

RECENT FEDERAL COURT DECISION ON IMPUTING SUPERVISOR KNOWLEDGE TO EMPLOYER

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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. 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, 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.



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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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TOPICS TO BE DISCUSSED

- Overview of facts of case
- OSHA citations
- Summary of employer's challenges to ALJ decision
- Understanding the significance of supervisor knowledge
- Review of 11th Circuit's decision
- What employers should do



OVERVIEW OF FACTS OF CASE

- Employees of Samsson Construction applied stucco to Verizon store's façade
- Supervisor (father), lead (son) and subordinate (nephew) on 13 ft. scaffold
 - Used scaffold frame as ladder
 - Scaffold not fully planked
 - Scaffold missing top and mid guardrails
- OSHA AAD and CSHO observed noncompliant scaffold and inspected worksite



OVERVIEW OF FACTS OF CASE

- Samsson's safety program
 - Did not have written safety program
 - Only had weekly meetings with safety director
 - Did not cover scaffold safety
 - Supervisor admitted he was "in a hurry to get the job done"



OSHA CITATIONS

- OSHA inspectors issued 3 citation items alleging violations of scaffolding standard
 - Serious violation:
 - Allowing employees to use scaffold frame to access upper level
 - Willful violations:
 - Failing to ensure scaffold was fully planked
 - Using scaffolding that was missing the top and mid guardrails
 - Supervisor had heightened awareness: 58 years of experience and had built 1,500 scaffolds
 - ALJ affirmed citations



EMPLOYER CHALLENGES TO ALJ DECISION

- ALJ improperly imputed supervisor's actual knowledge of scaffold violations
 - The lead was not the supervisor's subordinate
 - The subordinate was not exposed to hazard on the top level
- ALJ improperly concluded second and third citations were willful violations
 - Samsson is a safety-conscious company with no prior history of violations
 - No injuries resulted



SIGNIFICANCE OF SUPERVISOR KNOWLEDGE

- Proving knowledge of employer
 - Imputing actual or constructive knowledge of supervisor
 - Constructive knowledge based on employer's failure to implement adequate safety program
- If supervisor is “actual malfeasant”
 - Rogue conduct will not be imputed to employer
 - Exception if subordinates exposed to hazard



11TH CIRCUIT DECISION

- Supervisor's actual knowledge was properly imputed to Samsson
 - If supervisor is actual malfeasant, rogue conduct will not be imputed to employer
 - Unless his malfeasance also exposes subordinates
- Company had constructive knowledge
 - Argument waived since Samsson did not challenge
- Second and third violations were willful



WHAT EMPLOYERS SHOULD DO

- Evaluate adequacy of safety program
 - Does program cover all foreseeable hazards?
 - Could go to employer's "constructive knowledge" of an OSH Act violation
- Have system to self-audit
- Train employees and supervisors
- Ongoing daily monitoring for safety compliance
- Train supervisors and management on how to handle inspections by enforcement agencies
- Employers should work with OSHA counsel on OSHA matters

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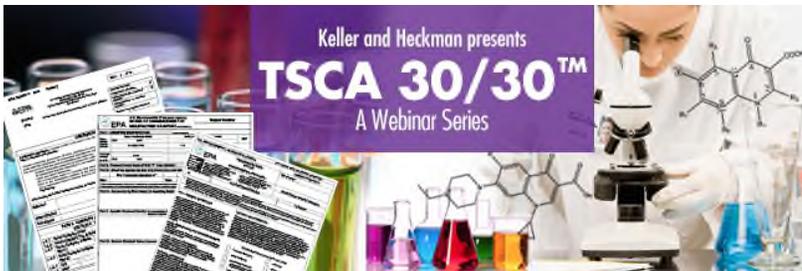
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