



# OSHA 30/30

A thirty minute update on OSHA law every thirty days

with **Manesh Rath**

## OSHA Citation for Contractor's Alleged Failure to Exchange Lockout/Tagout Information with Host Employer Heard by U.S. Court of Appeals

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# TOPICS TO BE COVERED

- The facts of the case: *Otis Elevator v. Secretary*
- Background – the applicable LOTO requirement
- Arguments by the parties
- What employers can do



# ***OTIS ELEVATOR CO. V. SECRETARY OF LABOR***

- Ken Nauholz, an elevator service mechanic
- Assigned to the Boston Store in Brookfield Square Mall, Wisconsin
- Freight elevator gate “hung up and not working”
- Boston Store employees not working near the elevator
- All store employees aware of broken elevator
- In three years of working there, no Boston Store employee had ever been involved in his work

# FACTS OF THE CASE

- Mr. Nauholz cut his hand while attempting to repair the elevator
- There was no electrical energization, just mechanical movement
- OSHA Compliance Officer had no knowledge of employee exposure to the gate's movement, other unexpected release of hazardous energy
- OSHA issued a citation under 29 CFR §1910.147(f)(2)(i)

## 29 CFR § 1910.147(f)(2)(i):

*Whenever outside servicing personnel are to be engaged in activities covered by the scope and application of this standard, the on-site employer and the outside employer shall inform each other of their respective lockout or tagout procedures.*



# ADMINISTRATIVE LAW JUDGE (ALJ) DECISION

- ALJ: the LOTO standard does not apply
- No potential for unexpected release of stored energy
- No Boston Employee should be in the zone of danger, interaction was unlikely
- The ALJ vacated the citation item
- The Secretary appealed to the Review Commission

# REVIEW COMMISSION DECISION

## Review Commission reversed the ALJ

- RC: the fact that Mr. Nauholz expected the chain to move does not make the standard inapposite;
- Standard applies to *potential* for unexpected release of stored energy
- RC cited GM case: Energization is unexpected if there is no mechanism to provide advanced notice of activation



# OTIS ELEVATOR'S ARGUMENT

- Mr. Nauholz had exclusive control over the work area
- LOTO procedures were not applicable to the task – no electrical energy or hydraulic energy involved
- Secretary must show that an employee's entry into the zone of danger is reasonably predictable
- 147(f)(2)(i) does not permit exposure to be presumed
- “Performance standard,” not specification standard – Employers allowed flexibility on meeting LOTO requirements

# SECRETARY'S POSITION

- Mr. Nauholz' unjamming task involved unexpected energization; LOTO applies
- Requirement for exchange of information does not require showing (1) host employer interaction (2) host employer's workers were in a zone of danger
- Hazard is presumed by the standard
- Whether store employees actually approached the elevator is not relevant to whether the exchange of information was required

# WHAT EMPLOYERS SHOULD DO

- Is it practical to expect contractors to share LOTO procedures with host employers in every instance?
- Otis Elevator argued infeasibility – that with scores of elevator models, it is impractical to exchange information each time
- What level of detail must the servicing employer provide the host employer?

## **Next OSHA 30/30**

**Please join us**

**at 1:00 PM EDT**

**Wednesday, May 21<sup>st</sup>, 2014**

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## **The Employment Law Aftermath**

**Live Lunch Meeting**

**Tuesday, July 15<sup>th</sup>, 2014**

**at 12:00 noon to 1:40 pm EDT**

**Web Encore**

**Thursday, July 17<sup>th</sup>, 2014**

**at 12:00 noon EDT**

**Web Encore:**

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# *Thank you!*

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# DAVID G. SARVADI

David Sarvadi practices in the areas of occupational health and safety, toxic substance management, pesticide regulation, and product safety.

David Sarvadi represents clients before a variety of federal and state enforcement agencies in legal proceedings involving OSHA citations, EPA Notice of Violations, TSCA consent orders, CPSC Notices, FIFRA Stop Sale Use and Removal Orders, and EEOC Charges of Discrimination. He works with clients in developing, reviewing, and auditing compliance programs in all of these areas, and in obtaining agency rulings on proposed or novel activities and questions, seeking interpretations of regulations as they apply to specific sets of facts. He has been counsel to the National Coalition on Ergonomics from its inception.

He has a background in occupational safety and health, having worked as an industrial hygienist for more than 15 years and became a Certified Industrial Hygienist in 1978, a designation he held until he voluntarily relinquished it in 2010. Prior to becoming an attorney, he managed a corporate industrial hygiene program for a Fortune 500 company. Mr. Sarvadi was selected by the National Academy of Sciences to participate in a panel of the Institute of Medicine that was asked to review a NIOSH study on the use of respirators. He was asked to participate because of his expertise in law and industrial hygiene.



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# LAWRENCE P. HALPRIN

Lawrence Halprin is a partner in Keller and Heckman's workplace safety and health, chemical regulation and litigation practice groups. He is nationally recognized for his work in workplace safety and chemical regulation. His workplace safety and health practice covers all aspects of legal advocacy, including: representing clients in OSHA and MSHA investigations and enforcement actions; providing compliance counseling and training; conducting incident investigations, compliance audits and program reviews; participation in federal (OSHA, MSHA and NIOSH) and state rulemakings and stakeholders processes; bringing and intervening in pre-enforcement challenges to final agency rules; advising on legislative reform and oversight; and participation in the development of national consensus standards under the ANSI process, and TLVs under the ACGIH process.

Mr. Halprin's engineering and financial background and extensive knowledge of OSHA rulemakings have greatly enhanced his ability to: provide compliance counseling and represent clients in enforcement actions; and evaluate and critique rulemaking proposals and suggest alternative approaches. On behalf of one or more clients, Mr. Halprin has participated in almost every major OSHA rulemaking over the past 25 years as well as numerous Cal-OSHA rulemakings.



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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. On developing legal issues, he has been quoted or interviewed in *The Wall Street Journal*, Bloomberg, *Smart Money* magazine, *Entrepreneur* magazine, on "PBS's Nightly Business Report," WAVY-TV and C-SPAN. He was listed in *Smart CEO* Magazine's Readers' Choice List of Legal Elite.

Mr. Rath has extensive experience representing industry in OSHA rulemakings. He has successfully represented employers—including some of the largest in the country—in OSHA citations and investigations before federal OSHA in regions across the country and in state plan states.

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 is the editor and co-author of the OSHA chapter of the *Employment and Labor Law Audit* (9<sup>th</sup> and 10<sup>th</sup> Editions) and a co-author of the book *Occupational Safety and Health Law Handbook* (2001).



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