



# OSHA 30/30<sup>®</sup>

A thirty minute update  
on OSHA law every thirty days

with  
**Manesh Rath**

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## **Review Commission Remanded Judge's Opinion On Multi-Employer Worksite Doctrine**

January 25, 2023

# Manesh 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.



Manesh Rath  
Partner  
rath@khlaw.com  
202-434-4182

# Taylor Johnson



Taylor Johnson is an environmental lawyer specializing in the area of environmental regulation of products, including chemical control, pesticides, energy efficiency regulation, and importantly, domestic and international transportation of hazardous materials. Mr. Johnson also advises clients on community-right-to-know laws, Proposition 65, occupational safety and health matters, and supports a wide variety of commercial tort and other litigation issues.

Mr. Johnson has special expertise in the area of hazardous materials transport, including enforcement defense and compliance counseling. Mr. Johnson helps companies secure competent authority approvals, special permits, and letters of interpretation from regulatory authorities around the world. He has also prepared successful petitions to PHMSA on behalf of shippers seeking regulatory relief.

Prior to joining Keller and Heckman, Mr. Johnson promoted the development of energy and environmental legislation and policy at the state level.



# Topics to be Discussed

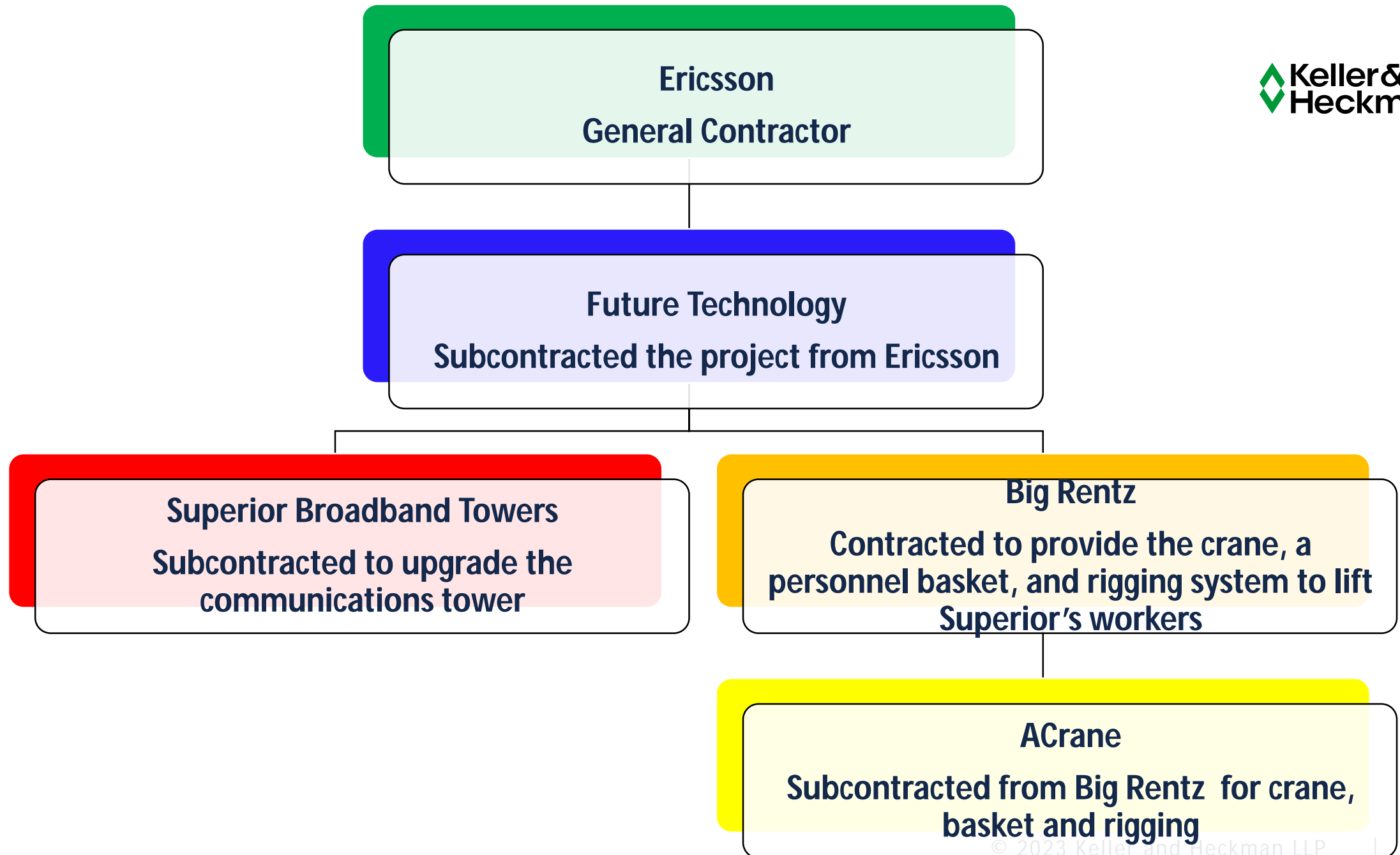
## *Secretary v. A Crane Rental LLC*

- ◆ Facts of the case
- ◆ Multi-Employer Worksite Doctrine
- ◆ Overview of the Crane and Derricks Standard
- ◆ Review ALJ Decision
- ◆ Analysis of the Review Commission Decision
- ◆ What Employer's Should Do
- ◆ Off the Record

