



OSHA 30/30[®]

A thirty minute update
on OSHA law every thirty days

with
Manesh Rath

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Judge Vacates Six Citations, Crediting Defense in Multi-Employer Case

November 15, 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.



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.



Topics to be Discussed

- ◆ Companies Involved
- ◆ Facts of *Ireland Contracting v. Secretary of Labor*
- ◆ Discussion of Secretary's Three Arguments
- ◆ Analysis of ALJ Decision
- ◆ What Employers Should Do

Ireland Contracting v. Secretary of Labor

Companies Involved:



**Ireland Contracting
(General Contractor)**

**Integrity Construction LLC
(Subcontractor at 4108 Worksite)**

**William Miller Construction LLC
(Subcontractor at 4115 Worksite)**



4108 Worksite (Integrity Construction)

- ◆ CO inspected worksite after receiving complaint of workers on roof without fall protection
- ◆ Photographs showed Integrity's crew working on the roof about 11 ft off the ground without fall protection equipment, guardrails, or a safety net.
- ◆ Integrity crew did not contact Ireland Contracting during the inspection



4115 Worksite (William Miller Construction)

- ◆ Photographs showed Miller's crew working on the roof about 20ft off the ground without fall protection equipment, guardrails, or a safety net
- ◆ Ladder jack scaffolds erected at the back of the residence
- ◆ Miller crew did not contact Ireland Contracting during the inspection



Ireland Contracting v. Secretary of Labor

Citations Issued



- ◆ 4108 Site – One citation – Fall Protection (\$5,398)
- ◆ 4115 Site – Five-item citation – Eye Protection, Powered Industrial Truck, Fall Protection, Scaffold Safety (General and Specific) (\$23,906)
- ◆ All citations issued to Ireland Contracting



ALJ Decision

- ◆ The primary dispute is whether Ireland Contracting was responsible for the safety of the roofers at the 4108 Worksite and the 4115 Worksite either as a direct employer of the roofers or as a controlling employer.
- ◆ If Ireland was responsible, all four elements must be met.



OSHA's Three Arguments

- ◆ 1. Ireland should be treated as a direct employer of Integrity's and Miller's employees. Thus, violations by those workers should be attributed directly to the General Contractor, Ireland.
- ◆ 2. Ireland and its subcontractors, Integrity and Miller, were co-employers. Ireland and its subcontractor formed a single employer.
- ◆ 3. OSHA's Multi-Employer Worksite doctrine. Under this doctrine, Ireland is a "controlling" employer even if not an actual employer of the subcontractor's employees.

Direct Employer. *Darden* Factors

- ◆ Control over the manner and means of accomplishing work
- ◆ Hours worked, right to assign additional projects
- ◆ Skills required
- ◆ Source of tools
- ◆ Location of work
- ◆ Work was regular part of business
- ◆ Duration of the relationship
- ◆ Method of payment
- ◆ Employee benefits



Single Employer Theory Elements



- ◆ Share a common worksite;
- ◆ Have interrelated and integrated operations; and
- ◆ Share common president, managements, supervision, or ownership
- ◆ Unity in policies, management, oversight

Multi-Employer Worksite Doctrine

- ◆ Creating
- ◆ Exposing
- ◆ Correcting
- ◆ Controlling



Controlling Employer:



- ◆ An employer who has general supervisory authority of the worksite; and
- ◆ Has the power to correct safety and health violations itself;
- ◆ or as the authority to require others to correct safety violations
- ◆ Control can be established by contract or by the exercise of control in practice.

Ireland Contracting v. Secretary of Labor

ALJ Decision



- ◆ ALJ found that the Secretary failed to establish Ireland's liability under the Darden analysis, the single employer theory, or as a controlling employer.
- ◆ All citation items were vacated



What Employers Should Do

Contractual allocation
of duties

Monitoring should be
allocated by contract

General contractors
should review
subcontractor safety
practices

Subcontractors should
undertake their own
worker training,
provide equipment,
PPE

Subcontractors should
retain records of
correctional actions

Cited parties must
press OSHA to identify
its cause of action or
theory for liability



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Thank you

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

