



OSHA 30/30[®]

A thirty minute update
on OSHA law every thirty days

with
Manesh Rath

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Review Commission Overturns ALJ on Basis of Actual Knowledge and Reasonable Care

April 20, 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.



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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.



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Topics to be Discussed:

Factual
Background

Discussion of
Controlling
Employer

Proving Actual
Knowledge

Defining
Reasonable
Care

What
Employers
Should Do

Off the Record

Factual Background

- ◆ StormForce was the general contractor for a roofing project
- ◆ StormForce subcontracted the work to Florida Roofing Experts, Inc. (FRE)
- ◆ FRE's employees were working on the roof when an OSHA compliance officer conducted an inspection
- ◆ None of the employees appeared to be using any form of fall protection



The Citation



- ◆ StormForce was cited – as the controlling employer – for allegedly violating the fall protection standard
- ◆ The case went before an ALJ, and the judge affirmed the citation and assessed a penalty amount of \$10,210
- ◆ StormForce appealed to the Review Commission

Multi-Employer Worksite Doctrine

Creating
Employer

Controlling
Employer

Exposing
Employer

Correcting
Employer

Three Focal Points of the Case:

Controlling
Employer

Actual
Knowledge

Reasonable
Care

Controlling Employer:

Is an employer who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them

Has a duty to exercise “reasonable care” with respect to identifying hazards and exercising control to address them

Control can be established by contract or exercise of control in practice

Controlling Employer:



StormForce:

- Pointed to contract

OSHA:

- StormForce exercised sufficient supervisory control

Review Commission:

- StormForce was controlling employer because of “Subcontractor Expectations” as well as work and safety practices

Actual Knowledge:

StormForce:

- Argued it did not have actual knowledge of the violations

OSHA:

- Used pictures taken by the foreman as proof that StormForce had actual knowledge of the violation

Review Commission:

- Found that the evidence provided by the Secretary did not establish StormForce's actual knowledge of violative conditions



Evaluating Reasonable Care:

Reasonable care can be established if the employer:

1

Conducted
periodic
inspections
at an
appropriate
frequency

2

Implemented
an effective
system for
promptly
correcting
hazards

3

Enforced the
other
employer's
compliance
with safety
and health
requirements

Reasonable Care:

StormForce:

Argued it met its obligation to exercise reasonable care to prevent or detect violations

OSHA:

Secretary says the foreman “should have seen” the violative conditions and abated them

Review Commission:

Reversed ALJ decision and Secretary did not prove that StormForce failed to take reasonable care to prevent or detect hazards in the workplace



What Employers Should Do:

It is difficult for Employers contract away their duty to exercise reasonable care while still maintaining quality control

Frequent monitoring of subcontractors, record observations

Controlling Employer :

- Implement corrections between employers
- Avoid managing sub's employees

Provisional safety measure should be memorialized with a written plan as a best practice.



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May 25, 2022
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Please join us at 1:00 PM Eastern U.S.
Wednesday, May 11, 2022
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Please join us at 1:30 PM Eastern U.S.
Wednesday, June 8, 2022
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Next session to be scheduled
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Thank You

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