Circuits, that the Secretary had the burden of proving that the violation was preventable as part of its prima facie case. Accordingly, the

17. Id.
18. Id. at 2–3.
19. Id. at 1.
20. Id. at 5.
21. Id.
22. Id. at 8.
23. Id. at 6.
24. Id. (citation omitted).
25. Id. at 7.
26. Id.
Commission affirmed the ALJ's finding of constructive knowledge.27

B. New York State Electric & Gas Corp. v. Secretary of Labor

On appeal, the Second Circuit considered NYSEG's contentions that:

(a) the Commission erred in requiring NYSEG to shoulder the burden of proving the adequacy of its safety program, when that issue arose as part of the Secretary's prima facie case; (b) there was insufficient proof that NYSEG's safety program was inadequate and, therefore, the Secretary could not show NYSEG had knowledge of the violation; (c) the evidence was insufficient to permit Webb's knowledge to be ascribed to NYSEG on the basis of his purported supervisory status, because Webb was not a supervisor and, in any event, he had no actual or constructive knowledge; and (d) even if Webb had constructive knowledge of the violation, imputation was improper because the violation was unforeseeable.28

With respect to NYSEG's first contention that the Commission had improperly placed upon NYSEG the burden of demonstrating the adequacy of its safety program, the Court observed, "[t]he proper allocation of the burden regarding whether a violation constituted unpreventable conduct—an issue closely related to, but not the same as, the burden-of-proof contention urged by NYSEG on this appeal—has split the Circuits."29 After reviewing previous cases decided by the Courts of Appeals that concerned the issue of unpreventable conduct, the Second Circuit considered, and rejected, the Secretary's contention (which, significantly, had not been before the Commission) that NYSEG should bear not only the burden of proving unpreventable conduct, but also "the burden with respect to whether it had knowledge of Price's conduct, at least where such knowledge is based on the inadequacy of its safety policy."30 The Court suggested, but did not require, that the Commission adopt a burden-shifting framework similar to that used in employment discrimination cases, or some other rule, and then apply it in a consistent fashion.31

With respect to NYSEG's second and fourth contentions, the Second Circuit held that the Commission had departed from its own precedent by improperly applying a per se rule that an employer's safety policy could

27. Id. at 8.
28. N.Y. State Elec. & Gas Corp. v. Sec'y of Labor, 88 F.3d 98, 106 (2d Cir. 1996).
29. Id.
30. Id. at 107.
31. Id. at 108.
not be adequate unless a supervisor was present at all times. The Court rejected NYSEG's arguments that it could not be found to have had "knowledge of Price's conduct by imputation from Webb because Webb was not a supervisory employee and, in any event, he had no knowledge or constructive knowledge of Price's conduct." The Court held that if Webb were found to be a supervisor, imputation of knowledge would be appropriate. The Second Circuit then remanded the case to the Commission for further proceedings.

C. New York State Electric & Gas Corp. Remanded

On remand, the Commission declined the Second Circuit's invitation to formulate and adopt a rule governing the evidentiary burdens of the Secretary and employer with respect to the employer knowledge element of the prima facie case and the defense of unpreventable employee misconduct. The Commission vacated the citations on the grounds that "there are no circumstances which can reasonably be said to have put NYSEG on notice of a need for further or more intensive monitoring of Price or Webb." Commissioner Weisberg concurred in the Commission's finding of adequate monitoring, but dissented on the grounds that he would have affirmed the ALJ's finding that Webb was a supervisor. Commissioner Weisberg's dissent contends that the Commission should have considered whether there were deficiencies other than monitoring in NYSEG's safety program, and it also should have attempted to formulate an evidentiary burden-shifting rule.

IV. Subsequent OSHRC Decisions

A. Supervisor Knowledge

As shown below, the Commission generally has had little difficulty in finding both employer knowledge and a failure to establish an unpreventable employee misconduct defense where it has been shown that a supervisor was involved in conduct resulting in a violative condition.

32. Id. at 109–10.
33. Id. at 109.
34. Id. at 110–11.
35. Sec'y of Labor v. N.Y. State Elec. & Gas Corp., No. 91-2877, slip op. at 7 (Occupational Safety & Health Review Comm'n Oct. 16, 2000).
36. Id. at 9.
37. Id. at 11 (Weisberg, dissenting).
38. Id. at 12 (Weisberg, dissenting).
39. Id. at 13 (Weisberg, dissenting).
40. Id. at 14–15 (Weisberg, dissenting).
1. Rawson Contractors, Inc.

In this case, OSHA cited Rawson Contractors after OSHA compliance officers observed two of the company's employees working in an unshored trench. The competent person on site was an hourly union employee who allowed the work to go forward, contrary to both company policy and applicable OSHA regulations. In light of the foreman's knowledge of these requirements, the citations were found to be willful, and they were upheld by the ALJ.

Before the Commission, Rawson first argued that knowledge of the hazard could not be imputed to the company because the foreman was a non-supervisory, hourly union employee. The Commission followed established precedent to reject that argument on the ground that the foreman was the designated competent person on the site and therefore was responsible for ensuring safe work practices.

