



OSHA 30/30[®]

A thirty minute update
on OSHA law every thirty days

with
Manesh Rath

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Judge Found that OSHA Failed to Prove that the Employer's Industry Recognized an Employee's Position as Being in a Danger Zone

August 21st, 2024

Manesh Rath

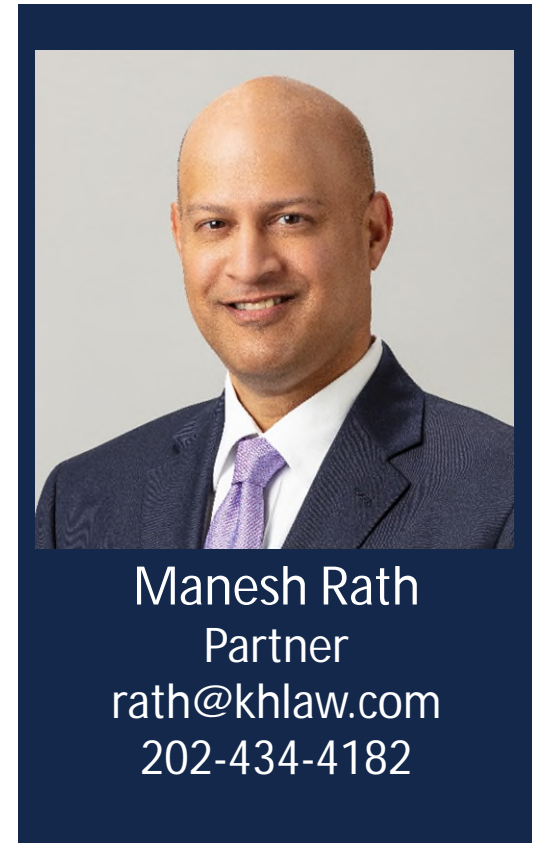


Manesh Rath is a partner in Keller and Heckman's litigation and OSHA practice groups. He has testified before Congress on OSHA matters, and he has served as lead amicus counsel on several cases before the U.S. Supreme Court including *Staub v. Proctor Hospital* and *Vance v. Ball State University*.

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 served two terms 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 -2023; and by corporate counsel as the 2017 Lexology winner of the Client Choice Award.



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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 *Secretary of Labor v. C&S Technical Resources, Inc.*
- ◆ Establishing a General Duty Clause Violation
- ◆ OSHA's Argument
- ◆ C&S's Argument
- ◆ ALJ's Decision
- ◆ What Employers Should Do

Facts of the Case

- ◆ C&S Technical Resources was hired to torch-cut decommissioned steel power transmission poles and load the cut pole segments onto flatbed trailers
- ◆ C&S estimated the weight of the pole segments loaded onto the flatbed to be between 4,000 and 8,000 pounds
- ◆ Two C&S employees were tasked with performing the work: a Foreman (operating a forklift) and a Spotter



Facts of the Case

- ◆ At one point during the project, the employees loaded several stacks of cut pole segments onto a trailer
- ◆ While attempting to load an additional stack, a segment slipped from the lifting fork causing the loaded stacks to collapse
- ◆ One of the segments struck and killed the Spotter
- ◆ At the time of accident, the Spotter was positioned next to a previously loaded stack of pole segments at the front-half of the truck, about 10 feet from the back-half of the trailer and 18 feet from the Foreman



Facts of the Case

- ◆ OSHA investigated the incident and issued two citations to C&S
 - ◇ Serious violation of training requirement for operators under the powered industrial trucks standard
 - ◇ Violation of Section 5(a)(1) of the OSH Act (“the General Duty Clause”)
- ◆ C&S appealed the citation to the Occupational Safety and Health Review Commission, which assigned the case to an Administrative Law Judge (“ALJ”) for adjudication



Establishing a General Duty Clause Violation

(1) A condition or activity in the workplace presented a hazard

(2) The employer or its industry recognized the hazard

(3) The hazard was causing or likely to cause death or serious physical injury

(4) A feasible and effective means existed to eliminate or materially reduce the hazard

(5) The employer knew or could have reasonably known of the hazardous condition or activity

OSHA's Argument



- ◆ The Spotter's position was a hazard recognized by C&S's industry and C&S had actual knowledge that the Spotter was positioned in the "danger zone"
- ◆ Cited to two warnings in the forklift operator's manual:
 - ◆ Warning One: "Danger zone is any zone around the machinery in which a person is subject to a risk to their health or safety . . . keep all persons out of danger zone"
 - ◆ Warning Two: "Worksites can be hazardous . . . [persons] can be killed or injured"
- ◆ Used testimony of an CSHO and Registered Engineer (neither was a qualified expert)

C&S's Argument

- ◆ Relied on the testimony of a qualified “construction safety expert”
- ◆ Common industry practice is that a forklift’s “danger zone” is 10 feet from the machine
- ◆ Since the Spotter was 18 feet from the forklift at the time of the incident, he was not in an industry recognized danger zone



ALJ's Decision

- ◆ Found that OSHA offered “no probative evidence” to show that C&S recognized the Spotter to be within the danger zone at the time of the accident
- ◆ While OSHA cited portions of the two warnings in the telehandler's operator's manual, the ALJ found that when read in totality, they did not support OSHA's case



ALJ's Decision



- ◆ The manual provided examples illustrating areas within the danger zone include
 - ◆ in the “immediate proximity to any hazardous moving parts” of the telehandler
 - ◆ “Into which equipment and attachments can be moved to quickly”
- ◆ Danger zone consists of the areas where there is a risk of being stuck by the telehandler, its load, or material falling from its attachment or working tools (e.g., its fork)
- ◆ Consistent with C&S’s expert witness’ testimony that the danger zone is 10 feet from the machine

ALJ's Decision

- ◆ Found that there is no evidence that the Spotter was at risk of being struck by the machine, its load, or the material that it was carrying
 - ◇ Spotter was 18 feet from the machine
- ◆ Concluded that there is insufficient evidence to establish that the Spotter was within an industry recognized danger zone and vacated the General Duty Clause violation



What Employers Should Do

Advance your own experts to counter OSHA's – especially considering *Loper Bright*

Review OSHA's evidence (*e.g.*, manuals) in its entirety

Proper documentation of real industry practices




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Please join us
at 1:00 p.m., Eastern Time
September 25, 2024
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Please join us at 10:00 a.m. Eastern U.S.
August 28th, 2024
www.khlaw.com/REACH-3030



Please join us at 1:00 p.m. Eastern U.S.
September 18th, 2024
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Thank You

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