



*Founded by and dedicated
to the professional
insurance company loss
control representative*

INSURANCE LOSS CONTROL ASSOCIATION

eNews

SEPTEMBER 2013

www.insurancelosscontrol.org

INSIDE THIS
ISSUE:

Conference Agenda	2-3
Sponsorship Opportunities	4
Conference Registration Form	5
Motivational & Keynote Speakers	6-8
Rogue Supervi- sor: Federal Court Rejects OSHA's At- tempt to create Strict Employer Liability	9-11



2013 Annual Conference

[Click here to make your reservation today!!](#)

The ILCA conference will be held on October 7th, 8th, and 9th in Carmel, IN. The conference will be held at the Renaissance Indianapolis North Hotel, 11925 N. Meridian Street, 317-816-0777. Rooms for the hotel will be discounted to \$115 per night for ILCA members. Members should identify themselves as coming to the ILCA conference to receive the discounted room rate. Members staying at the hotel will receive a full hot breakfast which is included in the nightly room rate. To make a room reservation online for the conference, go to: [Renaissance Indianapolis North Hotel](#)

All members of the conference will have a reception Monday night, hot lunch on Monday and Tuesday, and snacks/beverages for breaks. **We still have sponsorship opportunities available.**

If your company would like to sponsor a break/lunch, please contact Kevin Matthews (kmatthews@brotherhoodmutual.com) or Kristi Ruxlow (administration@insurancelosscontrol.org).

The meeting agenda includes Motivational Speaker, Guy D. Gruters, Captain, USAF as well as Keynote Speaker, Mark Robison, Chairman of the Board and President of Brother Mutual Insurance Company.

Conference cost is \$345 for members of ILCA and \$430 for nonmembers. Any group bringing 10 or more persons can take advantage of a group rate of \$325 per person.

Attendees can enter to win a Garmin NUVI 3490LMT 4.3" Portable GPS with Lifetime Maps and Traffic at the conference. The drawing will be held at the conclusion of the conference and you must be present, at the time of the drawing, to qualify.

2013 CONFERENCE AGENDA

Monday, October 7th

7:30 am	Registration
8:00 am	Welcome and Opening Remarks Kevin Matthews, President, ILCA Brotherhood Mutual Ins. Co.
8:15 am-9:45 am	Motivational Speaker Guy D. Gruthers—Captain, USAF
9:45 am—10:00 am	Break
10:00 am—11:00 am	Keynote Speaker Mark Robison—Chairman of the Board/President Brotherhood Mutual Insurance Company
11:00 am—11:30 am	Organizational Discussion with Members
11:30 am—12:30 pm	Lunch
12:30 pm—12:45 pm	Risk Control Technologies, Inc. —Conference Partner
12:45 pm—2:00 pm	Workplace Violence Mark Lies—Seyfarth Shaw LLP
2:00 pm—2:15 pm	Break
2:15 pm—3:30 pm	Industrial Hygiene Dave Wilson—U.S. Reports
3:30 pm—3:45 pm	Break
3:45 pm—5:00 pm	Product Liability Gary Spagnuolo—Zurich Services Corporation
5:00 pm—6:00 pm	Reception

Tuesday, October 8th

8:00 am—9:15 am	Ergonomics Jim Sredzinski—Midwest Technical Inspections
9:15 am—9:30 am	Break

2013 CONFERENCE AGENDA

Continued—Tuesday, October 8th

9:30 am—10:45 am	Fleet Safety Todd Carrier/Dennis Shinault—Baldwin & Lyons, Inc.
10:45 am—11:00 am	Break
11:00 am—12:00 pm	Business Meeting (All ILCA Members Attend)
12:00 pm—1:00 pm	Lunch
1:00 pm—1:15 pm	Conference Partner
1:15 pm—2:30 pm	Crane Safety Jason Villas—Konecranes
2:30 pm—2:45 pm	Break
2:45 pm—4:00 pm	GHS Anthony Kuritz—Indiana Department of Labor
4:00 pm—5:00 pm	Q & A

Wednesday, October 9th

8:00 am—9:15 am	Sprinkler Systems Bob Titter—Ashland, Inc.
9:15 am—9:30 am	Break
9:30 am—10:45 am	Webinars Stig Ruxlow—Zurich Services Corporation
10:45 am—11:00 am	Break
11:00 am—12:15 pm	Prof. Dev. / Eff. Training Bruce Guiliani—Heritage Group
12:15 pm—12:30 pm	Closing Remarks Ron Huber, President, ILCA Grange Insurance

SPONSORSHIP OPPORTUNITIES FOR THE 2013 ANNUAL CONFERENCE

ILCA is pleased to announce NEW pricing for our sponsorship and advertisement opportunities available during the two and a half day conference on October 7-9, 2013.

