

Importance of Supervisor Training and Employee Discipline in Contesting OSHA Citations

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The Fifth Circuit Court of Appeals' recent *Angel Brothers*¹ opinion is a reminder of two important issues when defending against an OSHA citation: (1) a supervisor's knowledge of a violation may be imputed to the employer; and (2) employees violating workplace safety rules need to be appropriately disciplined.

In *Angel Brothers*, the employer was cited for failing to provide adequate protection from cave-ins at a construction site. The employer argued that for the first two days of the job, it had used the "benching" method to prevent cave-ins, which involves excavating the sides of the trench to create a series of steps. However, by the third day, the trench was too close to a street to continue with benching. The employer's safety manager claimed that he told the foreman (supervisor) at the job site to start using a trench box instead, which is placed in the ditch and has walls that guard against cave-ins to protect the employees working in the ditch. The foreman failed to do so, and he watched an employee work without benching or a trench box. An OSHA compliance officer witnessed the violation, and cited the employer.

Employer Knowledge of a Safety Violation: To prove a safety violation, OSHA must establish, among other things, that the employer had knowledge of the violation. In analyzing this issue in *Angel Brothers*, the Court noted that employers act through their supervisors. So "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" of non-complying conduct of a subordinate. In other words, where a supervisor has knowledge of an employee's violation of safety rules, this knowledge is imputed to the employer, and satisfies OSHA's burden on proving employer knowledge. Thus, in *Angel Brothers*, the workplace foreman's knowledge of a violation when he watched an employee work in the ditch without a trench box was sufficient proof that the employer had knowledge of the safety violation.²

Employer Takeaway: As a supervisor's knowledge of a safety violation is imputed to the employer, it is critical that supervisors are properly trained in handling any safety infractions under their watch. Specifically, they should be trained on the importance of compliance with the workplace safety rules, closely monitoring for any safety violations, and adequately handling situations where safety rules are violated, including (as appropriate), the retraining of employee(s) involved, appropriate discipline, and the documentation of the steps taken.

Discipline for Safety Violations: In *Angel Brothers*, the employer argued that it was not liable because the violation occurred due to unpreventable employee misconduct. To prevail on this defense, an employer needs to prove, among other things, that it effectively enforces the safety rules when violations are discovered. In this case, the Court found that the employer failed to discipline the employee. The Court also found that while the employer performed more than a thousand excavations annually, there were only two documented instances of disciplining employees for safety rule violations, both of which only came after OSHA inspectors uncovered the violations. Further, the Court found that in the five years preceding the instant case, five OSHA

inspections had uncovered four trenching violations (including this instance), meaning at least some violations resulted in no discipline.

The Court did not agree with the employer's argument that a low rate-of-discipline record demonstrated the employer's "effective enforcement." Rather, the Court stated that it was statistically implausible that although OSHA found violations during 80% of its five inspections, the employer committed no safety violations the thousands of times it performed excavations in the last five years. Thus, the Court found that the employer failed to enforce the safety rules when violations were discovered.

Employer Takeaway: Employers should ensure that the workplace safety rules are enforced. When safety violations occur, employee(s) involved should be disciplined appropriately. All such instances must be adequately documented including the specific violation and the resulting discipline.

¹ *Angel Brothers. Enter. Ltd. v. Sec'y of Labor*, No. 20-60849 (5th Cir. December 1, 2021).

² An exception to this rule that may apply in some situations is when the supervisor himself engages in non-compliant conduct, such that the supervisor is the witness as to his own non-compliance.