



# OSHA 30/30®

A thirty minute update  
on OSHA law every thirty days

with  
**Manesh Rath**

[www.khlaw.com/osha3030](http://www.khlaw.com/osha3030)

## Review Commission Vacated Lockout Citation Based on Supervision and Enforcement

June 15, 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

# Topics to be Discussed:

Factual  
Background

Proving  
Constructive  
Knowledge

Defining  
Reasonable  
Diligence

What  
Employers  
Should Do

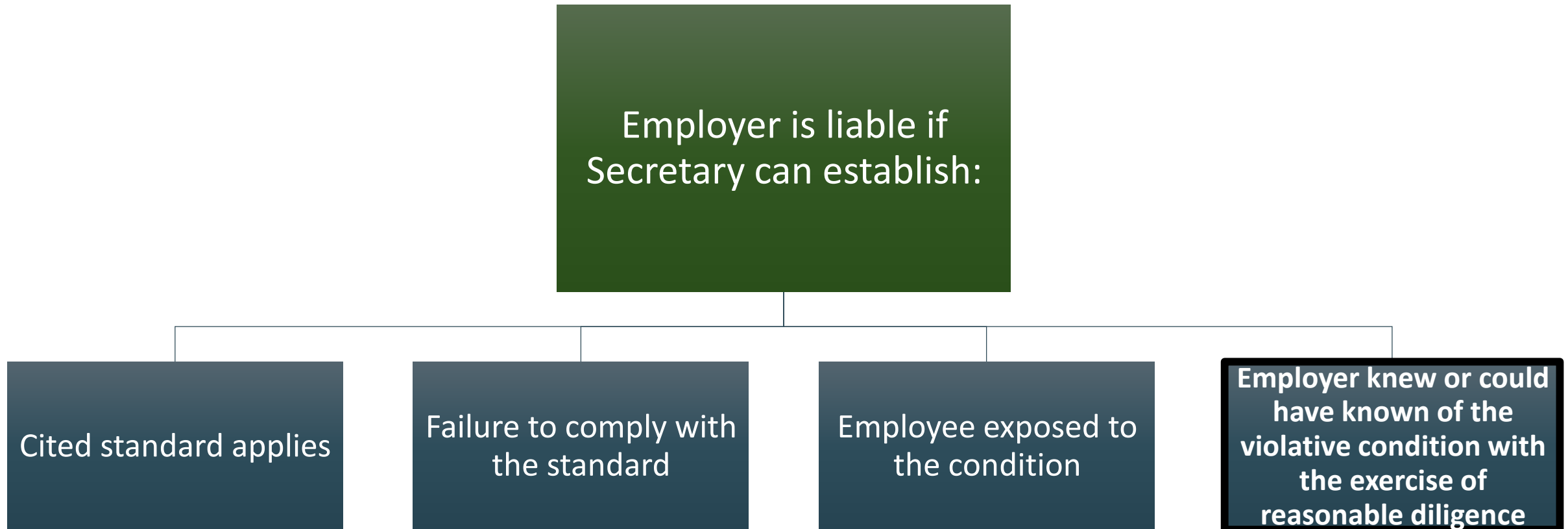
Off the Record