Any company participating in sponsorship and/or advertising in the 2013 Conference will also receive free advertising in ILCA eNews for one year.

Vendors Insert - \$150 – Insertion of your company brochure and information.

B&W advertisement we produce in black and white and include in the binder. You provide the original document. Material must be submitted by **September 13, 2013**.

Color advertisement, brochure, or flyer we will add to our binder. You provide and ship the materials in advance. These must be 3 hole punched. Materials must be submitted by **September 13, 2013**.

Exhibitor

1 Table – One day only - \$200

1 Table – Entire Conference - \$350

Break - \$300

Includes: Announcement before and after break, signage, notation and thank-you in conference agenda, web link to your website and a vendor's insert in the conference binders. Get all of the possible contacts you can create by networking.

Luncheon - \$600

Includes: Announcements before and after lunch, signage, notation and thank-you in conference agenda, web link to your website, table for materials and a vendor's insert in the conference binder. Encouraged to have small logo giveaways and all the possible contacts you can create by networking. Luncheon sponsors will also receive a special mention and a 3.5"x5" advertisement space in the post-conference newsletter.

Conference Partner - \$1,500

Includes: exhibit space and 2 full registrations. (Registrations must be in our hands by **9/6/13**). We welcome you to make a ten minute "presentation" to the attendees during the conference. We will insert your 3 hole punched brochure into our conference binder. This fee does not include Hotel registration.

Sponsorship opportunities are on a first come, first serve basis. Sponsorship payments must be received no later than September 13, 2013. Contact Kristi Ruxlow at 309-696-2551 or by email at administration@insurancelosscontrol.org for reservations and payment information.

2013 ILCA Annual Conference Registration Form

First Name:		Last Name:		<p>Registration Fees Members: \$345 Nonmember: \$430 Group of 10 or more: \$325 per person</p> <p>Hotel Renaissance Indianapolis North Hotel 11925 N. Meridian Street Carmel, IN 46032 Phone: 317-816-0777 Reservations: 866-905-9619 Fax: 317-816-0430</p> <p>The room rate is \$115 per night, single or double occupancy, plus tax. Reserve rooms no later than Monday, September 16, 2013, to receive the group room rate. Refer to the Insurance Loss Control Association Conference when making your reservation.</p> <p>Airport Transportation to the Hotel The hotel does not provide shuttle service. Alternate transportation: Black Car Service, reservation required. Estimated taxi fare: 75 USD (one way)</p> <p>Cancellation Cancellations made 10 or more business days prior to the start of the conference are 100% refundable. Cancellations made less than 10 business days prior to the start of the conference are 50% refundable. No refunds after October 7, 2013.</p> <p>Accommodation In accordance with Title III of the American with Disabilities Act, we invite all registrants to advise us of any disability and any request for accommodation for that disability. Please submit your request with this registration form.</p> <p>What to wear Business casual is suggested for this event.</p>
Job Title:				
Company Name:				
Address:				
City:		State:	Zip Code:	
Daytime Phone:		Fax:		
Email Address:				
<p>Method of Payment (Payment by check is due with registration form)</p> <p><input type="checkbox"/> Enclosed is check # _____ payable to ILCA (in U.S. Dollars)</p> <p>Grand Total Due/Enclosed: \$ _____</p> <p>Payment and Registration by Credit Card: Visa, AMEX, MasterCard or Discover must be completed online at www.insurancelosscontrol.org or by emailing a request to Kristi Ruxlow at administration@insurancelosscontrol.org. Credit Card payments will be securely processed by PayPal.</p>				
<p>Copy this form for multiple registrations, mailing them together with one check.</p> <p>RETURN THIS COMPLETED FORM WITH PAYMENT TO:</p> <p>ILCA PO BOX 346 MORTON IL 61550</p> <p>Questions, call Kristi Ruxlow, Administrative Coordinator at 309-696-2551.</p>				
Dietary/Special Needs Requested:				
Emergency Contact Person:				
Name:		Relationship:	Phone:	



**Guy D. Gruters, Captain, USAF
POW in North Vietnam,
December, 1967 to March, 1973; 5 years, 3 months**

Guy Gruters was raised in New Jersey, where his favorite interests were camping, hunting and trapping. He graduated from the Air Force Academy with a BS in Engineering Science and completed a Masters Degree in Astronautical Engineering from Purdue University. After Pilot Training and fighter gunnery school, he volunteered for Vietnam and served six years in Vietnam, more than five as a POW. He completed more than 400 combat missions as a FAC, first for the 173rd Airborne Brigade flying O-1 aircraft and then flying F-100s for the *MISTY* Fast FACS flying over North Vietnam. He was awarded more than 30 combat awards including two Silver Stars, two DFCs, two purple hearts, two bronze stars for valor, a Presidential Unit citation, POW medal, 20 air medals, and numerous other medals. He was shot down twice and captured the second time, on December 20, 1967.