# Facts of the Incident:

- ◆ In 2019, five companies were working on upgrading a communication tower in Norcross, Georgia
- ◆ ACrane Rental LLC (ACrane) was responsible for providing a crane, personnel basket, rigging system, and an operator
- ◆ Superior Broadband Towers (Superior) was responsible for providing the workers who would update the communications tower





# Facts of the Incident:

- ◆ Superior's foreman, Gorman, was the worksite's lift director
- ◆ An ACrane employee operated the crane
- ◆ March 21, 2019: the operator hoisted equipment and three Superior employees up to the top of the tower.
- ◆ The personnel platform was limited to lifting no more than two people
- ◆ One Superior employee tried to tie off, fell approximately 105 feet. He did not survive the fall.

# Crane and Derricks Standard (1926.1431)



Applies to power-operated equipment used in construction work that can hoist, lower and horizontally move a suspended load




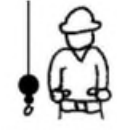




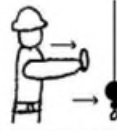
Requirements cover:

- ◆ Assembly/Disassembly
- ◆ Hoisting Personnel
- ◆ Inspections
- ◆ Operator Qualifications and Certifications
- ◆ Signal Person Qualifications
- ◆ Training
- ◆ Equipment Modifications



# Cranes and Derricks Signal Requirements

- ◆ Signal person must be provided when the direction in which the equipment is traveling is obstructed
- ◆ Standard method of hand signals listed in 1926.1419 but non-standard hand signals are permitted if agreed upon
- ◆ Electronic signals must be transmitted through a dedicated channel
- ◆ Employees being hoisted must remain in direct communication with the signal person (where used), or the operator

 <p><b>STOP</b> – With arm extended horizontally to the side, palm down, arm is swung back and forth.</p>	 <p><b>EMERGENCY STOP</b> – With both arms extended horizontally to the side, palms down, arms are swung back and forth.</p>	 <p><b>HOIST</b> – With upper arm extended to the side, forearm and index finger pointing straight up, hand and finger make small circles.</p>
 <p><b>RAISE BOOM</b> – With arm extended horizontally to the side, thumb points up with other fingers closed.</p>	 <p><b>SWING</b> – With arm extended horizontally, index finger points in direction that boom is to swing.</p>	 <p><b>RETRACT TELESCOPING BOOM</b> – With hands to the front at waist level, thumbs point at each other with other fingers closed.</p>
 <p><b>RAISE THE BOOM AND LOWER THE LOAD</b> – With arm extended horizontally to the side and thumb pointing up, fingers open and close while load movement is desired.</p>	 <p><b>DOG EVERYTHING</b> – Hands held together at waist level.</p>	 <p><b>LOWER</b> – With arm and index finger pointing down, hand and finger make small circles.</p>
 <p><b>LOWER BOOM</b> – With arm extended horizontally to the side, thumb points down with other fingers closed.</p>	 <p><b>EXTEND TELESCOPING BOOM</b> – With hands to the front at waist level, thumbs point outward with other fingers closed.</p>	 <p><b>TRAVEL/TOWER TRAVEL</b> – With all fingers pointing up, arm is extended horizontally out and back to make a pushing motion in the direction of travel.</p>

# Citation:

- ◆ A Crane was issued two citations for violating OSHA'S Cranes and Derricks in Construction Standard for:
  - ◆ Exceeding the maximum number of employees allowed on the platform
  - ◆ Not including the required employees in the pre-lift meeting
    - Superior's foreman held a lift meeting with an A Crane employee, but not with the employees who would be hoisted



# OSHA's Multi-Employer Worksite Doctrine

Creating  
Employer

Exposing  
Employer

Correcting  
Employer

Controlling  
Employer

# Definitions of “Employer” and “Employee”:



# Creating Employer:



An employer who creates a violative condition is citable even if the only employees exposed are those of other employers at the site