Rawson then asserted the unpreventable employee misconduct defense. Rawson demonstrated that it had explicit work rules on the safety issue which had been communicated to the foreman. Rawson also presented evidence that it had conducted training sessions and toolbox talks specifically addressing proper work practices. The company had also taken steps to discover actual or potential violations by making random and regular visits to the sites. In addition, Rawson had hired an outside consultant to make unannounced inspections. The consultant had seen the foreman's worksites on many occasions but had found only minor violations. The foreman was given a three-day suspension for the incident that led to the citations.

Despite the evidence presented by Rawson, the Commission rejected the affirmative defense on the ground that the company had failed to present any evidence that it had ever enforced its work rules prior to the inspection. "The foreman testified that he had never been disciplined for

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42. Id. at 3.
43. Id. at 2.
44. Id. at 1.
45. Id. at 18.
46. Id. at 20–21.
47. Id. at 4.
48. Id. at 5.
49. Id. at 21.
50. Id. at 5.
51. Id. at 9.
52. Id. at 5.
53. Id. at 22.
54. Id.
EMPLOYER KNOWLEDGE AND EMPLOYEE MISCONDUCT

the minor violations discovered by the outside consultant.\textsuperscript{55} Although Rawson’s president testified that the company had previously issued progressive discipline, including write-ups, “he could not recall nor provide any evidence of such discipline.”\textsuperscript{56} Accordingly, the Commission agreed with the ALJ that, “based on this void in the evidence,” the company had failed to establish the enforcement element of its affirmative defense.\textsuperscript{57} After Rawson Contractors, Inc., it is clear that where there is evidence of past violations of an employer’s work rules, the employer must present at least some evidence of discipline to succeed on the unpreventable employee misconduct defense.\textsuperscript{58}

2. Danis Shook Joint Venture XXV

This case arose out of an accident in which a pipefitter foreman drowned after being pulled into a drainpipe by water draining from a sewage treatment facility equalization basin.\textsuperscript{59} Following the accident, OSHA conducted an inspection of the worksite, and the Secretary issued a citation alleging that Danis Shook had violated the general duty clause by exposing employees who entered the water in the equalization basin to a potential engulfment hazard.\textsuperscript{60} The Secretary also issued a second citation that alleged violations of two OSHA standards

for failing to instruct employees in the recognition and avoidance of the hazards associated with entering a basin which contained accumulated water; and . . . for failing to require employees entering the water in the equalization basin to wear appropriate personal protective equipment such as safety harnesses and lifelines.\textsuperscript{61}

The ALJ vacated the first citation that alleged a violation of the

\textsuperscript{55} Id. at 5.
\textsuperscript{56} Id. at 5.
\textsuperscript{57} Id. at 5-6.
\textsuperscript{58} See also Sec’y of Labor v. Arby Constr. Co., No. 03-0826, slip op. at 5 (Occupational Safety & Health Review Comm’n Dec. 15, 2003) (Loye, A.L.J.) (holding that the company failed to establish the enforcement element of the employee misconduct defense because: (1) multiple employees, including a competent person, entered the trench; (2) the company failed to issue written discipline during the two year period preceding the inspection; and (3) the safety director failed to conduct inspections of the worksite).
\textsuperscript{60} Id. at 8.
general duty clause. The ALJ also vacated the item of the second citation that alleged failure to instruct, but affirmed the item that alleged failure to require wearing of PPE. The issues on appeal to the Commission were: whether the ALJ erred in vacating the citation for failure to instruct; whether the company “had knowledge of the failure of its employees to wear personal protective equipment”; and “whether the judge erred in rejecting [the company’s] unpreventable supervisory misconduct defense to” the citation for failure to wear PPE.

The Commission found that Danis-Shook had violated the Act by failing “to provide sufficiently specific instructions” regarding recognition and avoidance of the hazards associated with entering a basin filled with accumulated water. The Commission also found that Danis-Shook had actual knowledge of the failure of its employee to use PPE when entering the basin. The pipefitter who entered the basin and drowned was a foreman working in a supervisory capacity and, as a result, his knowledge of his own failure to wear PPE was imputed to the company.

The Commission also found that Danis Shook had constructive knowledge because it could have discovered the violative condition with the exercise of reasonable diligence. Specifically, the Commission found that the company had failed to provide adequate safety training and had no work rules either requiring the use of PPE when entering water or prohibiting the pipefitters from entering the equalization basins. Given its failure to provide adequate safety training, the company also impermissibly relied on the pipefitter’s own ability “to recognize and avoid the hazards associated with working in the equalization basins.” The Commission rejected Danis-Shook’s unpreventable employee misconduct defense essentially by adopting its constructive knowledge analysis:

We find that the defense fails here for largely the same reasons upon which we base our finding of constructive knowledge of the violation at issue; Danis Shook failed to establish and adequately communicate a work rule that was designed to prevent the hazard. We therefore conclude that Danis Shook failed to

63. Id.
64. Id.
65. Id. at 6.
66. Id. at 10.
67. Id. at 9.
68. Id.
69. Id. at 7, 10.
70. Id. at 10.
establish that the violation was the result of unpreventable supervisory misconduct.\footnote{1} On appeal, the Sixth Circuit agreed with the Commission’s reasoning and affirmed its decision.\footnote{2}