# Factual Background



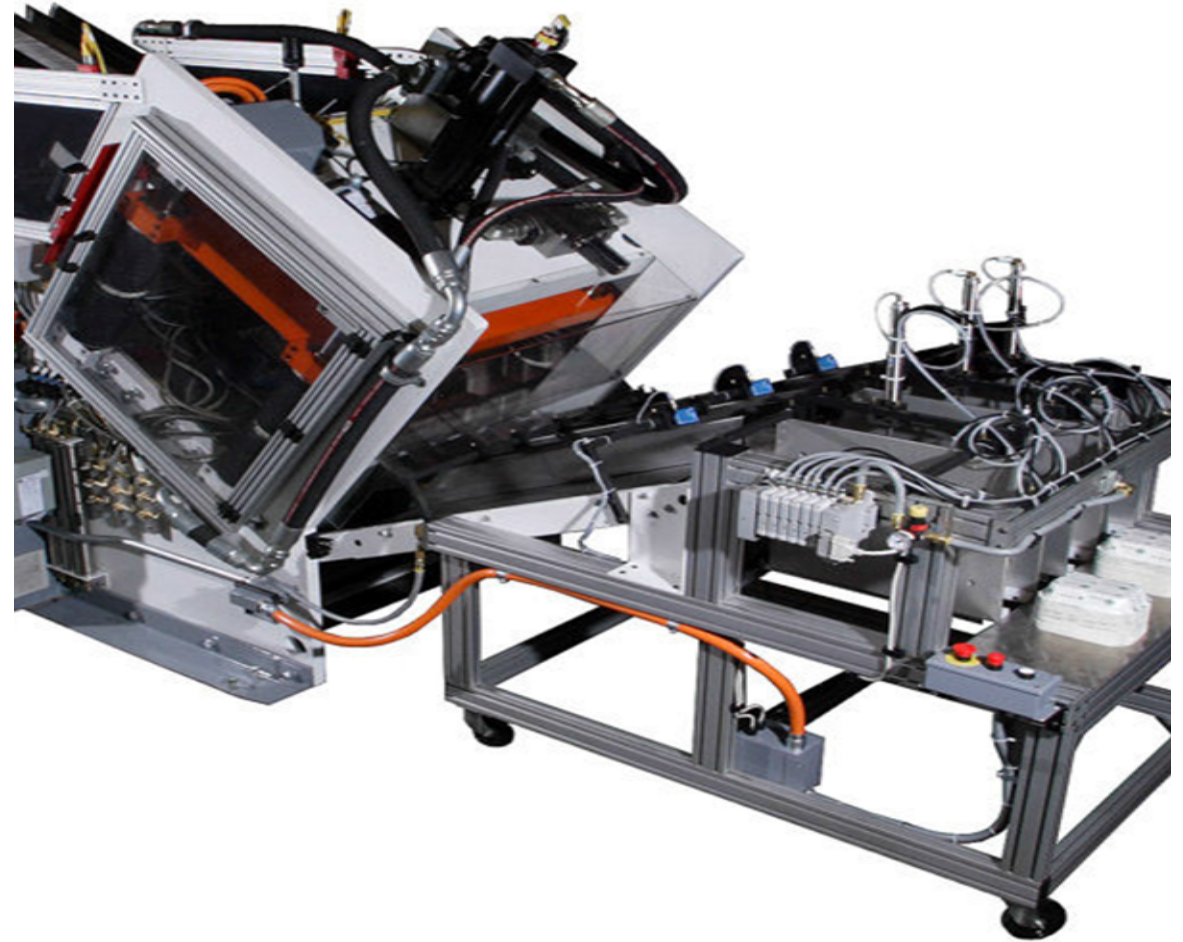
- ◆ AJM Packaging Corporation manufactures paper plates and bowls at its facility in Vineland, New Jersey
- ◆ In May 2016, an employee suffered an amputation injury while clearing a paper jam on one of the facility's machines
  - ◇ Previous employee amputation with similar fact pattern in 2015
- ◆ OSHA inspected the facility and issued a one-item, four-instance repeat citation alleging a violation of a provision of the lockout/tagout (LOTO) standard

