



OSHA 30/30[®]

A thirty minute update
on OSHA law every thirty days

with
Manesh Rath

www.khlaw.com/osha3030

Rogue Supervisor Defense Fails at Fifth Circuit Court of Appeals

May 22, 2024

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 through 2024, and in 2023, selected in his field as Lawyer of the Year; 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

- ◆ Facts of J.D. Abrams v. Occupational Safety and Health
- ◆ OSHA's Burden of Proof
- ◆ Elements of Unpreventable Supervisor Misconduct
- ◆ Discussion of ALJ Decision
- ◆ Analysis of 5th Circuit Decision
- ◆ What Employers Should Do
- ◆ Off the Record

Facts of J.D. Abrams v. Occupational Safety and Health Review Commission



- ◆ J.D. Abrams is a company of about 500 employees that performs highway construction projects
- ◆ In December of 2019, they were engaged in a waterline installation project in Austin, TX
- ◆ On December 3, 2019, the OSHA Area Director passed by the worksite and saw what appeared to be an employee working in an unprotected trench
 - ◆ After an investigation, Abrams was cited for having an employee working in a trench excavation over five feet deep that was not protected from cave-ins, and for a ladder that did not extend the minimum required three feet above the landing surface.



Facts (2)

- ◆ Ramon Louis Reyes Rivera (Mr. Rivera) was an installation supervisor for Abrams
- ◆ The day before OSHA's inspection, Mr. Rivera's crew worked on a section of trench that had been flooded after a trench box crushed a section of pipe
- ◆ Mr. Rivera told the crew that because of the crushed pipe the day before, they would not use a trench box that day
- ◆ Abrams contested both citations, alleging:
 - ◆ That they did not have knowledge of the hazardous condition, and
 - ◆ That Mr. Rivera engaged in unpreventable employee misconduct (UEM)



OSHA's Burden of Proof

The standard applies

The employer did not comply with the terms of the standard

Employees had access to the violative condition

The employer had actual or constructive knowledge of the violation

Elements of Unpreventable Employee Misconduct (UEM)



J.D. Abrams appeal was denied due to their failure to establish they had satisfied these last two points for their UEM Defense

Supervisor Knowledge Can be Imputed to Employer If:

The employee was acting in a supervisory role at the time of the accident

The supervisor had actual or constructive knowledge of misconduct

Supervisor's misconduct was foreseeable

ALJ Decision

- ◆ As a supervisor, Rivera's knowledge is imputed to Abrams
 - ◇ Employers ability to foresee relates to employer's foreseeability of supervisor's misconduct, not employee's.
- ◆ Abrams failed to prove the last two elements of the unpreventable employee misconduct defense
- ◆ No documentation was provided to support that Abrams took steps to detect violations of safety rules at its worksites
- ◆ No corroboration that Abrams had effective and consistent discipline for safety rule violations

