



OSHA 30/30®

A thirty minute update
on OSHA law every thirty days

with
Manesh Rath

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Reasonable Foreseeability Under the General Duty Clause

December 15, 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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Taylor Johnson is an environmental lawyer specializing in the area of environmental regulation of products, including chemical control, pesticides, energy efficiency regulation, and importantly, domestic and international transportation of hazardous materials. Mr. Johnson also advises clients on community-right-to-know laws, Proposition 65, occupational safety and health matters, and supports a wide variety of commercial tort and other litigation issues.

Mr. Johnson has special expertise in the area of hazardous materials transport, including enforcement defense and compliance counseling. Mr. Johnson helps companies secure competent authority approvals, special permits, and letters of interpretation from regulatory authorities around the world. He has also prepared successful petitions to PHMSA on behalf of shippers seeking regulatory relief.

Prior to joining Keller and Heckman, Mr. Johnson promoted the development of energy and environmental legislation and policy at the state level.



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Topics to be Discussed:

- ◆ Review Facts of the Case
- ◆ Overview of the General Duty Clause
- ◆ Discussion of Reasonable Foreseeability Under the General Duty Clause
- ◆ Applicability of Industry Standard to a Non-Industry Participant
- ◆ What Employers Should Do

Background of *Secretary of Labor v. Eastern Gas Transmission and Storage Inc.*



- ◆ Eastern Gas provides natural gas transportation and storage services to the Midwest, Mid-Atlantic, and Northeast regions of the United States
- ◆ Employees frequently remove trees along access roads to aid in transportation of natural gas and maintain pipeline safety
- ◆ Employees were trained by Eastern Gas on tree felling procedures



Background of *Secretary of Labor v. Eastern Gas Transmission and Storage Inc.*



- ◆ Two employees assigned to remove dead ash trees
- ◆ One employee was in Bobcat
- ◆ Large section of a tree fell and hit the other employee
- ◆ Employee's injuries were severe, required hospitalization and surgery
- ◆ Employer notified OSHA on the day of the incident
- ◆ OSHA arrived at employer's office the following day to investigate

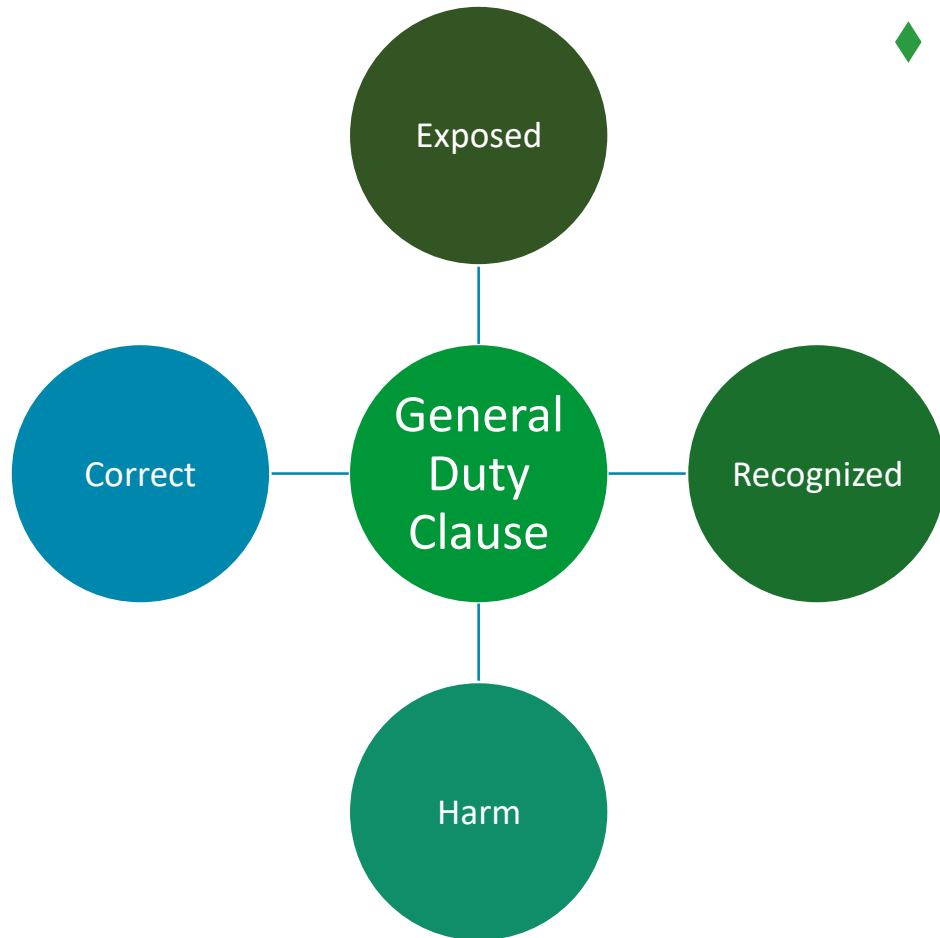
OSHA's Citation



- ◆ OSHA interviewed both employees involved in the incident and inspected the access road
- ◆ The investigator cited Eastern Gas for two hazards under the general duty clause
 - ◇ Employee was exposed to falling objects and crush injuries while removing dead tree limbs
 - ◇ Employee was exposed to falling objects and crush injuries while using an excavator
 - ◇ Both citations were classified as serious
- ◆ Sec. proposed penalty of \$13,494 (max)

