



OSHA 30/30[®]

A thirty minute update
on OSHA law every thirty days

with
Manesh Rath

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Steel Fabricator Asks Federal Court to Declare the Review Commission's Process Unconstitutional

November 20th, 2024

Manesh Rath

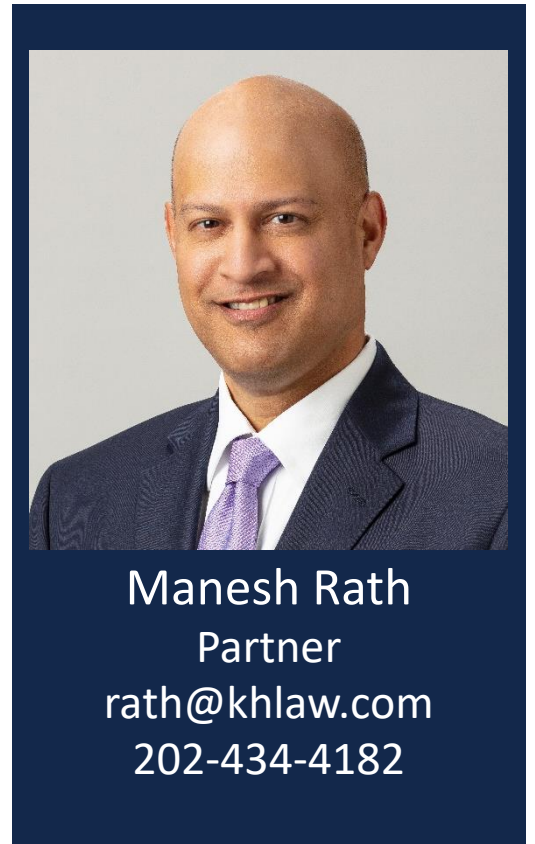


Manesh Rath is a partner in Keller and Heckman’s litigation and OSHA practice groups. He has been the lead amicus counsel on several cases before the U.S. Supreme Court. He has been called to testify before Congress in several hearings relating to OSHA law.

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 interviewed in The Wall Street Journal, Bloomberg, Smart Money, Entrepreneur, on PBS's Nightly Business Report, and C-SPAN.

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

He was voted by fellow members to The Best Lawyers in America 2016-2025 (in 2024, was voted 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

- ◆ Background: Occupational Safety & Health Review Commission
- ◆ *Securities and Exchange Commission v. Jarkesy*
- ◆ Facts of *Kenric Steel v. OSHA*
- ◆ Procedural Background
- ◆ Kenric Steel's Arguments
- ◆ Current Posture of Case
- ◆ What Employers Should Do

Background: Occupational Safety & Health Review Commission

- ◆ Independent federal agency
- ◆ Two-tiered administrative court
 - ◇ “Trial” Level: Administrative Law Judges (ALJ)
 - ◇ “Appellate” Level: Panel of Three Commissioners
- ◆ ALJs are removable by Commissioners if there is “good cause”
- ◆ ALJs, Commissioners removable by the President
 - ◇ inefficiency, negligence, or malfeasance