3. \textit{S&G Packaging Co.}

S&G Packaging was cited for failing to have guards installed on a bag-making machine based on an inspection following an injury to a worker whose hair became caught in the drive shaft rollers of the machine.\footnote{3} The Commission found that the employer had actual knowledge of the violation because the unguarded rollers were in plain view and visible to anyone who walked by the machine.\footnote{4} The Commission rejected the unpreventable employee misconduct defense on the grounds that the employer’s work rules did not prevent employees from coming within the zone of danger while tending the machine.\footnote{5} The Commission also found that a provision in the employer’s job safety booklet prohibiting employees from placing their hands in any piece of machinery was not enforced as written because supervisors expressly instructed employees to reach into the machines to perform maintenance or make adjustments.\footnote{6}

\textbf{B. \textit{Supervisor Knowledge Plus Foreseeability}}

"Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case—even though it may differ from the Commission’s precedent."\footnote{7} Accordingly, where a party could appeal to either the Third,\footnote{8} Fourth, Ninth or Tenth Circuits, the

\footnotesize{71. Id. at 12.}
\footnotesize{72. Danis-Shook Joint Venture XXV v. Sec’y of Labor, 319 F.3d 805 (6th Cir. 2003). See also Sec’y of Labor v. CBI Servs., Inc., No. 95-0489, slip op. at 26 (Occupational Safety & Health Review Comm’n Oct. 29, 2001) (rejecting the unpreventable employee misconduct defense in part because an off-site project manager failed to communicate a potential solution for moving a load to the on-site project superintendent under his supervision).}
\footnotesize{73. Sec’y of Labor v. S&G Packaging Co., No. 98-1107, slip op. at 1 (Occupational Safety & Health Review Comm’n Aug. 2, 2001).}
\footnotesize{74. Id. at 7.}
\footnotesize{75. Id. at 9.}
\footnotesize{76. Id. at 10.}
\footnotesize{77. Sec’y of Labor v. Kerns Bros. Tree Serv., No. 96-1719, slip op. at 7 (Occupational Safety & Health Review Comm’n Mar. 16, 2000).}
\footnotesize{78. Id. at 1.}
Commission will require the Secretary to prove both that a company supervisor had knowledge of, or participated in, conduct violating the Act and that the conduct was reasonably foreseeable.79 As shown below, shifting the burden of proof with regard to the adequacy of the employer’s safety program to the Secretary can have a significant effect on the outcome of the case.

1. Interstate Brands Corp.

OSHA cited Interstate Brands Corporation, a baking company, for a violation of the lockout/tagout standard, based on an accident in which the company’s chief engineer suffered an amputation of several fingers after reaching into a machine while a rotary valve was still rotating.80 There were three disconnect switches on the machine that were clearly labeled.81 For some reason, the engineer turned only two of the three disconnect levers to the “off” position and failed to turn the third lever which controlled the rotary valve that caused the accident.82

The ALJ applied the test for knowledge set forth in Pennsylvania Power & Light Co. v. Occupational Safety & Health Review Commission,83 which requires the Secretary to demonstrate in cases involving the violation of a general safety standard both that a supervisor with authority to direct that protective measures be taken was aware of the violation and that the violation was foreseeable.84 The Secretary may establish “foreseeability [under the Third Circuit’s test] by demonstrating the inadequacy of the company’s safety program, training or supervision.”85

The ALJ vacated the citations on the grounds “that the Secretary failed to establish that the chief engineer’s failure to properly lockout the rotary valve was foreseeable.”86 The judge noted that the three disconnect levers were specifically labeled as to which system component each controlled and that “there were several methods to verify that a component of the system had been isolated.”87 The ALJ “also found that [the company] adequately trained its employees, undertook inspections to discover

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79. See id. at 18 (Visscher, concurring); Sec’y of Labor v. Donohue Indus., Inc., No. 99-0191, slip op. at 5 (Occupational Safety and Review Comm’n Aug. 29, 2003).
81. Id. at 15.
82. Id. at 2.
84. Interstate Brands, at 3 (citing 737 F.2d 350, 358 (3d Cir. 1984)).
85. Id. at 3.
86. Id.
87. Id.
violations, and utilized a progressive disciplinary policy. Finally, the judge noted that the chief engineer had an excellent safety record and a reputation as a safe employee.\footnote{Id.}

The Commission affirmed the ALJ’s decision on the grounds that it was not foreseeable that such an accident would have occurred, given the clear training and well-established lockout/tagout program maintained by the company.\footnote{Id.} There had been no other accidents, no reason to suspect the engineer would act in this manner, and the company had implemented suggested changes to its lockout/tagout program based on a prior OSHA inspection.\footnote{Id. at 4, 6.} Commissioner Rogers dissented on the vacating of a citation item relating to verification, because she believed that the company could have had better extrinsic means to verify deenergization of the machine.\footnote{Id. at 15 (Rogers, dissenting).}