Violation Type	2020	2021
Posting requirement	Up to \$13,494 for each violation	Up to \$13,653 for each violation
Other-than-serious violation	Up to \$13,494 for each violation	Up to \$13,653 for each violation
Serious violation	Up to \$13,494 for each violation	Up to \$13,653 for each violation
Willful violation	Between \$9,639 and \$134,937 per violation	Between \$9,753 and \$136,532 per violation
Uncorrected violation	Up to \$13,494 per day until the violation is corrected	Up to \$13,563 per day until the violation is corrected

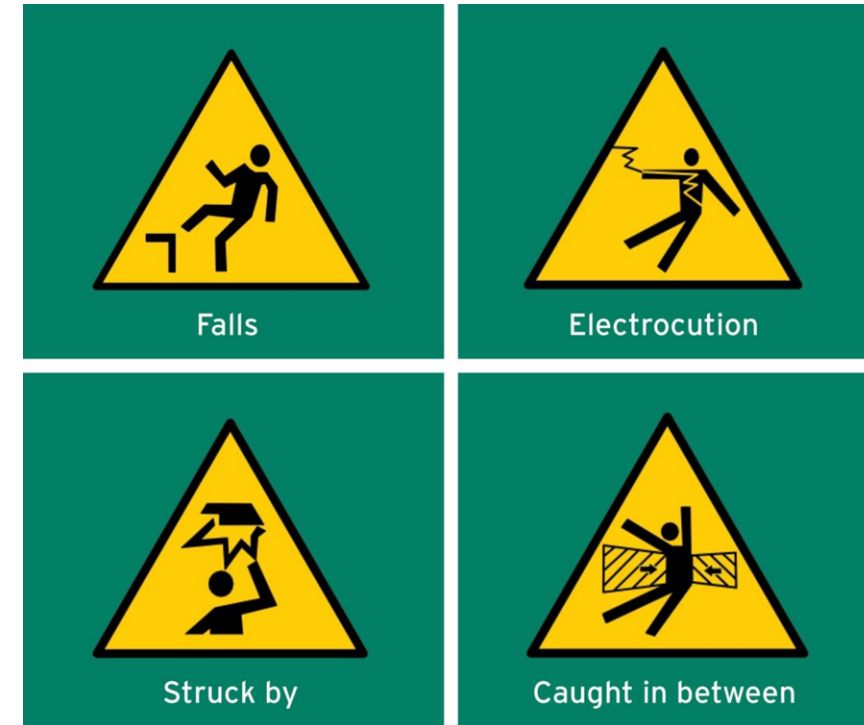
General Duty Clause



- ◆ General Duty Clause elements (all four must be met):
 - ◇ Employee must have been exposed to a hazard (“danger trees”)
 - ◇ **Alleged Hazard must be recognized (training)**
 - ◇ Alleged hazard caused or was likely to cause death or serious physical harm (390 lb. tree)
 - ◇ A feasible method exists to correct the alleged hazard (failure to follow ANSI standard)

Hazard Recognition- Reasonable Foreseeability

- ◆ OSHA Field Manual states that the hazard for which a citation is issued must be “reasonably foreseeable”
- ◆ All the factors that could cause a hazard need not be present in the same place or at the same time to prove foreseeability of the hazard (e.g., an explosion need not be imminent).
- ◆ It is necessary to establish the reasonable foreseeability of the workplace *hazard*, rather than the particular *circumstances* that led to an accident/incident.



