



Review Commission Evaluates OSHA Citation on Basis of “Normal Operations” Element

June 16, 2021

Manesh K. Rath

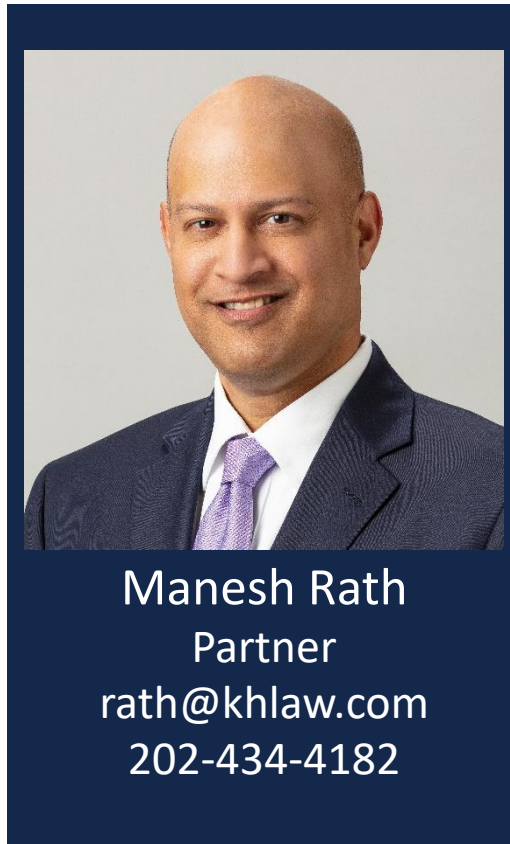


Manesh Rath is a partner in Keller and Heckman's litigation and OSHA practice groups. He has been the lead amicus counsel on several cases before the U.S. Supreme Court including *Staub v. Proctor Hospital* and *Vance v. Ball State University*.

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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John Gustafson primarily practices environmental law. He counsels clients on regulatory compliance and enforcement and litigates related matters.

Specifically, Mr. Gustafson assists clients with issues arising under FIFRA, TSCA, the OSH Act, and California Proposition 65. He has litigated at trial and appellate levels, participated in EPA and CDPR enforcement negotiations and arbitrations, and appealed standards developed by private standards development organizations. He variously assists clients with B-to-B contracting conflicts, advertising disputes, and labor and employment issues.



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Topics to be Discussed

- ◆ Background - OSHA's machine guarding performance standard
- ◆ Facts of *Sec. of Labor v. Wayne Farms, LLC*
- ◆ Occupational Safety and Health Review Commission appeal decision
 - ◆ Key question - whether access to the hazard was reasonably predictable during normal operation
- ◆ Consequences of decision
- ◆ What employers should do
- ◆ Off the Record (new feature for live program only)

Off the Record

- ◆ After our program, we'll turn off the recording and answer a few questions, only for participants of the live program.
- ◆ Two pre-submitted questions we'll address:
 - ◇ I saw that OSHA finally issued its Emergency Temporary Standard on Covid-19. When you get to the "Off the Record" section of your program, can you please summarize what I need to know?
 - ◇ A federal court ruled that an employer can require vaccinations for every employee before returning to work. What was the basis of the claim? And this was a hospital, does the case apply to all employers?

Background on Machine Guarding Standard

Machine guarding standard is a performance standard

Performance standards requires a safety result (protection from hazard) rather than a specific type of guard

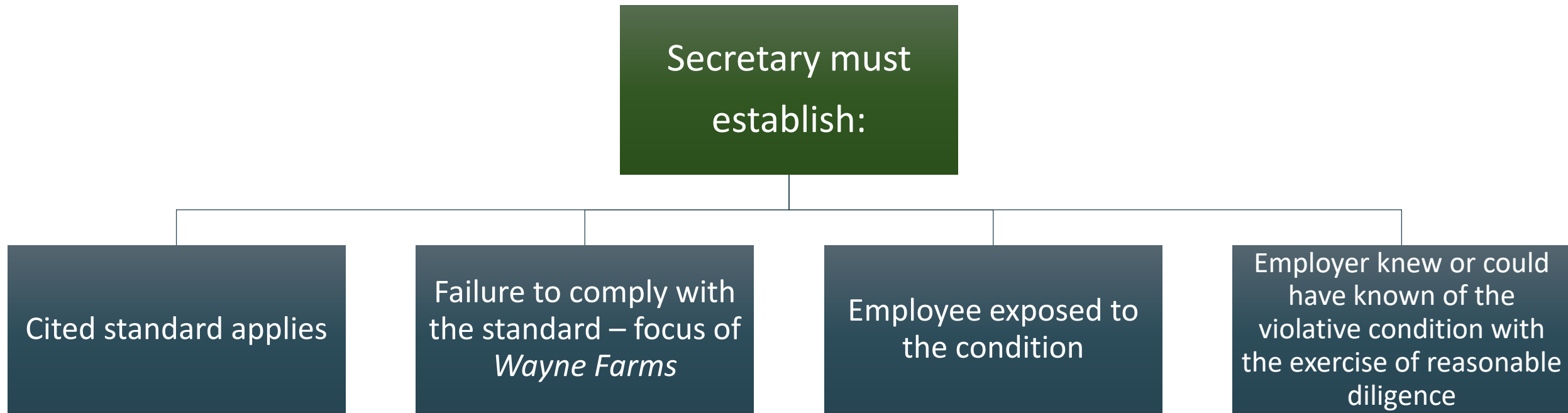
Performance standards require employer to:

