



OSHA 30/30[®]

A thirty minute update
on OSHA law every thirty days

with
Manesh Rath

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Judge Refused to Credit Employer Evidence of Unpreventable Employee Misconduct

July 19, 2023

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.



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.



Topics to be Discussed

- ◆ Facts of *J.D. Abrams v. Occupational Safety and Health Review Commission*
- ◆ Elements of Unpreventable Employee Misconduct
- ◆ Discussion of ALJ Decision
- ◆ Analysis of Petitioner's Brief
- ◆ Overview of Respondent's Brief
- ◆ What Employers Should Do
- ◆ Off the Record

Facts of J.D. Abrams v. Occupational Safety and Health Review Commission

- ◆ J.D. Abrams is a company of about 500 employees that performs highway construction projects
- ◆ In December of 2019, they were engaged in a waterline installation project in Austin, TX
- ◆ On December 3, 2019, the OSHA Area Director passed by the worksite and saw what appeared to be an employee working in an unprotected trench
- ◆ After an investigation, Abrams was cited for having an employee working in a trench excavation over five feet deep that was not protected from cave-ins, and for a ladder that did not extend the minimum required three feet above the landing surface.



Facts of J.D. Abrams v. Occupational Safety and Health Review Commission

- ◆ Ramon Louis Reyes Rivera (Mr. Rivera) was an installation supervisor for Abrams
- ◆ The day before OSHA's inspection, Mr. Rivera's crew worked on a section of trench that had been flooded after a trench box crushed a section of pipe
- ◆ Mr. Rivera told the crew that because of the crushed pipe the day before, they would not use a trench box that day
- ◆ Abrams contested both citations, alleging:
 - 1) that they did not have knowledge of the hazardous condition, and
 - 2) that Mr. Rivera engaged in unpreventable employee misconduct



OSHA's Burden of Proof

The standard applies

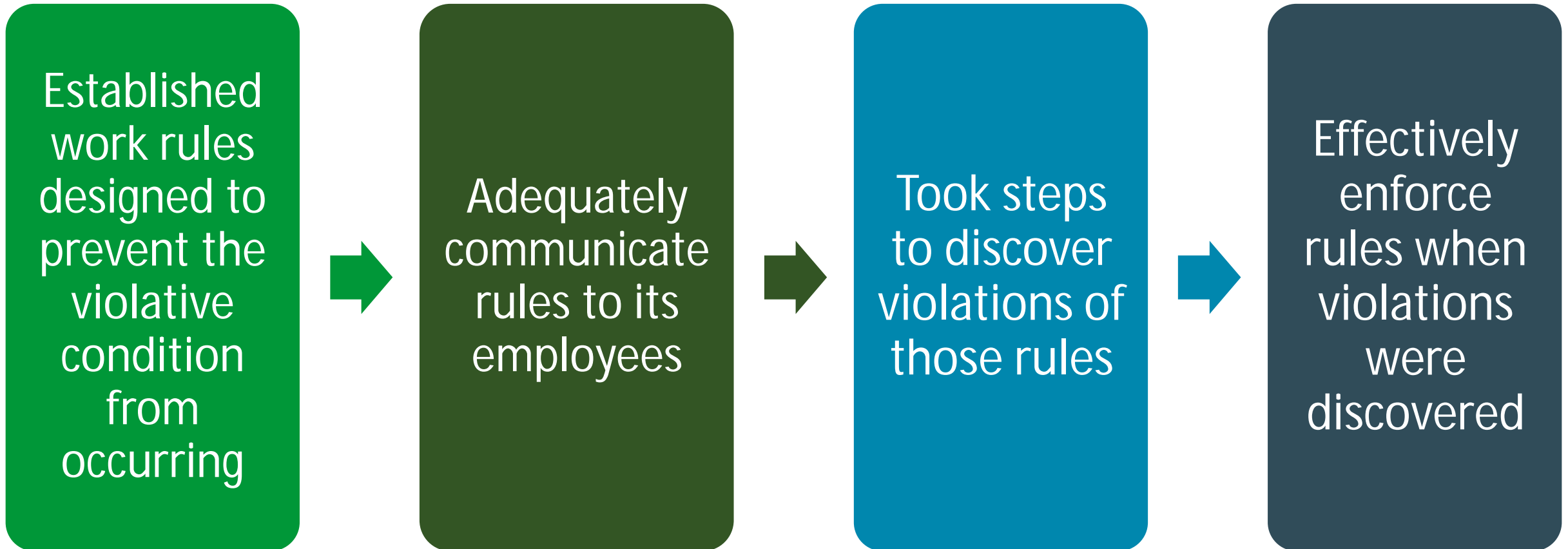
The employer did not comply with the terms of the standard

Employees had access to the violative condition

The employer had actual or constructive knowledge of the violation.

