



# OSHA 30/30<sup>®</sup>

A thirty minute update on OSHA law every thirty days

with **Manesh Rath**



## RECENT REVIEW COMMISSION DECISION HIGHLIGHTING “LACK OF CONTROL” DEFENSE

August 22, 2018  
1001 G Street NW, Ste. 500 W,  
Washington, D.C.

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# MANESH K. RATH

Manesh Rath is a partner in Keller and Heckman's litigation and OSHA practice groups. He has been the lead amicus counsel on several cases before the U.S. Supreme Court including *Staub v. Proctor Hospital* and *Vance v. Ball State University*.

Mr. Rath is a co-author of three books in the fields of wage/hour law, labor and employment law, and OSHA law. He has been quoted or interviewed in *The Wall Street Journal*, Bloomberg, *Smart Money* magazine, *Entrepreneur* magazine, on "PBS's Nightly Business Report," and C-SPAN.

Mr. Rath currently serves on the Board of Advisors for the National Federation of Independent Business (NFIB) Small Business Legal Center. He served on the Society For Human Resources (SHRM) Special Expertise Panel for Safety and Health law for several years.

He was voted by readers to Smart CEO Magazine's Readers' Choice List of Legal Elite; by fellow members to The Best Lawyers in America 2016, 2017 and 2018; selected by Super Lawyers 2016 – 2017, 2017 – 2018; and by corporate counsel as the 2017 Lexology winner of the Client Choice Award.



# JAVANEH S. NEKOOMARAM

Javaneh Nekoomaram is an associate in the environmental and workplace safety and health (OSHA) practice groups at Keller and Heckman. Ms. Nekoomaram practices in all areas of environmental law as well as occupational health and safety law, and chemical control law. She routinely advises clients on a broad range of environmental health and safety compliance issues.

Prior to joining Keller and Heckman, Ms. Nekoomaram served for three years as Counsel for the American Coatings Association. She provided regulatory compliance and advocacy on a number of issues on behalf of the coatings industry including TSCA, Prop 65, hazard communication and labeling, state chemical regulation, hazardous waste, air and water quality, occupational health and safety, and chemical safety regulations. She also served as Advocacy Counsel for the Graffiti Resource Council, an organization supported by the aerosol coatings industry that provides anti-graffiti strategies for cities across the country.



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# TOPICS TO BE DISCUSSED

- Overview of facts in recent Occupational Safety and Health Review Commission case.
- Review of employer's arguments.
- Discussion of “lack of control” over worksite defense.
- Analysis of Administrative Law Judge's decision.
- What employers should do.



# OVERVIEW OF FACTS OF CASE

- Hightower Metal Works (HMW) operates steel fabrication facility
- TMD supplies employees to operate HMW's steel fabrication machines
  - Bending roll (or plate roll)
  - Ironworker machine (punch)
  - Two press brakes
- OSHA CSHO inspected facility after TMD employee's finger was crushed by bending roll used to roll metal sheets
- Issued citations to HMW and TMD for violations of OSHA's machine guarding standard

# EMPLOYER'S ARGUMENTS BEFORE ALJ

- TMD: No exposure to struck-by and caught-by hazards when using unguarded machine
  - Employees did not have access to unguarded points of operation of cited machines
  - OSHA recognizes guarding by safe distance
- TMD: No employer knowledge where employer was not an expert in machine guarding and did not recognize the unguarded condition
- TMD affirmative defenses:
  - Unpreventable employee misconduct
  - Lack of control over worksite

# “LACK OF CONTROL” DEFENSE

- TMD cites to *Central of Georgia Railroad Company v. OSHRC* (5<sup>th</sup> Circuit)
  - RR’s employees worked on property owned by subcontractor
  - Affirmative defense can be made by showing lack of control over hazard
- TMD arguments
  - No supervision at the HMW site
  - Visited only 2-4 times per year for site inspections
  - TMD left machine training to HMW
  - No contractual right to insist on changes being made to the machines
  - No contractual right to access or alter the machines, or contractual covenants that TMD could enforce or force HMW to change its machines

# ALJ's DECISION

- Affirmed citation
- Employees did have access to violative condition
  - Ironworker machine: Employees required to place hands 2-3 inches from unguarded point
  - Press brakes: “Safe distance” only allowed if guarding is not feasible
  - Bending roll: Also in the zone of danger when operating
- TMD survey of equipment at site and use of form with unchecked space for “guarded at point of operation” established knowledge
- Rejected unpreventable employee misconduct and lack of control affirmative defenses

# ALJ's DECISION CONT.

- Lack of Control defense
  - Cannot contract out your duties under the OSH Act
    - Must comply with OSHA standards even if TMD did not create or control the hazard
  - Employer still must protect its employees through alternative means
    - Direct HMW to provide guards
    - Prohibit employees from operating machine or avoid area where hazard exists
    - Get a general contractor to come in and abate
    - Require HMW to provide guards in contracts

# WHAT EMPLOYERS SHOULD DO

- Routinely monitor for hazards to which your employees may be exposed
- Incorporate OSHA compliance in contracts with contracting companies
- Promptly notify contracting companies if you discover hazards and request that the hazards be abated
- Retain authority to exit contract or pull workers if contracting company does not abate hazards



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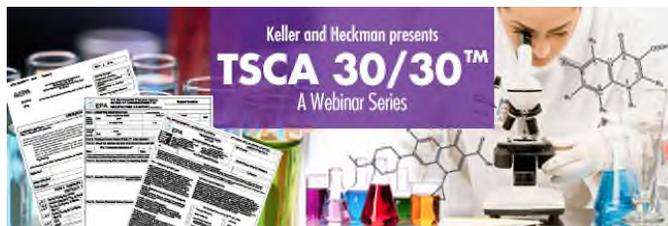
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