Securities and Exchange Commission v. Jarquesy

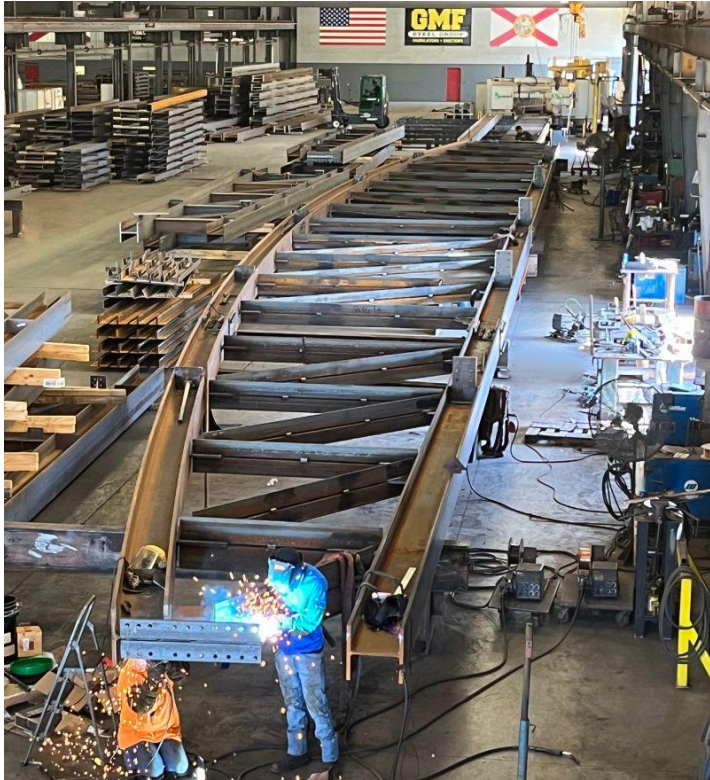
- ◆ Facts in *Jarquesy*:
 - ◇ Investment advisor cited for alleged fraud under the Securities Act
 - ◇ SEC brought claims through an administrative proceeding
 - ◇ SEC ALJ and Review Commission upheld violations
 - ◇ *Jarquesy*: SEC administrative proceeding violated Seventh Amendment
- ◆ **Opinion.** When the SEC seeks civil penalties against a defendant for securities fraud, the Seventh Amendment entitles the defendant to a jury trial

Facts of *Kenric Steel v. OSHA*



- ◆ New Jersey-based steel fabricator
- ◆ OSHA inspection on July 26, 2023
- ◆ Cited for eleven violations
 - ◆ Respiratory Protection
 - ◆ Hazard Communication
 - ◆ Overhead and Gantry Cranes
 - ◆ Welding, Cutting and Brazing
 - ◆ Listing and Labeling of Equipment
 - ◆ Flammable Liquids
- ◆ Penalties totaled \$348,383.00

Procedural Background



- ◆ January 22, 2024: OSHA citation issued
- ◆ February 7, 2024: Kenric contested citation
- ◆ Before ALJ issued ruling, Kenric sued OSHA and OSHRC
 - ◆ Sought declaration that OSHRC violates several constitutional principles
 - ◆ Relied on *SEC v. Jarkesy*
- ◆ Parties agreed to stay ALJ proceeding until the resolution of the federal suit

Kenric Steel's Arguments: Seventh Amendment



- ◆ Kenric:
 - ◇ Entitled to jury trial to decide liability
 - ◇ Seventh Amendment: Jury trial available for legal claims
 - ◇ *Jarkesy*: Civil penalties are legal claims
 - ◇ OSHA citations intend to punish employer rather than restore victim
 - ◇ Calculated based on employer's culpability
- ◆ Novel theory
 - ◇ *Atlas Roofing v. OSHRC* (1977) upheld OSHRC on constitutional grounds
 - ◇ A split in circuits may lead to Supreme Court

Kenric Steel's Arguments: Separation of Powers; Appointment & Removal

- ◆ OSH Act gives executive power to try cases
- ◆ Kenric: OSHRC ALJs must be appointed under the Appointments Clause
 - ◆ *Lucia v. SEC* (2018): SEC ALJs are “Officers of the United States”
 - ◆ Subject to presidential nomination and confirmation by the Senate
- ◆ Kenric: ALJs and Commissioners are unconstitutionally insulated from removal



Current Posture of *Kenric* Case



- ◆ **September 17, 2024:**
Complaint filed in US District Court
- ◆ **November 25, 2024:**
Deadline for Answer
- ◆ Hearing date has not been set

What Employers Should Do

- ◆ Stay in touch with us to follow this case
- ◆ When issued citations, timely consider which should be contested
- ◆ Evaluate whether a jury would lead to a different outcome
- ◆ Consider whether to move for protection of federal discovery rules
- ◆ Move for rulings on evidence based on federal rules of evidence
- ◆ Evaluate whether right to face accuser may be at issue
- ◆ Consider any impact of potential trial by surprise



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at 1:00 p.m., Eastern Time

December 11th, 2024

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Please join us at 10:00 a.m. Eastern U.S.
December 4th, 2024
www.khlaw.com/REACH-3030



Please join us at 1:00 p.m. Eastern U.S.
December 4th, 2024
www.khlaw.com/TSCA-3030



Thank You

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