



OSHA 30/30[®]

A thirty minute update
on OSHA law every thirty days

with
Manesh Rath

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Review Commission Reverses ALJ Decision Twice Based on Employer Knowledge

July 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

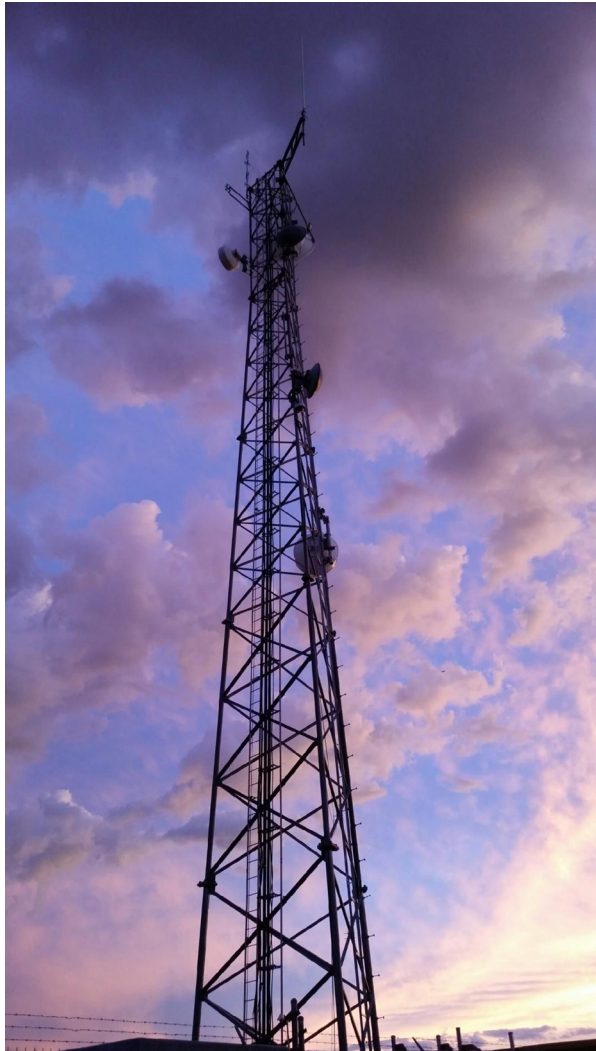
- ◆ Background of the Incident
- ◆ Background of the Investigation and Citation
- ◆ Second ALJ Decision
- ◆ Second Review Commission Decision
- ◆ What Employers Should Do
- ◆ Off the Record

Background of the Incident

- ◆ TNT Crane and Rigging was hired to replace an antenna on a communication tower in Georgetown, Texas
- ◆ In May 2016, an employee of TNT Crane and Rigging suffered serious injuries while taking apart a crane
- ◆ Crane operator and TNT employee, Jeff Benson, created a job safety analysis for the crew to disassemble the crane
- ◆ As the crane operator lowered the boom, the “beckett” hit a power line, causing the employee to be electrocuted
- ◆ The employee was hospitalized with severe burns, serious injuries



Background of the Investigation



- ◆ OSHA inspector, Darren Beck, was tasked to investigate the accident
- ◆ When CSHO Beck arrived on site, he was unable to enter the locked worksite
- ◆ Instead of inspecting the location of the accident, CSHO Beck went to TNT offices and interviewed witnesses, and inspected the stored crane
- ◆ This was CSHO Beck's first crane accident inspection
- ◆ Based on his investigation, CSHO Beck concluded that TNT failed to comply with two regulatory requirements for crane disassembly

Citation

- ◆ TNT Crane and Rigging was issued two serious violations under the powerline safety assembly and disassembly section of the construction standard:
 - 1) Additional measures were not in place to prevent the encroachment of power lines
 - 2) Violated the minimum clearance between the lines and any part of the crane
- ◆ Total penalty amount: \$24,942



Second ALJ Decision- October 2020



- ◆ OSHA argued that knowledge should be imputed to the employer because Benson was acting as a supervisor, and he knew or should have known he did not follow guidelines for crane disassembly
 - ◇ Also argued TNT failed to train, supervise, and discipline employees regarding their work rules
- ◆ TNT argued that Benson was not a supervisor and argued unpreventable employee misconduct
- ◆ On remand, ALJ Duncan vacated both citations on the grounds that OSHA failed to prove employer knowledge

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.

Unpreventable Employee Misconduct Defense



Employer established work rules designed to prevent the violation.

Employer adequately informed the employees of the work rules

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

Employer effectively enforce the rules when violations are detected.

Supervisor Knowledge Can be Imputed to Employer If:



The employee
was acting in a
supervisory
role at the
time of the
accident

The supervisor
had actual or
constructive
knowledge of
misconduct

Supervisor's
misconduct
was
foreseeable

Second Review Commission Decision- June 2022



- ◆ RC held that TNT did have knowledge because alleged violations were based on activities of the entire crew, not just Benson
- ◆ The entire crew was part of the job safety analysis and met as a group to discuss
- ◆ Benson had knowledge of other crew member's conduct and that knowledge is imputed to TNT without a showing of foreseeability

Second Review Commission Decision- June 2022



- ◆ Found that TNT did not have sufficient work rules to prevent this type of accident from occurring
- ◆ RC found that “reliance on an employer’s general plan or intent to maintain the 20-foot distance without an affirmative, specific measure in place before starting disassembly to prevent encroachment.”
 - ◇ Did not specify how
- ◆ Additionally found that TNT failed to prove it sufficiently monitored employees for compliance
- ◆ RC reversed the AL’s decision again and affirmed the citations and the \$24,942 penalty

What Employers Should Do

- ◆ Job-specific safety plan, not just reliance on policy that copies standard
- ◆ The inspector's interviews are crucial, so train field staff on how to prepare for inspections
- ◆ Supervision of safety and health intensive tasks could be improved with an onsite safety professional
- ◆ Automate spotting functions by utilizing proximity alarms, range control warning devices, devices that automatically limits range of movement, or elevated warning line
- ◆ Frequently audit worksites to determine that supervisors are applying rules correctly
- ◆ Training and records of training





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Stick around for Off the Record

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