This case demonstrates the significance of the legal theory utilized to analyze the citations. Unlike the employer in Rawson Contractors, Inc., the employer in this case did not need to prove work rule enforcement through prior discipline in order to prevail, as it would if the burden had been placed on it to prove unpreventable employee misconduct.\footnote{Compare Sec’y of Labor v. Rawson Contractors, Inc., No. 99-0018, slip op. at 22 (Occupational Safety & Health Review Comm’n Apr. 4, 2003), and Sec’y of Labor v. Interstate Brands Corp., No. 00-1077 (Occupational Safety & Health Review Comm’n Apr. 24, 2003).} In both Rawson Contractors, Inc. and Interstate Brands Corp., the employer had strong safety programs, training, and regular inspections. Yet the result appeared to turn on the legal analysis required under the precedent of the relevant Circuit Court of Appeals. Had the Commission’s decision in Interstate Brands Corp. been appealable to any of the majority of Circuits not requiring the Secretary to prove foreseeability as part of its prima facie case, the OSHA citation might have been upheld rather than vacated.\footnote{See, e.g., Sec’y of Labor v. Am. Wrecking Corp., Nos. 96-1330, 96-1331, consol. slip op. at 13–14 (Occupational Safety & Health Review Comm’n Dec. 20, 2001) (holding, under the Third Circuit’s imputed knowledge test, that the supervisor’s misconduct in failing to remove unsupported bricks from a steel building framework during a demolition project was foreseeable because the contractor “did not have workrules ‘designed to prevent the violation’ and did not provide adequate training to its supervisors”); Sec’y of Labor v. Kerns Bros. Tree Serv., No. 96-1719 (Occupational Safety & Health Review Comm’n Mar. 16, 2000) (holding, under the Third Circuit’s imputed knowledge test, that the misconduct of a supervisor and crew in failing to wear hard hats was not foreseeable because the company: (1) had a work rule requiring hard hats; (2) adequately communicated that rule to supervisors and crew members; (3) provided safety training; (4) belonged to a safety council; (5) conducted unannounced site visits to at least seventy-five percent of jobs; (6) disciplined different supervisors for hard hat violations; and (7) gave verbal and written warnings to employees for safety violations; moreover, the crew leader had an unblemished

North Landing Line Construction Co. (NLL), a commercial and industrial electrical contractor, was cited by OSHA for a "violation of a standard requiring that employees maintain a minimum distance from energized parts and that they exercise 'extraordinary caution' when in [the] vicinity" of such parts. An NLL employee died from electrical and thermal burns suffered while standing on a ladder directly below the energized side of a power station switch. The ALJ affirmed the citation on the grounds "that NLL failed to comply with the minimum distance requirement... and that it failed to exercise the requisite extraordinary caution."

The Commission affirmed the ALJ's decision, finding, inter alia, that the Secretary had proven that the job superintendent, who was working on another ladder on the non-energized side of the power station switch, had both actual and constructive knowledge of the violative condition that was properly imputed to the employer. The Commission noted that "[u]nder applicable Fourth Circuit precedent, the Secretary has the burden of showing that [the supervisor's] conduct in violation of the standard was reasonably foreseeable and preventable in order to impute his knowledge of the violative conditions to [his employer]." As in the Third Circuit, the Secretary may satisfy its burden by demonstrating "inadequacies in the employer's safety program, training or supervision, based on whether the employer 'has established workrules designed to prevent the violation, has adequately communicated these rules to its employees, has taken steps to discover violations, and has effectively enforced the rules when violations have been discovered.'"

The Commission found that the job superintendent had actual knowledge of the violative conditions because he engaged in the same misconduct as the laborer who was injured. The superintendent also "had constructive knowledge because he could have known, with the exercise of reasonable diligence, that [the employee] could have come

95. Id.
96. Id.
97. Id. at 14.
98. Id. at 18.
99. Id. at 15 (citations omitted).
101. Id. at 13–14.
closer than [the minimum allowable distance] from the energized equipment."\textsuperscript{102} The Commission found that the job superintendent’s knowledge was properly imputed to NLL because the company provided little or no evidence of its safety program and enforcement; the company’s work rule in its safety program requiring a safe zone between the work area and the energized parts of the substation applied only to non-employees; and the company had otherwise failed to provide guidance for working in the vicinity of energized parts.\textsuperscript{103} The Commission rejected NLL’s affirmative defense of unpreventable employee misconduct for essentially the same reasons that it found the job superintendent’s knowledge was properly imputed to the company.\textsuperscript{104}

3. \textit{Arcon, Inc.}

In the most recent OSHRC decision addressing the issue of foreseeability of supervisor misconduct, the Commission affirmed most of the items included in the two citations issued to the employer, but dismissed three of the items on the grounds that the Secretary had failed to show that the supervisor’s misconduct was foreseeable and preventable, relying on precedent from the Court of Appeals for the Fourth Circuit, where the incident arose.\textsuperscript{105} Arcon, Inc. (Arcon), an asbestos abatement contractor, was hired to work on an asbestos abatement project on a ship, the MV Cape Lobos, docked in Wilmington, North Carolina.\textsuperscript{106} Arcon prepared a work plan for the project, assigned a three-man crew to perform the work and designated one of the crew members, David Poole, as the supervisor of the project.\textsuperscript{107} “Arcon also hired Phoenix Envirocorp [(an environmental monitoring firm)] to conduct air monitoring.”\textsuperscript{108} Eleven days before the work was to begin, Arcon’s safety and environmental manager, Cynthia Morey, conducted a briefing with Poole to review the work plan for the project.\textsuperscript{109} During the briefing, Morey emphasized to Poole that if the material being removed became friable, he was to stop the work and contact her immediately.\textsuperscript{110} “On the first day of work on the boat deck, Poole used a Saws-all, a

