

RECENT REVIEW COMMISSION DECISION ON THE “EMPLOYEE EXPOSURE” ELEMENT

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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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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.



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TOPICS TO BE DISCUSSED

- Overview of facts of case
- Discussion of “employee exposure” element of proof
- Overview of ALJ decision and the Secretary’s arguments on appeal
- Understanding the Occupational Safety and Health Review Commission’s reversal of the ALJ’s decision
- What employers should do



OVERVIEW OF FACTS OF CASE

- Calpine Corp. owned and operated power generating plant
- Turbine needed maintenance
 - Involved accessing platform 17 ft. above floor
 - Openings in platform due to removal of grates
- Calpine maintenance operator fell to his death
 - No witnesses to fall; no one saw him for two hours
- OSHA issued one-item series citation
 - Alleged violation, walking-working surface standard



“EMPLOYEE EXPOSURE” ELEMENT

- To establish violation, Secretary must show:
 1. Cited standard applies
 2. Failure to comply with cited standard
 - 3. Employees had access to violative condition**
 4. Employer knew or could have known of the condition with the exercise of reasonable diligence



“EMPLOYEE EXPOSURE” ELEMENT

- To establish exposure element:
 - Employee was actually exposed to the cited condition; or
 - Access to the cited condition was reasonably predictable
- “Reasonably predictable” exposure = employees have been, are, or will be in the “zone of danger”
- Exposure more than theoretically possible



ALJ DECISION

- ALJ vacated citation
- Held that no Calpine employees were exposed to violative condition based on:
 - Low priority of the assigned replacement task
 - Conditional nature of the authorization to do the task
 - Calpine's training of employees
 - Decedent's good safety record
 - Obviousness of hazard



SECRETARY'S ARGUMENTS ON APPEAL

- Employee exposure was reasonably predictable
 - Reasonable to expect employee exposure to platform opening due to continuing work order to install the spark rod
 - Task required going to upper platform containing the cited opening
 - Nexus between the unguarded platform opening and the likely movements of employees assigned to the task



OSHRC DECISION

- OSHRC reversed ALJ decision and affirmed citation
- Agreed with Secretary that exposure was reasonably predictable
 - Continuing work orders
 - Nexus between platform opening and likely movements of employees assigned to task
 - Proximity of ladder to access door
 - Proximity of platform opening to ladder



WHAT EMPLOYERS SHOULD DO

- Train employees on known and foreseeable hazards
- Ongoing monitoring for potential new hazards
 - Should track new major projects where new hazards could be introduced
- Daily safety meetings
 - Identify hazards and action items
- Record noted hazards and restrictions
- Restrict access until hazards abated



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