# Secretary Must Prove



# Employer Knowledge:

**Should AJM have known that employees raised the PCM's scrap chute to clear paper jams?**

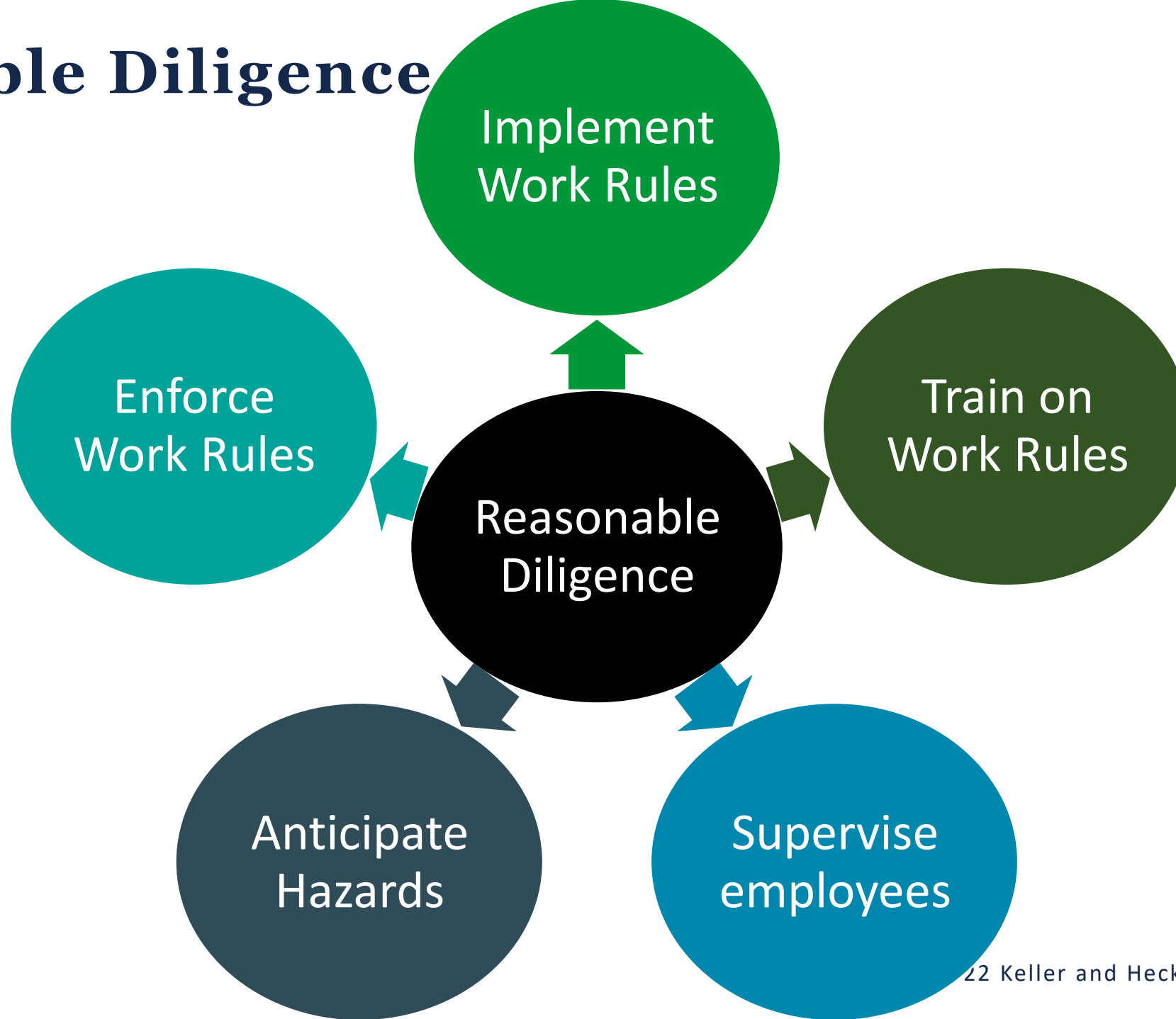


# Constructive Knowledge



- ◆ OSHA must prove that with the exercise of reasonable diligence, the employer *should have known* the conditions constituted the violation
- ◆ OSHA needs to show employer knowledge that the physical condition existed
- ◆ Employer does not need to be aware of a specific OSHA regulation or of probable consequences violation