Meanwhile, Lance Sijan had been shot down in early November and was still in the jungle. Lance evaded capture for forty-six days. He was finally captured on Christmas Day of 1967 and moved into a small holding prison with Guy and Major Bob Craner shortly thereafter. The three of them made the trip north to the Hanoi Hilton in the back of a military truck. Guy and Bob were with Lance until his last-minute removal to a hospital and death in late January, 1968.

2013 ILCA ANNUAL
CONFERENCE
OCTOBER 7-9
INDIANAPOLIS, IN

After release in March of 1973, their testimony was the basis for the award of the Congressional Medal of Honor to Lance. Guy also collaborated closely with Malcolm McConnell of the Reader's Digest in his book "Into the Mouth of the Cat," a story about one man's struggle to successfully resist all interrogation despite terrible physical injuries.

There have been two additional books written with stories about Guy, "Bury Us Upside Down," by Rick Newman and Don Shepperd, and "Misty," by Major General Don Shepperd, USAF (Ret.).

Guy joined Eastern Airlines as a pilot, flying DC-9s and Boeing 727s, and retired as a Captain in 1991. During this time, Guy and Sandy were blessed with seven children, two before Vietnam and five after. Guy also was a very successful international account representative for the IBM Corporation, handling GTE Sylvania, a three billion dollar company. He left IBM with his brother and was president of PC Software Systems for more than ten years, building it into IBM's leading supplier of application software for Accountants and Independent Insurance agents. Upon retiring from Eastern, Guy took the position of Director of Data Processing for Pearl Vision in Dallas and then VP-MIS for McCrory Corporation in Pennsylvania, both billion dollar corporations.

Guy was asked to leave the corporate world by his brother, Peter, in Ohio. Guy currently works there with his brother as a writer/editor and professional speaker about the POW experience. Peter is an author of many books on rural family life that have been well received.

The goal they are working for is to strengthen families by facilitating their return to traditional living on five to ten acre plots with large gardens and numerous domestic animals in the countryside.



2013 ILCA ANNUAL
CONFERENCE
OCTOBER 7-9
INDIANAPOLIS, IN

Mark Robison
Chairman of the Board and President
Brotherhood Mutual Insurance Company

Mark Robison has served Brotherhood Mutual for more than 18 years. He took on the role of company president in 2007, and was named Chairman of the Board in 2010 as well. In the more than six years since Robison took office, Brotherhood Mutual has increased its national footprint from 29 to 43 states and its customer base has grown by more than 5,000. Corporate assets also have increased from \$293 million to \$385 million. At the home office in Fort Wayne, Indiana, an additional 100 jobs have been created to help meet the insurance and risk management needs of America's churches and related ministries.

Robison has an extensive background in accounting and finance. He earned his accounting degree from Manchester College and his CPA from the Indiana State Board of Public Accountancy. He holds a Fellow Life Management Institute (FLMI) designation, an Associate in Insurance Accounting and Finance (AIAF) and the CPCU designation. A member of the American Institute of Certified Public Accounts and the Indiana CPA Society, Robison also is a past chairman of the Insurance Accounting Systems Association.

KEYNOTE SPEAKER

2013 ILCA ANNUAL
CONFERENCE
OCTOBER 7-9
INDIANAPOLIS, IN

Rogue Supervisor:

Federal Court Rejects OSHA's Attempt To Create Strict Employer Liability

By Mark A. Lies II* & Kerry M. Mohan**

I. INTRODUCTION

It is well recognized that employer knowledge is required for OSHA to establish a violation. Under most circumstances, this element can be satisfied when a supervisor, manager, or foreman, who are agents of the employer, witnesses an employee exposed to a hazard, but does nothing about it. But what happens when the supervisor, manager, or foreman is the individual violating OSHA's regulations (and the Company rules)? In the past, OSHA has tried to use the supervisor's bad act to impute strict liability on the employer, arguing that the supervisor's own knowledge of his bad act is sufficient to impute or infer knowledge of that bad deed onto the employer. This article addresses a recent Federal Court of Appeals' decision rejecting OSHA's interpretation, and how that decision may affect OSHA's ability to prove a violation in the first place or for the employer to prove unavoidable supervisor misconduct affirmative defense.