\textsuperscript{102} Id. at 14.
\textsuperscript{103} Id. at 16–18.
\textsuperscript{104} Id. at 19–20.
\textsuperscript{105} Sec’y of Labor v. Arcon, Inc., No. 99-1707, slip op. at 12 (Occupational Safety & Health Review Comm’n July 1, 2004).
\textsuperscript{106} Id. at 1.
\textsuperscript{107} Id. at 2.
\textsuperscript{108} Id.
\textsuperscript{109} Id. at 17.
\textsuperscript{110} Id.
reciprocating saw, to cut one of the panels away from a pipe. Other panels broke apart as the crew removed them.\(^{111}\) Both activities resulted in the release of asbestos fibers into the air.\(^{112}\) The results of the air quality monitoring conducted by Phoenix Envirocorp indicated that the crew was being exposed to levels of asbestos fibers exceeding the permissible exposure limit.\(^{113}\) Phoenix Envirocorp immediately contacted Morey and informed her of the high air sampling results and recommended that the boat deck area be contained and cleaned before work proceeded to another area of the vessel. \(\ldots\) Morey notified Arcon president Arthur Hawthorne ("Hawthorne"), who telephoned Poole at the job site. Poole told Morey and Hawthorne that the sampling results were high "because of the way [he] started removing the panels" and that "a chunk" of wallboard probably "fell on the [air monitoring] cassette." Poole did not inform Morey and Hawthorne of the deteriorated condition of the panels or that he used a saw to cut one of the panels away from a pipe.\(^{114}\)

The following day, after the crew had moved to a different area of the ship, Phoenix Envirocorp again contacted Morey to express its concerns "that Poole had not taken appropriate steps to contain and clean the boat deck before proceeding with work on another deck."\(^{115}\) On the third day of the job as Arcon was preparing to begin asbestos removal on the upper deck, first assistant engineer Gregory Baccari, the \(\ldots\) official responsible for approving Arcon's work area, told Poole that he would not approve the containment until Arcon corrected the tears, holes and gaps in the polyethylene sheeting that was used to contain the area and covered the open area overhead where ceiling panels had been removed. When Baccari later returned to the work area, he found that Arcon had proceeded with the work without correcting the containment deficiencies. He described the area as "knee deep" in broken panels with visibility so diminished by dust that "it was as if you were looking through a cloud."\(^{116}\)

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111. Id. at 2–3.
112. Id. at 3.
113. Id.
114. Id. (alteration in original).
115. Id. at 3–4.
116. Id. at 4.
“Later that same morning, Allen Mosby ("Mosby"), a compliance officer from the North Carolina Department of Health and Human Services, boarded the vessel to investigate an anonymous complaint concerning the manner in which Arcon was performing asbestos removal."[117] Mosby conducted an inspection of the work and, based on the results of his inspection, shut down the job and cited Arcon under North Carolina’s Asbestos Abatement Program . . . He also referred the case to . . . OSHA for possible workplace safety and health violations. OSHA compliance officer Andrea Reid ("Reid") conducted an investigation, and as a result of her investigation, the Secretary issued[118]

"[two] citations alleging four serious and eight willful violations of provisions in the asbestos standard for shipyard employment, 29 C.F.R. § 1015.1011. [The Secretary] proposed penalties totaling $108,500."[119]  

"Arcon contested the citations, and a hearing was held . . . "[120] The ALJ “affirmed two serious and three willful items, affirmed four items as serious instead of willful, and vacated one willful and two serious items. [The ALJ] assessed total penalties of $40,450.”[121]

“The Commission granted Arcon’s petition for review of . . . issues [including, inter alia,] . . . whether Fourth Circuit precedent should apply to Arcon’s unpreventable employee misconduct defense with respect to Citation [One]” and three items of Citation Two.[122] The Commission agreed with Arcon’s contention that, because either party could appeal to the Fourth Circuit, the law of that Circuit should be applied.[123] The Commission also agreed that “under Fourth Circuit precedent, in order to impute a supervisor’s actual or constructive knowledge where the violation is based on supervisory misconduct, the Secretary must prove that the supervisor’s acts were foreseeable or preventable.”[124] At the hearing before the ALJ, Arcon had raised, and the judge rejected, the affirmative defense of unpreventable employee misconduct.[125] However, on review, Arcon argued instead that the Secretary had failed to establish her case-in-chief because she had failed to prove that Poole’s actions were foreseeable and