Hazard Recognition - Reasonable Foreseeability



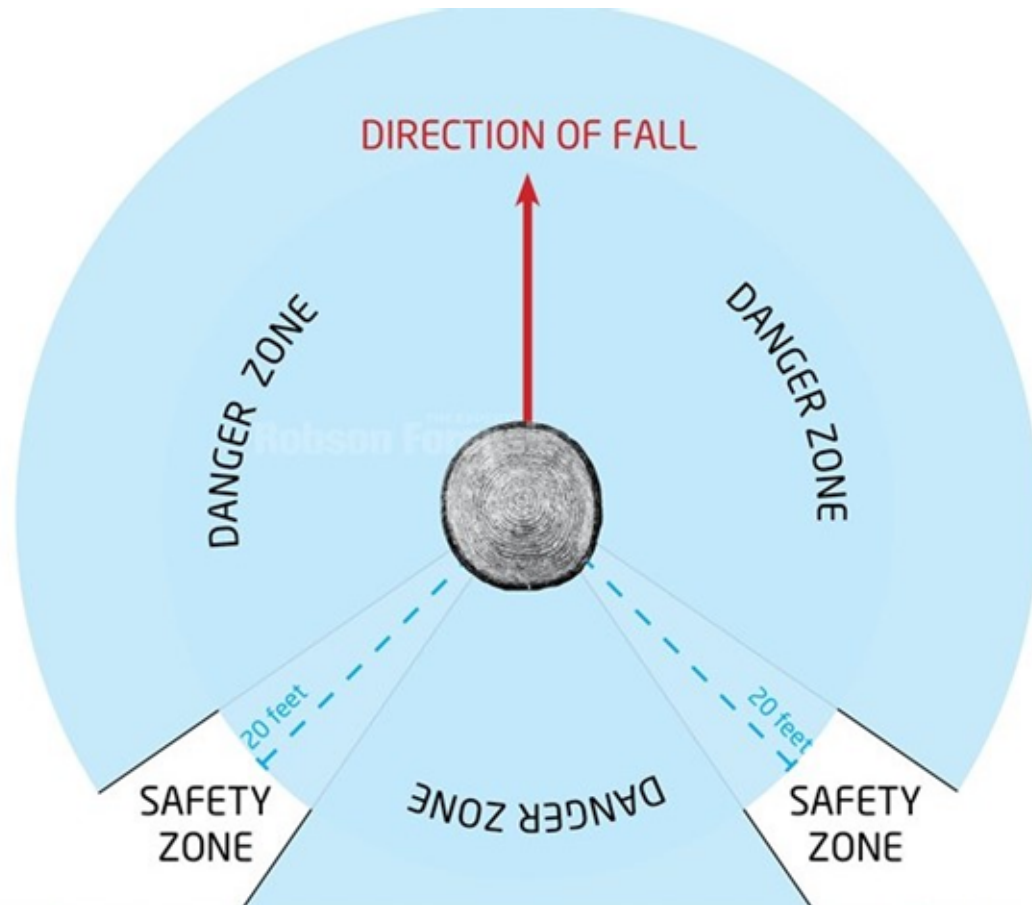
- ◆ Secretary points to Eastern Gas training materials as evidence that the injury was foreseen
- ◆ Eastern Gas argued the incident was not “reasonably foreseeable” but rather was freakish in nature and could not have been foreseen
- ◆ ALJ holds that Eastern Gas implemented training because it knew the trees were dangerous, and therefore the injury was foreseeable

Applicability of Industry Standards

- ◆ Eastern Gas argued that training materials which referenced ANSI Standard Z-113 should not be considered evidence of hazard recognition as Eastern Gas is not in the arborist industry
- ◆ Felling a tree is felling a tree, regardless of industry, the danger remains the same
- ◆ Industry standards apply to “non-industry” participants
- ◆ Secretary proved both Eastern Gas, and industry, recognized the hazard



Employee Misconduct



- ◆ Initially, Eastern Gas raised the affirmative defense of employee misconduct
- ◆ Evidence suggested employee outside of the excavator engaged in misconduct by standing in the felling zone
- ◆ Failure to raise the argument at the hearing or in its post hearing briefing resulted in abandonment of the argument

ALJ Decision

- ◆ The Secretary established Eastern Gas' actual and constructive knowledge of violative conditions
- ◆ Removing dangerous trees was a routine part of employee tasks and Eastern Gas training materials acknowledged the hazard associated with felling dangerous trees
- ◆ Secretary proved all the elements of the general duty clause violation
- ◆ Both citations were affirmed – Eastern Gas ordered to pay \$13,494
- ◆ Employer appealed to OSHRC and case is pending review



What Employers Should Do



- ◆ Affirmative defenses raised in Answer must be addressed at trial and post-trial. Avoid abandonment
- ◆ If training materials reference a specific standard, then employer must train to that standard
- ◆ Non-industry participant argument is not defense
- ◆ Jobs should start with pre-task briefing (toolbox talk, safety overview, tailgate talk) before equipment is assigned and staff depart for task



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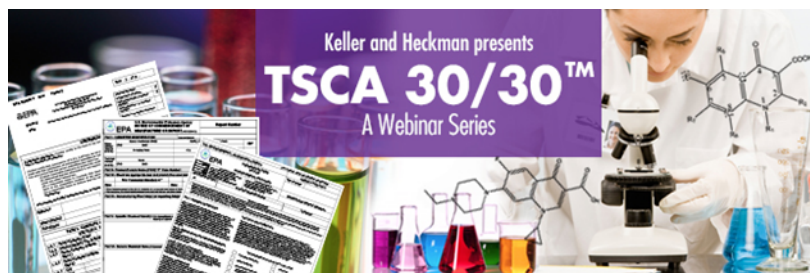
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