- Identify hazards specific to their workplace and
- Determine steps necessary to abate identified hazards

Background on Machine Guarding Standard



Burden of proof for establishing violation of the standard is on the Secretary of Labor



Facts of *Wayne Farms*



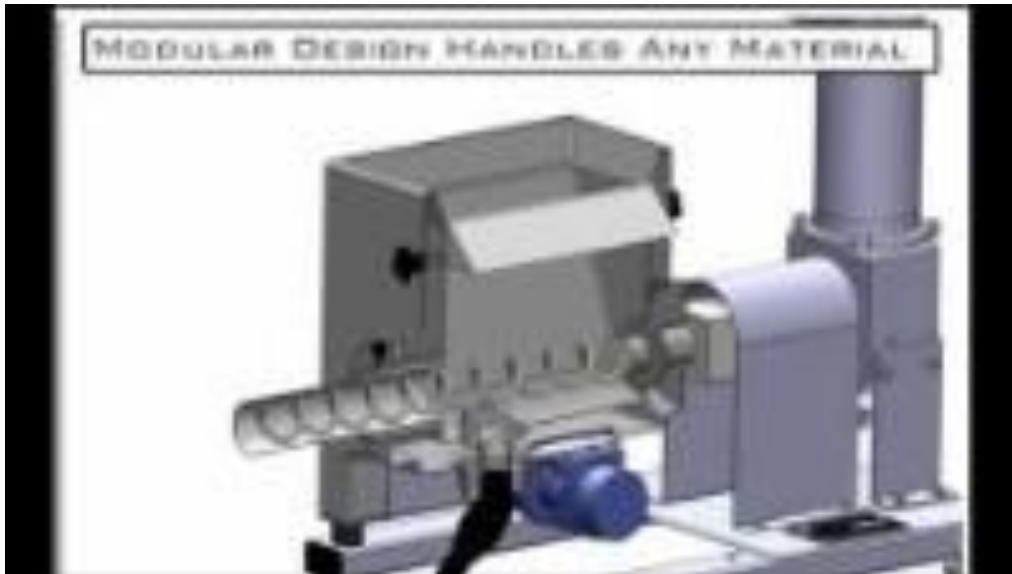
- ◆ AccuFeeder machine used to bread chicken on production line in Decatur, Alabama facility
- ◆ Flour poured through latched/hinged metal grate into enclosed hopper
 - ◇ Latch can be screwed down to hopper
 - ◇ Hopping occurs 2 feet below grate
- ◆ Facility has 3 shifts
 - ◇ 2 daytime operational shifts
 - ◇ 1 overnight cleaning shift
 - Machine's automated cleaning function cleans flour that adheres to interior of the hopper after 2nd daytime shift

Facts of *Wayne Farms*

- ◆ Employee working daytime operational shift
- ◆ Lifted hinged metal grate, which was unlatched (unscrewed) at the time
- ◆ Reached inside to clean flour adhering to interior
- ◆ Machine caught Employee's smock
- ◆ Pulled arm and hand into machine; injury occurred



Facts of *Wayne Farms*



Testimony at trial:

- ◆ During training, employees are instructed not to open or reach below hinged grate
- ◆ Team leader saw Employee stick hand below grate and told him to discontinue practice
- ◆ Employee admitted to other employees after injury that he knew he should not have placed hand inside hopper
- ◆ Employee's testimony was internally inconsistent – stated at different times that he was and wasn't taught to stick hand below the grate

Facts of *Wayne Farms*

Testimony at trial (cont.):

- ◆ Though flour sticks to machine during operation, it does not pose an obstacle to operation during first shift
- ◆ In other words, it is never necessary to clean during operation on first shift
- ◆ Flour can also be knocked off of hopper interior by striking hopper/machine exterior



Commission's Decision



- ◆ Vacated OSHA's citation:
 - ◆ Secretary failed to prove employer did not comply with machine guarding standard
 - ◆ "We agree with the [ALJ] that manual cleaning of the hopper was not required during the Accufeder's normal operation."
 - ◆ Based decision on testimony and credibility findings, Commission decided injury resulted from "the intentional, idiosyncratic behavior of only one employee."

Significance of *Wayne Farms* Decision

- ◆ Employers are not liable for hazards when encounter is not “reasonably predictable” during “normal operation” of machinery
- ◆ Employers do not need to protect against “intentional, idiosyncratic behavior of only one employee.”
- ◆ Wayne Farms’ other employees’ testimony was essential to establishing normal course of operation and practices that weren’t permitted, even informally
- ◆ OSHRC: Employers do not need to predict unreasonable behavior
 - ◇ Similar case - *Secretary of Labor v. Aerospace Testing Alliance (ATA)*
 - ◇ Fixed guards should actually be fixed. Screw not replaced.
 - ◇ For frequently accessed areas guards, interlocked guards

What Employers Should Do

Document predictable hazards and protections

Document training, work processes

Include safety compliance in employee evaluations

Reprimand where necessary, and obtain acknowledgment of proper processes

Do not informally permit divergent practices

Periodic internal inspections to identify hazards and informal workplace practices



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