Elements of Unpreventable Employee Misconduct

Employer must show that it:



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

ALJ Decision



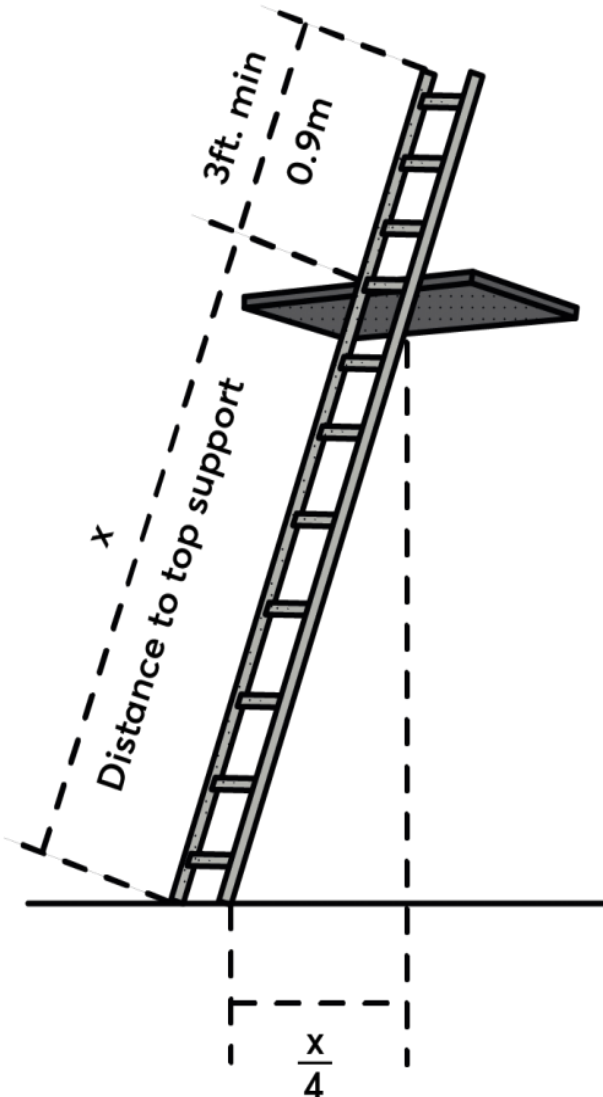
- ◆ As a supervisor, Rivera's knowledge is imputed to Abrams
 - ◇ Foreseeability relates only to imputation of supervisor's knowledge of his own misconduct
- ◆ Abrams failed to prove the last two elements of the unpreventable employee misconduct defense
- ◆ No documentation was provided to support that Abrams took steps to detect violations of safety rules at its worksites
- ◆ No proof that Abrams had effective and consistent discipline for safety rule violations

Abrams' Brief Before 5th Circuit Court of Appeals

- ◆ Rivera admitted to making “big mistake” that was contradictory to his training
- ◆ ALJ disregarded evidence regarding pre-inspection disciplinary actions taken by Abrams for safety violations
- ◆ ALJ created a heightened legal standard - required Abrams to call *certain* witnesses and introduce *specific* evidence
- ◆ Abrams had a robust safety program including routine safety audits
- ◆ No proof that anyone used the ladder when it was not 3 feet above the landing surface (exposure)



OSHA'S Brief Before the 5th Circuit Court of Appeals



OSHA: Significant gaps in testimony regarding safety audits – undermined by other evidence in record

OSHA: Management failed to visit the site where the pipe burst the day before the OSHA inspection

Post inspection discipline alone is not enough to prove enforcement

OSHA: Six-hour period in which violation occurred is strong evidence of lax enforcement

What Employers Should Do



Trench protection shouldn't be balanced against competing construction objectives.

Train field staff on how to interact with OSHA during an inspection – remember four elements.

Frequently monitor worksites to determine that foremen are applying work rules correctly. This should be done by a safety and health professional or superintendent.

Document all instances of discipline. Post-incident or post-inspection discipline is not enough.

Identify actual act that violates the standard. Don't let OSHA misframe that element.



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Stick around for Off the Record

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