

## OSHRC Rules in Favor of Employer in Supervisor Misconduct Case

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PRACTICES OSHA, Labor and Employment

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Employers may breathe a little easier following a recent decision regarding supervisor-based vicarious liability. In *Secretary of Labor v. S.J. Louis Construction of Texas*, the Occupational Safety and Health Review Commission's ("OSHRC") ruling potentially narrowed the scope of the constructive knowledge requirement in supervisor misconduct cases.<sup>1</sup> The decision, which vacated an Administrative Law Judge's previous ruling, focused on an incident where S.J. Louis Construction crew workers were killed after entering a manhole that emanated a strong odor. Despite 22 years of experience, a spotless safety record, and confined space entry training, the leader of the crew and another employee both entered the manhole, where they were asphyxiated by the gas within. The Secretary of Labor cited the organization with a serious violation under the General Duty Clause of the Occupational Safety and Health Act of 1970, Section 5(a)(1).

In order to get OSHRC to vacate the citation, S.J. Louis Construction had to demonstrate that despite being the employer, it had no knowledge of potential safety issues via its supervisor's conduct. OSHRC looked at several factors that supported this contention. First, the crew leader had abundant experience and a perfect safety compliance record. Second, the crew leader was instructed by supervisors and through training that a breathing apparatus should be used in confined spaces if necessary. Third, in a similar situation where odors emanated from a sewer line, the crew leader told his organization's area director and safety manager that he couldn't enter the sewer without a breathing apparatus, indicating that his previous training had been adequate. OSHRC believed that these factors demonstrated that S.J. Louis had sufficiently attempted to comply with applicable OSHA applicable regulations and that the organization should not be held responsible for the crew leader's action.

Though OSHRC's decision is helpful to employers, in order to take advantage of this ruling, employers must continue comprehensive and effective safety training, oversight, and management. When a supervisor is directly responsible for the harm, employers are liable only if the supervisor's actions were reasonably foreseeable. By regularly assessing the competency of supervisors and ensuring that they are up to date with the latest safety standards, it is less likely that the OSHRC would find that the harmful conduct was foreseeable.

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<sup>1</sup> 25 O.S.H. Cas. (BNA) 1892 (O.S.H.R.C. Feb. 5, 2016).