



OSHA 30/30®

A thirty minute update
on OSHA law every thirty days

with
Manesh Rath

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Fourth Circuit Considers Higher Standard for Unpreventable Misconduct Defense

March 16, 2022

Manesh 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.



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

Taylor Johnson



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.



Taylor Johnson
Associate
johnsont@khlaw.com
202-434-4255



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Topics to be Discussed:

- ◆ Factual Background
- ◆ Discussion of Constructive Knowledge
- ◆ Elements of the Unpreventable Employee Misconduct Defense
- ◆ Analysis of Administrative Law Judge's Decision
- ◆ 4th Circuit Precedent and Ultimate Ruling
- ◆ What Employers Should Do
- ◆ Off the Record

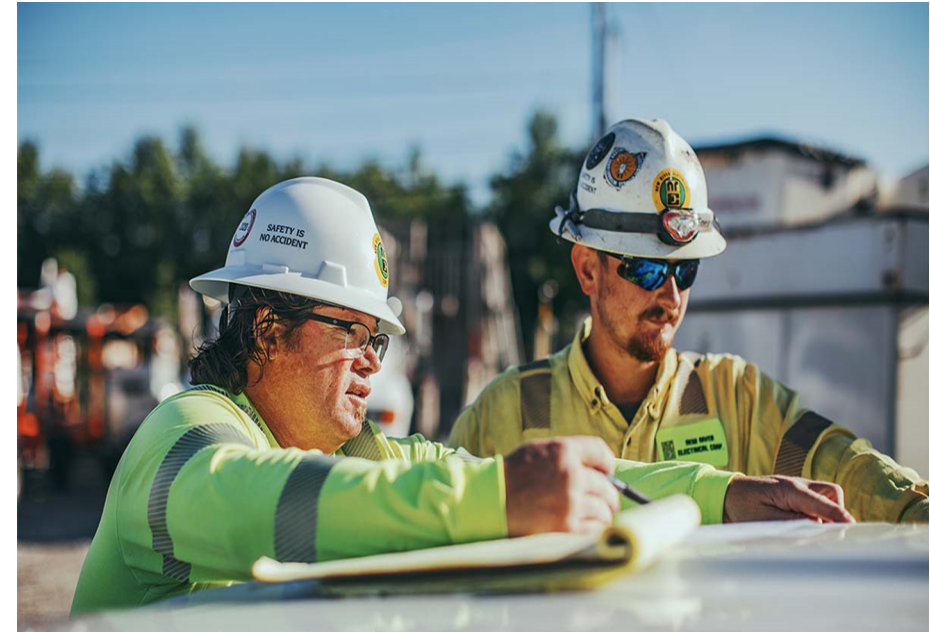
Facts: New River Employee Eric Marsh



- ◆ New River was completing final stages of underground cable replacement project
- ◆ Pressure to finish project before winter
- ◆ Failure to test, tag, or ground the transformer
- ◆ Employee working on transformer sustained second and third degree burns when he was shocked with 7,650 volts of electricity.

Facts: New River Foremen Howard and Bail

- ◆ Two foremen decided to cover up error by adding tags to and grounding the transformer after accident, lying to employer about what had occurred
- ◆ Told subordinate employee to stay silent, did not tell CSHO.
- ◆ New River suspected the Foremen were lying and fired them both
- ◆ Both men later confess to manipulating key evidence



Facts: OSHA Investigation and Citation



- ◆ On November 14, OSHA opens a formal investigation into the incident
- ◆ Foreman Howard confesses to manipulating key evidence
- ◆ Citation issued to New River – three serious violations and a total proposed penalty of \$38,802
 - ◇ Failure to tag cables
 - ◇ Failure to open disconnecting means
 - ◇ Failure to ground cables

OSHA's Burden of Proof

The standard applies



The employer did not comply with the terms of the standard

Employees had access to the violative condition

The employer had actual or constructive knowledge of the violation.

Is a Supervisor's Knowledge Imputed to the Employer?

- ◆ In the 2d, 3d, 4th, 5th, 6th and 10th Circuits:
 - ◇ A supervisor's knowledge of an allegedly violative condition is imputed to the employer.
 - ◇ But when the supervisor commits the alleged violation, the employer loses its "eyes and ears" to detect and prevent misconduct.
 - ◇ In those cases, OSHA must show that a supervisor's misconduct or a violative condition was reasonably foreseeable.

“Actual or Constructive Knowledge”

Can be proven by:



Employer had constructive knowledge, and the violations were reasonably foreseeable, by showing that the *employer failed to take specific risk-prevention measures*

Prior similar violations can show that the employer had constructive knowledge, or that the violation was reasonably foreseeable.

Employer had constructive knowledge because it *failed to exercise reasonable diligence to discover violations* or it had a *history of lax enforcement of work rules*.

Unpreventable Employee Misconduct Defense



Employer established work rules designed to prevent the violation.

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The employer adequately communicated the rules to its employees.

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Employer has demonstrable record that it took steps to discover violations of the rules.

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The employer effectively enforce the rules when violations are detected.

Appealing ALJ decision to Fourth Circuit:

1. OSHA must first meet its burden of proof that a violation occurred
2. Only then does the Employer need to present a defense of unpreventable employee misconduct.
3. This can cause confusion –
 - Two types of constructive knowledge, the employer failed to take specific safety measures, and failure to monitor along with lax enforcement, look like elements of the unpreventable misconduct defense.
 - Often, the same evidence can be examined for both tests

4th Circuit Precedent



- ◆ Cases going back to 1979
 - ◇ The burden of proof lies with OSHA to prove all of the elements of a violation
 - ◇ If OSHA fails to meet that burden,
 - then Employer does not need to show unforeseeability
 - Employer does not need to show good faith efforts to comply

Fourth Circuit Opinion

- ◆ With respect to constructive knowledge - burden of proof is on OSHA to show an employer's safety program is inadequate
- ◆ Court reversed and remanded for new trial



What Employers Should Do

Conduct job hazard analysis that is site and task specific

Establish clear work rules

Training. And periodic re-training.

- Use of performance testing

Post-accident discipline. but should reflect consistent prior application

Use past incidents, citations, near misses, injury and illness data to modify practices

Monitoring frequently for internal compliance.

Document all discipline.

- Verbal warnings should be documented.

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Manesh Rath and Taylor Johnson



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A promotional graphic for an OSHA 30/30 event. On the left, a man in a blue suit and purple tie is shown from the chest up, leaning forward. The background is a composite image: the left side shows a brick wall, and the right side shows an industrial facility with tall smokestacks and piping under a cloudy sky with a bright sun flare on the right edge. The text 'OSHA 30/30' is prominently displayed in large red letters, with a registered trademark symbol (®) to the right of the second '30'.

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at 1:00 PM Eastern U.S.
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Stick around for Off the Record

Manesh Rath

Partner

1001 G Street N.W. Ste. 500W

202.434.4182

rath@khlaw.com



Taylor Johnson

Associate

1001 G Street N.W. Ste. 500W

202.434.4255

johnsont@khlaw.com



Off Record with Manesh Rath

Pre-submit your questions to osha@khlaw.com

Question:

- ◆ Can you provide an update on the proposed changes to the Hazcom standard?

Question:

- ◆ What is the status of OSHA's initiative relating to Heat stress?

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Thank You