

**GREATER HAZARD AND INFEASIBILITY
DEFENSES IN RECENT REVIEW
COMMISSION CASE**

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www.khlaw.com

Presented by:

Manesh Rath

Partner

rath@khlaw.com

Javaneh Nekoomaram

Associate

Nekoomaram@khlaw.com

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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.

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

JAVANEH S. NEKOOMARAM

Javaneh Nekoomaram is an associate in the environmental and workplace safety and health (OSHA) practice groups at Keller and Heckman. Ms. Nekoomaram practices in all areas of environmental law as well as occupational health and safety law, and chemical control law. She routinely advises clients on a broad range of environmental health and safety compliance issues.

Prior to joining Keller and Heckman, Ms. Nekoomaram served for three years as Counsel for the American Coatings Association. She provided regulatory compliance and advocacy on a number of issues on behalf of the coatings industry including TSCA, Prop 65, hazard communication and labeling, state chemical regulation, hazardous waste, air and water quality, occupational health and safety, and chemical safety regulations. She also served as Advocacy Counsel for the Graffiti Resource Council, an organization supported by the aerosol coatings industry that provides anti-graffiti strategies for cities across the country.



Javaneh S. Nekoomaram

Associate

nekoomaram@khlaw.com

202-434-4176





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TOPICS TO BE DISCUSSED

- Overview of “greater hazard” and infeasibility defenses to OSHA citations.
- Review facts in recent Occupational Safety and Health Review Commission case.
- Potential employer’s defenses.
- Understanding ALJ’s decision and implications for employers.
- What employers should do.



FACTS OF AUCHLY ROOFING CASE

- OSHA CSHO spotted workers on roof without fall protection
 - Roof 11-18 ft above ground level
 - Used toe boards, pick boards/ladder jacks, and kneepads instead
- Used portable ladders to access roof
 - Ladders did not extend 3 ft beyond gutter
 - Ladders not secured (but used wooden board as a grabrail at top of ladders for climbing on and off)



EXAMPLES



Toe Boards

**Ladder
Jacks**



Three feet above gutter

CITATION

- Citation to Auchly for alleged violations of:
 - Fall protection standard: employees engaged in residential construction activities above 6 feet or more above lower levels were not protected by:
 - guardrail systems
 - safety net system, or
 - personal fall arrest system
 - Ladder standard: where portable ladders were used for access to an upper landing surface and the ladder's length allows, the ladder side rails did not extend at least 3 feet above the upper landing surface being accessed.



GREATER HAZARD DEFENSE

- 1) The hazards created by complying are greater than those of noncompliance.
- 2) Other methods of protection are not available (or were tried unsuccessfully).
- 3) A variance is not available (or application for a variance is inappropriate).



INFEASIBILITY DEFENSE

1) Compliance would have been infeasible because:

- a) technologically or economically infeasible, or
- b) necessary work operations would have been technologically or economically infeasible, and

2) there are no feasible alternatives.



AUCHLY'S INFEASIBILITY DEFENSE

- Infeasibility defense for alleged fall protection violation
 - Fall protection lines created tripping hazards, unique difficulties
- OSHRC ALJ rejected defense
 - Lacked scientific study or professional data
 - Auchly used personal fall arrest systems on other jobs
 - Similar employers use required fall protection
 - Difficulty or expense of compliance is not a defense
 - Auchly owns retractable yo-yo harnesses



AUCHLY'S GREATER HAZARD DEFENSE

- Greater hazard defense for alleged violations of both standards
- Auchly: tripping hazard (fall protection) and hazards with climbing up ladder (ladder std.)
- OSHRC ALJ rejected defense
 - Tripping isn't greater hazard than falling
 - Other methods of compliance available like guardrail system or safety nets; securing ladder
 - Auchly did not apply for variance



WHAT EMPLOYERS SHOULD DO

If deviating from conventional fall protection standard:

- Document technical or economic data and analysis or risk assessments to support claim of infeasibility or greater hazard
- Unsubstantiated conclusions are insufficient
- Assess availability of, and implement, alternative means of protection
- Must develop a fall protection plan if not complying with fall protection
- Consider potential for obtaining variance



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1. Manesh Rath, David Sarvadi, Larry Halprin, Javaneh Nekoomaram
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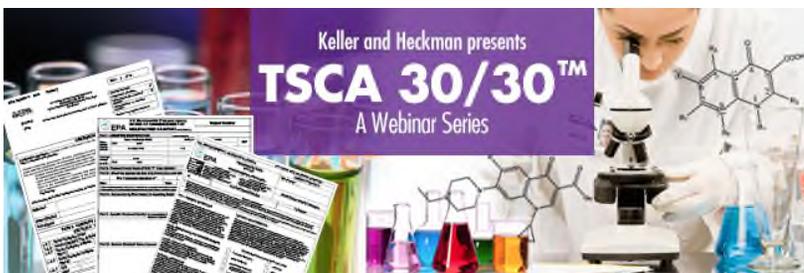
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Keller and Heckman LLP
1001 G Street NW
Suite 500 West
Washington, DC 20001

(202) 434-4182
rath@khlaw.com



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



**Javaneh
Nekoomaram**
Associate
nekoomaram@khlaw.com
202-434-4176