II. OSHA Burden To Prove Employer Liability

In order to prove a violation of an OSHA safety or health regulation (or the General Duty Clause, Section 5(a)(1)), the agency must show by a preponderance of factual evidence at the hearing the following elements:

- (1) the regulation or a generally recognized industry safety practice or the employer's own safety policy applies to the safety or health hazard (e.g. fall, confined space, machine guarding, etc.) which OSHA observed at the worksite, and
- (2) the requirements of the regulation or industry practice or employer policy were not met at the worksite (e.g. there was no fall protection, no confined space program, no machine guards in place, etc.); and
- (3) one or more of the employer's employees were actually exposed to the hazardous condition so that the employee could have been injured by the hazard. NOTE: On multi-employer worksites, an employer may be liable for exposure of another employer's employee to the hazard if certain conditions are met; and
- (4) the employer **knew**, or with the exercise of reasonable diligence, **should have known** of the violative conditions.

Thus, "employer knowledge" is a critical element. Employers are not strictly liable under the Act or a particular OSHA standard simply because a violative condition exists or an accident has occurred. Because many employers are legal entities, such as corporations, and are not individuals, it may be

*Mark A. Lies, II, is a partner with the law firm of Seyfarth Shaw LLP, 131 South Dearborn Street, Suite 2400, Chicago, IL 60603 (312) 460-5877, miles@seyfarth.com. He specializes in occupational safety and health related employment law and civil litigation.

**Kerry M. Mohan is an associate with Seyfarth Shaw, (312) 460-5659, kmohan@seyfarth.com. His practice focuses on occupational safety and health, traditional labor matters, and related employment law and civil litigation.

difficult to determine what a corporation “knows”. Therefore, the case law involving OSHA citations has established a general rule that the actual or constructive knowledge of an employer’s agent, such as a foreman or supervisor, can be imputed to the employer. In other words, if OSHA can prove that a supervisor or foreman knew or, with the exercise of reasonable diligence, should have known that a violative condition exists, OSHA may be able to satisfy the employer knowledge element of its burden of proof in a contested case.

III. OSHA’s Attempt To Establish Employer Knowledge By A Supervisor’s Own Bad Deeds

To satisfy its burden of establishing “employer knowledge,” OSHA has often tried to use a supervisor’s own bad deeds to impute direct knowledge to the employer. In essence, OSHA’s view is that because the supervisor engaged in the dangerous act, his knowledge of that dangerous act is sufficient to establish employer knowledge.

In a recent OSHA Review Commission decision, *ComTran Group, Inc.*, 2011 OSAHRC LEXIS 114 (O.S.H.R.C.A.L.J., Oct. 17, 2011), a supervisor was caught digging in a six-foot deep trench with an unprotected five-foot high “spoil pile” at the edge of the trench. The administrative law judge found that because the supervisor “had dug the excavation and placed the spoil pile at the edge,” his knowledge of his own malfeasance was imputed to the employer. As a result, the administrative law judge found that the Secretary had established its *prima facie* violation and affirmed the citation.

IV. The Eleventh Circuit Rejects OSHA’s Attempt To Impose Strict Liability Based On Supervisor Malfeasance

Following the OSHA Review Commission’s decision in *ComTran*, the employer appealed the decision to the Eleventh Circuit Federal Court of Appeals. *ComTran Group, Inc. v. DOL*, 2012 U.S. App. LEXIS 15023 (11th Cir. July 24, 2013). On appeal, the Eleventh Circuit addressed the issue of whether it is appropriate to impute a **supervisor’s knowledge of his own violative conduct** to his employer under the Act, thereby relieving the Secretary of his burden to prove the “employer knowledge” element of his *prima facie* case. The Eleventh Circuit found against OSHA, holding that if this approach were to apply, the Secretary would only have to meet three of the four evidentiary elements of the *prima facie* case, and would not have to prove the “employer knowledge” element.

Analyzing prior Federal appellate court decisions, the Eleventh Circuit stated that:

We say that a supervisor’s knowledge is “generally imputed to the employer” because that is the outcome in the ordinary case. The “ordinary case,” however, is where the supervisor knew or should have known that subordinate employees were engaged in misconduct, and not, as here, where the supervisor is the actual malfeasant who acts contrary to the law.