# Reasonable Diligence

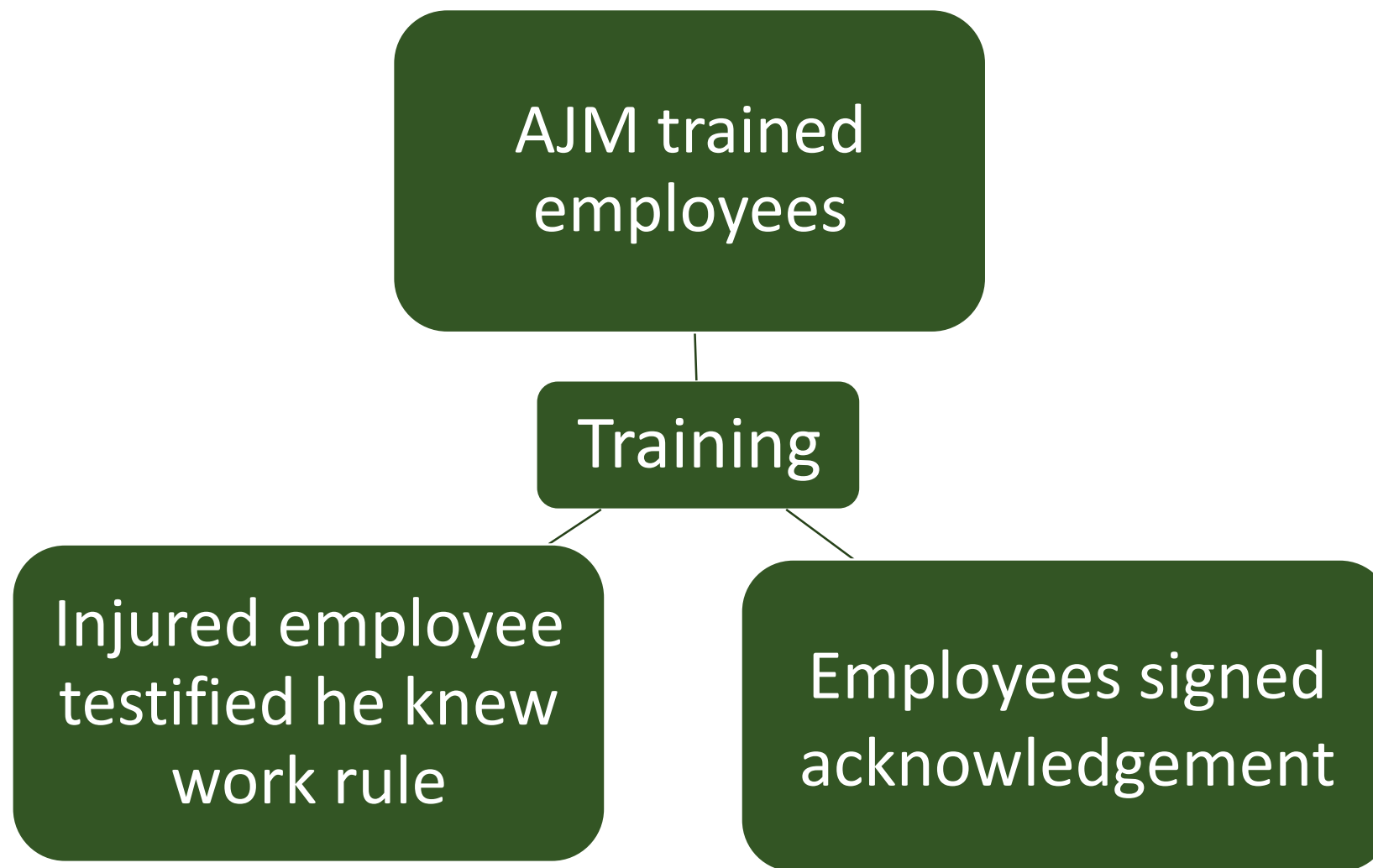


AJM established work rule to “NEVER raise the scrap chute to clear a jam”