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117. Id.
118. Id.
119. Id. at 1.
120. Id. at 1–2.
121. Id. at 2.
122. Id.
123. Id. at 12.
124. Id. (citations omitted).
125. Id. at 11–12.
The contested item of Citation One was based on Arcon’s failure to conduct the additional exposure monitoring required under asbestos standard after the crew used a saw and crowbar to remove the panel and Arcon was notified that exposures exceeded the permissible exposure limit. Arcon argued that the item should be vacated because Poole’s use of the saw in violation of an established company work rule was unforeseeable and unpreventable. However, the Commission noted that the violation was “not based on Poole’s use of the saw, but on Arcon’s failure to comply with the standard after Poole used the saw and Arcon was notified about overexposures at the work site.” The Commission found that the repeated warnings from Phoenix Envirocorp, coupled with “Poole’s own admissions about the manner in which he was conducting the project,” placed Arcon on notice of a need to investigate and supervise Poole’s conduct. Based on Arcon’s inadequate response to the information it had received from those at the worksite, the Commission found that the Secretary had met her burden proving that Poole’s conduct was foreseeable and preventable. Accordingly, the Commission affirmed the contested item of Citation One.

The three contested items of Citation Two were based on Arcon’s failure to prevent the crew members from being exposed to levels of asbestos exceeding the permissible exposure limit. The ALJ had affirmed the items based on the monitoring conducted by Phoenix Envirocorp on the morning of the first day of the project shortly after the work began. The Commission noted that the violation at issue had occurred at the start of the project, before any information had been transmitted back to Morey and Hawthorne. The panel found Morey’s testimony regarding her pre-job briefing of Poole on the work plan to be dispositive on the issue of foreseeability. The Commission noted that the Secretary had failed to address Morey’s testimony; that she had expressly directed Poole to stop work and contact her immediately if the material became friable; and that Poole had unexpectedly failed to heed this
directive. The panel also found that, aside from her argument that Arcon did not have a work rule prohibiting the use of a saw, the Secretary had failed to "show any inadequacy in Arcon's safety program, training, or supervision until the end of the first workday when Morey and Hawthorne failed" to respond adequately to the information they received from the work site. The Commission concluded that the Secretary had failed to demonstrate that Poole's initial misconduct was foreseeable and preventable, and vacated the three contested items of Citation Two.

The Commission's decision in Arcon, Inc. demonstrates that the requirement of foreseeability adopted by the minority of circuits is both reasonable and fair. Where a supervisory employee engages in unexpected misconduct which immediately results in a violation of an OSHA standard, the employer may not be held liable for the violation unless the Secretary can meet her burden of demonstrating that the supervisor's acts were foreseeable. However, even where the supervisor's acts were unforeseeable, the employer will not escape liability if it could have taken corrective action to prevent the violative condition after becoming aware of the supervisory misconduct.

C. Constructive Knowledge

1. Donohue Industries, Inc.

In this case, a millwright died from electrical shock after a non-supervisory company electrician failed to ground a spot welder, in violation of company policy and OSHA regulations. The ALJ vacated the citation on the grounds of unpreventable employee misconduct. The Commis-

137. Id.
138. Id.
139. Id.
140. Compare L.R. Willson & Sons, Inc., No. 94-1546, slip op. at 2–3 (Occupational Safety & Health Review Comm'n Apr. 7, 1999) (on remand) (holding that a steelworker foreman's conduct in working on steel structural beams without fall protection was not foreseeable where the foreman had been specifically instructed that morning to finish work in another area and wait for safety cables before beginning work in area where violation occurred), with N&N Contractors, Inc., No. 96-0606, slip op. at 12, 10 n.4 (Occupational Safety & Health Review Comm'n May 18, 2000) (holding that a contractor had constructive knowledge of a non-supervisory employee's misconduct because of its prior failure to enforce safety rules, and noting that the Secretary would have met his burden even if the employee had been found to be a supervisor because the Secretary "effectively has same burden" under Fourth Circuit foreseeability test as under the Commission's constructive knowledge test), aff'd, 255 F.3d 122 (4th Cir. 2001).
142. Id. at 1.
sion affirmed, but "on the ground that the Secretary failed to carry her burden of proving that Donohue [(the employer)] had knowledge of the violative condition."\textsuperscript{143}

The Commission held that the Secretary had failed to establish that the company had constructive knowledge of the electrician’s failure to ground the welder.\textsuperscript{144} The electrician had made a conscious decision to rewire the welder’s electrical plug instead of replacing it, and did not advise his supervisor as to his actions.\textsuperscript{145} Because the electrician’s supervisor had no knowledge of the violation, "the issue presented [was] whether, with the exercise of reasonable diligence, Donohue could have discovered the ungrounded welder."\textsuperscript{146} Given the adequacy of the company’s work rules and training programs, as well as its regular inspections and disciplinary proceedings, there could be no finding of constructive knowledge of the violative condition.\textsuperscript{147} In rejecting the Secretary’s argument that the equipment in question should have been inspected, the Commission found that such inspection would not have prevented the accident in this case in any event because the evidence showed that the welder was actually properly grounded before the electrician had attempted to repair it.\textsuperscript{148}