Id. at *8, n. 2. Further, seeming to support the unavoidable supervisory misconduct defense, the Eleventh Circuit found that “[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 purpose behind the Act require that a citation be set aside.” *Id.* At *20 Finally, the Court stated that a supervisor’s “**rogue conduct**” cannot be imputed to the employer merely because the supervisor is the violator. *Id.* At *25. As a result, the Eleventh

Circuit remanded the matter back to the Review Commission to require the Secretary to prove the “employer knowledge” element and permit the employer to establish its defenses to the citation.

V. The Eleventh Circuit’s Decision And Its Application To The Unavoidable Supervisory Misconduct Defense

The Eleventh Circuit’s decision has seemingly breathed new life into the often difficult to prove “unavoidable supervisor misconduct” employer affirmative defense. Under the typical “unavoidable employee misconduct” defense that applies to hourly employees, the employer must prove the following elements:

- (a) the employer had a safety or health program and work rules which applied to the OSHA regulation contained in the citation (e.g., if OSHA has cited the employer for violations of the fall protection regulations, the employer had a specific program and work rules relating to fall hazards), and
- (b) the employees were effectively trained in such safety or health program and work rules (to prove this element the employer will need documentation of training—NOTE: This training requirement is often difficult to establish when employees are illiterate or cannot understand the language, typically English, in which the written and spoken training is being provided), and
- (c) the employer has effectively enforced these safety or health programs and work rules at previous times or jobs with discipline for violations (to establish this element the employer must be able to produce documentation of verbal or written discipline given to employees for past violations which requires that such documents be generated and maintained), and
- (d) the employer must prove that on the date when the violation occurred in the citation that the violation occurred in such a fashion (e.g., extremely short time-frame, totally unforeseeable circumstances) that the employer could not have learned of and prevented the violation—hence the violation is due to “unavoidable” employee misconduct.

Because supervisors are expected to follow and enforce an employer’s safety rules, the “unavoidable supervisory misconduct” defense is often more difficult to establish. Specifically, the employer often must present more evidence to show the propriety of its safety programs, that it monitored and audited the supervisor more frequently than the hourly employees, the supervisor has no prior history of engaging in any safety violations or unsafe behavior, and the employer could not have anticipated that the supervisor would have engaged in the unsafe behavior.

Because the Eleventh Circuit’s decision rejected OSHA’s argument that an employer is strictly liable whenever a supervisor engages in unsafe behavior, an employer now has a more viable argument that it should not be held liable when a trusted supervisor engages in “unforeseeable or idiosyncratic behavior” or “rogue conduct.” Since the burden of proof for this affirmative defense will remain on the employer to show that the supervisor’s bad deed was in fact “unforeseeable or idiosyncratic,” it will be necessary for the employer to conduct audits or other evaluations of supervisor performance to establish the supervisor was compliant in prior situations.



Insurance Loss Control Association

PO Box 346
Morton, IL 61550
Phone: 309.696.2551
E-mail: administration@insurancelosscontrol.org

2013 Board Members:

President — Kevin Matthews
First Vice President — Ron Huber
Second Vice President — Larry Peterson
Secretary — Dan Finn
Financial Secretary — Stig Ruxlow
Member at Large — Dave Waggamon

Thank you to our vendors!

Please visit the ILCA Website. Follow the links to our Vendor Directory for info about these companies and their services:



Alexander & Schmidt
PO Box 337
Yarmouth, ME 04096
Phone: 800-491-6484

www.alexanderschmidt.com



Brotherhood Mutual Insurance Company
6400 Brotherhood Way
Fort Wayne, IN 46825
Toll Free: 800-333-3735
www.brotherhoodmutual.com



Risk Control Technologies Inc.
www.riskcontroltech.com

3-1750 The Queensway Suite 1105
Toronto, ON, Canada
M9C 5H5
Toll Free: 1-877-777-2231
Phone Number: (416) 249-2260

TranStar
Technical Services, Inc.
www.transtartech.com
3225 Shallowford Rd #230
Marietta, GA 30062
Toll Free: 1-800-993-2990
Phone Number: (678) 236-9005
Fax Number: (678) 236-9014



ISI Insurance Services
www.isiinsuranceservices.com
1165 National Pike East
Uniontown, PA 15401
Toll Free: 1-800-837-8506
Phone Number: (724) 439-1910
Fax Number: (724) 439-1930