Work Rule

OSHRC found AJM’s work rule fulfills LOTO requirements

Work rule provided another way to clear jams

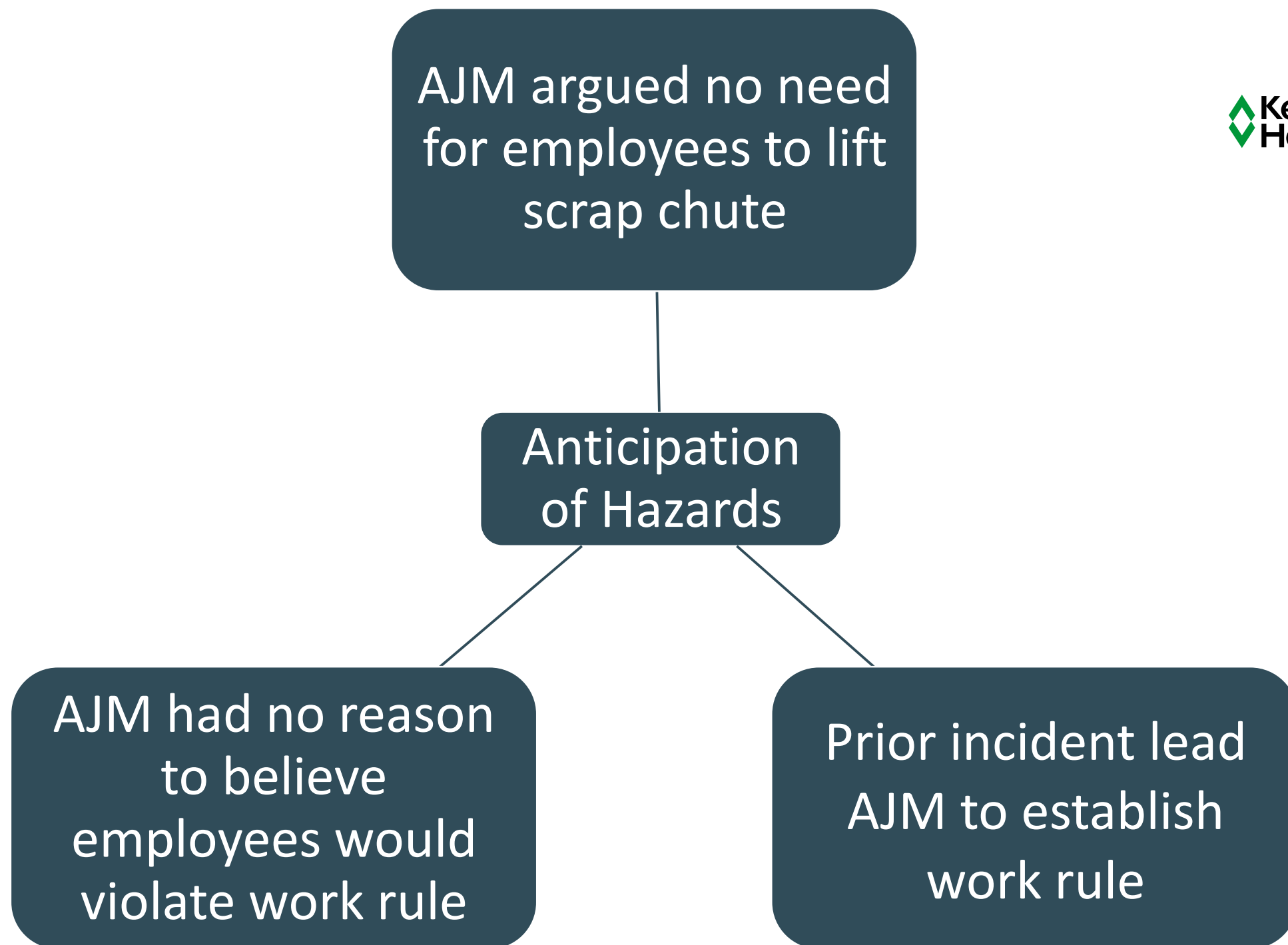


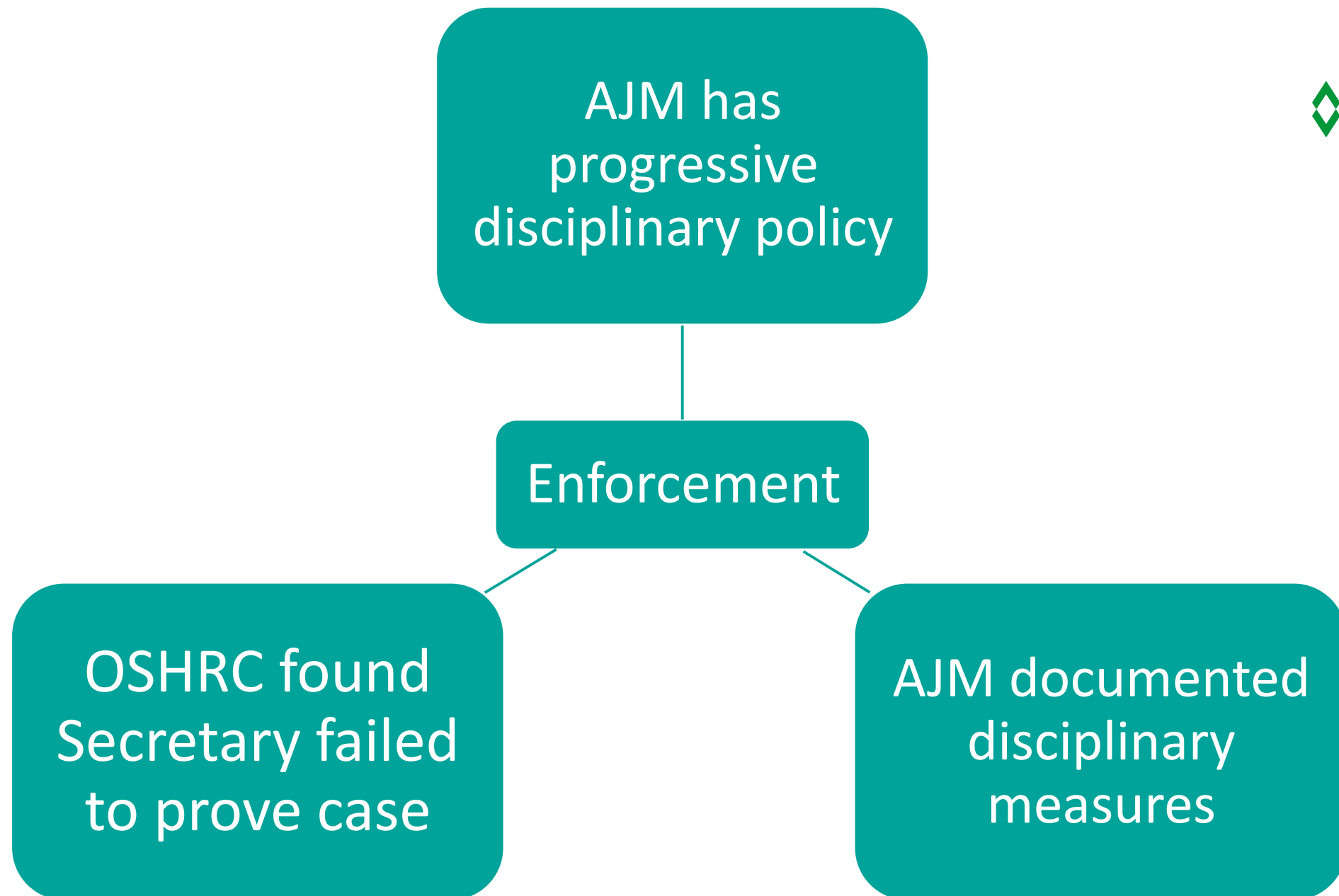
AJM supervisors spent  
the majority of their  
time on the  
production floor

Supervision

OSHRC found OSHA failed  
to establish that AJM's  
continuous safety  
monitoring by multiple  
supervisors was  
inadequate

Evidence does not support  
OSHA's claim that a raise  
scrap chute would have  
been readily apparent to  
any supervisor walking the  
production floor





# What Employers Should Do



Establish work rules  
to prevent  
reoccurring injuries

Clearly train  
employees and  
document their  
training

Supervisors should  
spend the majority of  
time observing and  
monitoring workers

Regularly review and  
update safety and  
health policies and  
procedures

Document all  
disciplinary measures



The entire library of prior  
OSHA 30/30s at:

[www.khlaw.com/OSHA3030](http://www.khlaw.com/OSHA3030)

# More From the OSHA 30/30:



The OSHA 30/30 is available on Youtube!  
Subscribe to Keller and Heckman today



Connect with us on LinkedIn:  
Manesh Rath and Taylor Johnson



The OSHA 30/30 is now available as a Podcast!  
Find it on your favorite podcast platform





# OSHA 30/30<sup>®</sup>

A thirty minute update  
on OSHA law every thirty days

with  
**Manesh Rath**

[www.khlaw.com/osha3030](http://www.khlaw.com/osha3030)

Please join us  
at 1:00 PM Eastern U.S.  
July 20, 2022  
[www.khlaw.com/OSHA3030](http://www.khlaw.com/OSHA3030)



Please join us at 1:00 PM Eastern U.S.  
Wednesday, July 13, 2022  
[www.khlaw.com/TSCA-3030](http://www.khlaw.com/TSCA-3030)



Please join us at 1:35 PM Eastern U.S.  
Wednesday, August 10, 2022  
[www.khlaw.com/REACH-3030](http://www.khlaw.com/REACH-3030)



Next session to be scheduled  
[www.khlaw.com/FIFRA-3030](http://www.khlaw.com/FIFRA-3030)

**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