The Commission further noted that the electrician’s failure to ground the welder appeared “to have been the result of [his] intentional, idiosyncratic conduct . . . in failing to follow a basic tenet of the electrical trade without checking with any supervisor to determine whether he was authorized to do so.”\textsuperscript{149} However, the Commission saw no need to address whether the employer had established an unpreventable employee misconduct defense.\textsuperscript{150}

\textsuperscript{143} Id.
\textsuperscript{144} Id. at 11.
\textsuperscript{145} Id. at 3.
\textsuperscript{146} Id. at 5.
\textsuperscript{147} Id. at 9, 11.
\textsuperscript{148} Id. at 10–11.
\textsuperscript{149} Id. at 10 n.5.
\textsuperscript{150} Id. at 10 n.6. \textit{See also} Sec’y of Labor v. Noble Drilling, Inc., No. 98-2105, slip op. at 18 (Occupational Safety & Health Review Comm’n Nov. 18, 2003) (“[The employer] had neither actual nor constructive knowledge that [its employee] was in the elevator shaft without fall protection. Fixing the elevator was a low priority to management personnel, [T]he one person who gave specific instructions to [the employee] regarding the elevator had told him to wait until he could look at it. An employer cannot reasonably be expected to anticipate that an employee would do something so idiosyncratic as to climb down a poorly-lit elevator tower without using fall protection.”); Sec’y of Labor v. Stahl Roofing, Inc., Nos. 00-1268, 00-1637 (Occupational Safety & Health Review Comm’n Feb. 21, 2003) (holding that a roofing company did not have constructive knowledge of its roofers’ failure to tie off and wear eye protection because it: (1) formulated rules to protect its employees; (2) adequately communicated those rules to its employees; (3) had safety training programs; (4) enforced a progressive discipline policy when violations were discovered; and (5) provided adequate supervision); Sec’y of Labor v. Precision Concrete
2. Revoli Construction Co., Inc.

OSHA issued two citations for serious and willful violations to Revoli Construction Co. after an OSHA compliance officer observed one of the company's employees working in an unshored, unsloped trench without wearing a hard hat. The foreman and backhoe operator, who was the only other employee present and the designated competent person at the site, "was sitting in the cab of his backhoe where he could observe the laborer in the trench." The ALJ affirmed both citations, and Revoli appealed only the willful citation.

The Commission found that Revoli had actual knowledge of the laborer’s misconduct because, after the laborer ignored the foreman’s order to exit the trench, the foreman made no further efforts to obtain compliance and "simply watched" while the laborer remained in the trench and continued to work. The Commission also found that Revoli had constructive knowledge of the laborer’s misconduct because the company’s owner admitted that “the company did not have an enforcement policy or disciplinary policy for employees who fail[ed] to follow company rules” and “stated that his ‘hands were tied’ by the tight job market and his inability to fine employees for safety violations.”

The Commission also relied on Revoli’s assignment of the laborer, who was the owner’s nephew and had a propensity for rule-breaking, to a supervisor who had been unable to supervise him effectively in the past.

The Commission summarily rejected the company’s unpreventable employee misconduct defense based on the same facts which supported its finding of constructive knowledge:

We also agree with the judge that Revoli failed to show that the violation was the result of unpreventable employee misconduct.

Constr., No. 99-0707, slip op. at 6–7 (Occupational Safety & Health Review Comm’n Apr. 25, 2001) (holding that a concrete contractor did not have constructive knowledge of its worker’s presence under a falling concrete bucket that killed him because the bucket normally took a different path and the Secretary failed to show either that there were any possible preventative measures or that the bucket’s movement could have been anticipated).

152. Id. at 2.
153. Id. at 3.
154. Id. at 2.
155. Id. at 3 n.2.
156. Id. at 5.
157. Id. at 6.
158. Id. at 5.
159. Id. at 2.
160. Id. at 5.
To prove that a violative condition results from unpreventable employee misconduct, the employer must show that it had a work rule that effectively implemented the requirements of the cited standard and that the work rule was adequately communicated and effectively enforced. The defense fails here largely for the same reasons we find constructive knowledge. Revoli had a work rule, but it did little to implement or enforce the rule. Therefore, the defense fails.\textsuperscript{161}

V. THE NEED FOR A CONSISTENT APPROACH

In choosing the appropriate legal framework for review of an OSHA citation, the Commission will first determine whether a supervisor had actual knowledge of the conduct violative of the cited standard.\textsuperscript{162} If the answer is no, then the Secretary must prove that the employer has constructive knowledge.\textsuperscript{163} As discussed above, the Secretary may satisfy its burden by showing that the employer could have discovered the violative condition with the exercise of reasonable diligence.\textsuperscript{164} If the Secretary cannot demonstrate that the employer has failed to meet its obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations, the citation will be dismissed.\textsuperscript{165} If the Secretary satisfies its burden, the employer may raise the affirmative defense of unpreventable employee misconduct.\textsuperscript{166} However, as shown above, the employer’s efforts to do so will typically be futile because the Commission has repeatedly held that facts sufficient to support a finding of constructive knowledge