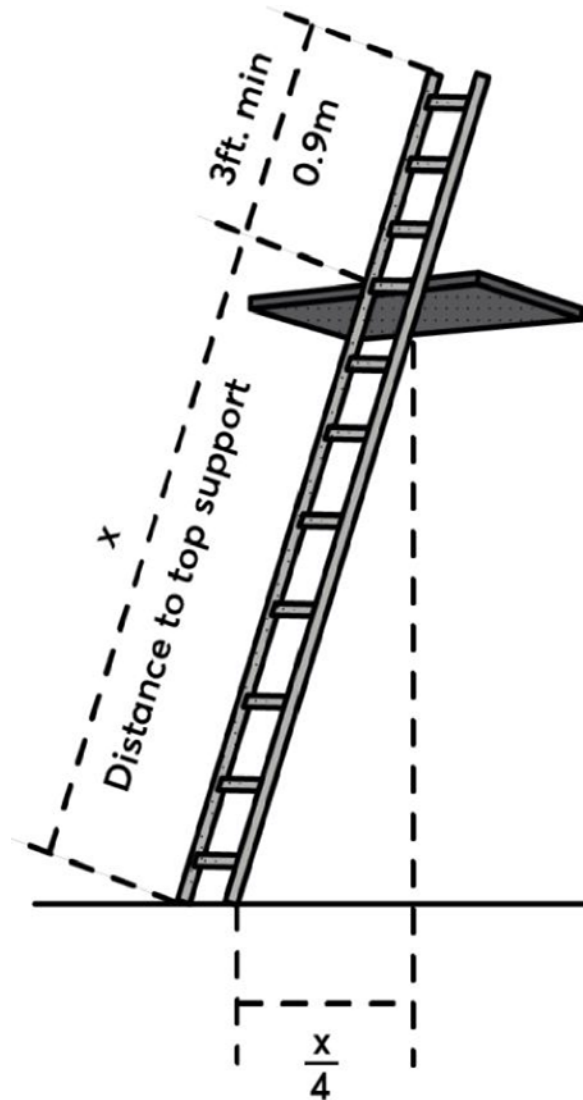


Abrams' Brief Before 5th Circuit:

- ◆ Rivera admitted to making “big mistake” that was contradictory to his training
- ◆ ALJ disregarded evidence regarding pre-inspection disciplinary actions taken by Abrams for safety violations
- ◆ ALJ created a heightened legal standard
 - ◇ Which required Abrams to call certain witnesses and introduce specific evidence
- ◆ Abrams had a robust safety program including routine safety audits
- ◆ No proof that anyone used the ladder when it was not 3 feet above the landing surface (exposure)



OSHA'S Brief Before the 5th Circuit:



OSHA: Significant gaps in testimony regarding safety audits – undermined by other evidence in record

OSHA: Management failed to visit the site where the pipe burst the day before the OSHA inspection

Post inspection discipline alone is not enough to prove enforcement

OSHA: Six-hour period in which violation occurred is strong evidence of lax enforcement

5th Circuit Court of Appeals Decision

- ◆ Abrams failed to meet burden regarding fourth element of UEM
- ◆ Agrees with ALJ that post-incident discipline is not sufficient
- ◆ Reliance on *Angel Bros. Enterprises v. Walsh*
 - ◆ *Yates* exception on foreseeability does not apply when the supervisor directs the misconduct



Angel Bros. Enterprises v. Walsh

- ◆ *Yates* Exception: If supervisor's own actions constitute the OSHA violation the supervisor's knowledge should be imputed to the employer only when the misconduct was foreseeable
- ◇ *Angel Bros.* addresses the limits of the *Yates* exception: it **does not** include the supervisor's authorization of a subordinate employee to engage in a safety violation; it only covers the supervisor themselves if they engage in unsafe conduct
 - Therefore: in *J.D. Abrams* case the supervisor's authorization of the employee to work without trench protection can be imputed knowledge to the employer

What Employers Should Do

A supervisors unforeseen actions is only a defense when it is the supervisor who performs the violative action.

Train field staff on how to interact with OSHA during an inspection – remember four elements.

Frequently monitor worksites to determine that foremen are applying work rules correctly.

Document all instances of discipline. Post-incident or post-inspection discipline is not enough.

Identify actual act that violates the standard.

Document walkthroughs, communication rules, and action items.




OSHA 30/30[®]

A thirty minute update
on OSHA law every thirty days

with
Manesh Rath

www.khlaw.com/osha3030



Please join us
at 1:00 p.m., Eastern Time
June 26, 2024
www.khlaw.com/OSHA3030



Please join us at 10:00 a.m. Eastern U.S.
June 12, 2024
www.khlaw.com/REACH-3030



Please join us at 1:00 p.m. Eastern U.S.
June 12, 2024
www.khlaw.com/TSCA-3030



Thank You

Stick around for Off the Record

Manesh Rath

Partner

1001 G Street NW Ste. 500W

202.434.4182

rath@khlaw.com



Taylor Johnson

Associate

1001 G Street NW Ste. 500W

202.434.4255

johnsont@khlaw.com