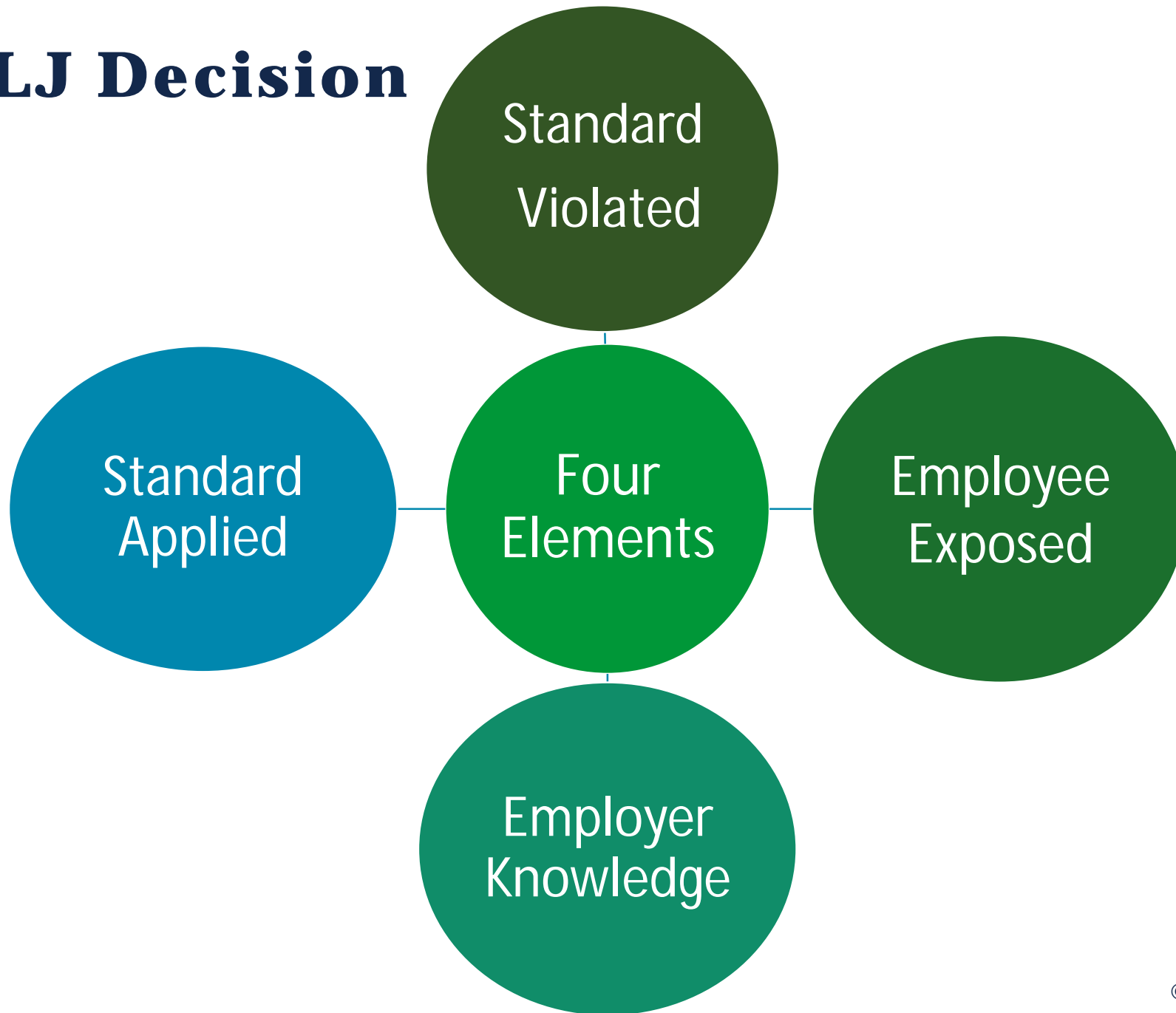


An Employer who creates a violative or hazardous condition is obligated to protect its own employees as well as employees of other contractors who are exposed to the hazard



Example: If a trenching company creates a noncompliant trench at a worksite, the trenching company is responsible for preventing entry into the trench. If the trench collapsed and someone was injured, the trenching company could be considered the creating employer.

# ALJ Decision



ALJ found that Secretary did not prove third and fourth elements.

# Review Commission Decision



- ◆ Secretary never alleged that ACrane was a controlling employer
- ◆ Discussed that ALJ erred in analyzing the case under a “controlling employer” framework
- ◆ COSHO Starks testified that he viewed ACrane as the “creating” employer because the operator:
  - ◆ Lifted the basket with more than two employees
  - ◆ Failed to properly conduct a pre-lift meeting
- ◆ Issued a Remand Order so the ALJ would review the case

# What Employers Should Do:

Crane companies at a multi-employer site should supply their own operator and spotter

Subcontractors should secure representations from co located subcontractors that they will provide safety oversight for their respective tasks

General contractors should carefully vet subcontractors' safety record

Prohibit further subcontracting without review of new entities to the worksite

If cited, for each element of a citation, examine the knowledge element as it applies to every participant in a multi-employer worksite





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**Stick around for Off the Record**

## Manesh Rath

Partner

1001 G Street N.W. Ste. 500W  
202.434.4182  
rath@khlaw.com



## Taylor Johnson

Associate

1001 G Street N.W. Ste. 500W  
202.434.4255  
johnsont@khlaw.com