\textsuperscript{161} Id. at 6 n.3 (citations omitted) (emphasis added); see also Sec’y of Labor v. Hackensack Steel Corp., No. 97-0755 (Occupational Safety & Health Review Comm’n Sept. 25, 2003) (finding that a steel erection subcontractor had constructive knowledge of its non-supervisory steelworkers’ failure to wear hard hats and use fall protection equipment based on: (1) the subcontractor’s failure to supervise/monitor steelworkers; (2) the employer’s awareness of the need for increased monitoring because of fourteen final Commission orders over the previous seven years; and (3) the failure to inform the foreman of previous citations on work sites where he was in charge); Sec’y of Labor v. RK Hydro-Vac, Inc., No. 03-1583, slip op. at 8 (Occupational Safety & Health Review Comm’n Dec. 15, 2003) (Spies, A.L.J.) (rejecting the employer’s employee misconduct defense “for the same reasons that constructive knowledge was held to be established.”).


\textsuperscript{163} Sec’y of Labor v. Donohue Indus., Inc., No. 99-0191, slip op. at 8 (Occupational Safety & Health Review Comm’n Aug. 29, 2003).

\textsuperscript{164} Id. at 5–6.

\textsuperscript{165} Id. at 17–18.

will conclusively demonstrate that the employee's misconduct was preventable.\textsuperscript{167}

If a supervisor has knowledge of the conduct violative of the standard, the Commission will look to the law of the Circuit to which the decision could be appealed to determine whether the supervisor's knowledge may be imputed to the employer.\textsuperscript{168} In the majority of the Circuits, the supervisor's knowledge will be strictly imputable to the employer.\textsuperscript{169} However, if the decision could be appealed to the Third, Fourth, Ninth or Tenth Circuits, the Secretary must also satisfy any foreseeability requirements imposed as part of the prima facie case under Circuit precedent.\textsuperscript{170}

If the Secretary establishes its prima facie case, the employer may raise the affirmative defense of unpreventable employee misconduct.\textsuperscript{171} However, if the Secretary has already established the foreseeability of the violation as required under the minority view, the employer will be hard-pressed to establish that it could not prevent the violation.\textsuperscript{172} Accordingly, it appears that the unpreventable employee misconduct defense is likely to succeed only where the employer can show that the employee's conduct was idiosyncratic, implausible, or unforeseeable, and where specific discipline has been imposed in the past.\textsuperscript{173}

There are significant problems with the Commission's current approach to this area of the law. It appears that the selection of analysis between the Secretary's burden of proving employer knowledge and the employer's burden of proving employee misconduct is outcome-determinative (i.e., the employer has a far greater chance of prevailing if the Commission analyzes the same facts under the former framework than


\textsuperscript{168} Sec'y of Labor v. Kerns Bros. Tree Serv., No. 96-1719, slip op. at 7 (Occupational Safety & Health Review Comm'n Mar. 16, 2000) (citations omitted).


\textsuperscript{170} Sec'y of Labor v. Kerns Bros. Tree Serv., No. 96-1719, slip op. at 18 (Occupational Safety & Health Review Comm'n Mar. 16, 2000).


\textsuperscript{173} See id. at 5–6.
under the latter). Where employees violate safety rules without supervisory presence, the employer will typically prevail, as in *Interstate Brands Corp.* and *Donohue Industries, Inc.* If a supervisor is present, as in *Rawson Contractors* and *North Landing Line Construction Co.*, the Commission will typically find employer knowledge, and then virtually automatically apply the same analysis to reject the unpreventable employee misconduct defense. The effect of this approach is to eviscerate the affirmative defense, as employers invariably fail to establish this defense where the Secretary has been found to establish employer knowledge.

Moreover, there is no analytical or logical reason why an employer should be held more accountable when a supervisor violates an established safety rule than when a non-supervisory employee does so. Where an employer has a strong safety program with training and regular inspections, it has taken all possible precautions, yet it may still be liable for a citation based solely on the presence of a supervisor who improperly ignores the rules he is required to enforce.

The current burden-shifting framework applied by the Commission and the Courts of Appeals in reviewing OSHA citations is both confusing and duplicative. A decision by the United States Supreme Court adopting the foreseeability element required by the minority of Circuits would be most welcome, as it would essentially collapse the unpreventable employee misconduct defense into the foreseeability and constructive knowledge tests. The analysis could be simplified even further by eliminating the rather meaningless distinction between “supervisor knowledge plus foreseeability” and “constructive knowledge,” and establishing a uniform knowledge test applicable in all situations. Where the employer

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180. *See supra* Part IV.B.

knew or should have known of the violation, it should be held accountable, as in situations, for example, where the employer fails to establish compliance requirements for OSHA standards or ignores potential safety and health issues. Where the employer has a strong safety program (with regular training and inspections supported by a disciplinary program) as in *Rawson Contractors*,¹⁸² and an employee, whether supervisory or non-supervisory, violates the rules and applicable standards, the violation should not be seen as foreseeable, and no citation should issue. Such a formulation is logical, relatively easy to administer, and provides guidance for employers, in contrast to the "confusing patchwork"¹⁸³ that is current Commission precedent.

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