



OSHA 30/30[®]

A thirty minute update
on OSHA law every thirty days

with
Manesh Rath

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Judge Vacates Lockout Tagout Citation, Finding no Employee Exposure

January 24, 2024

Manesh Rath

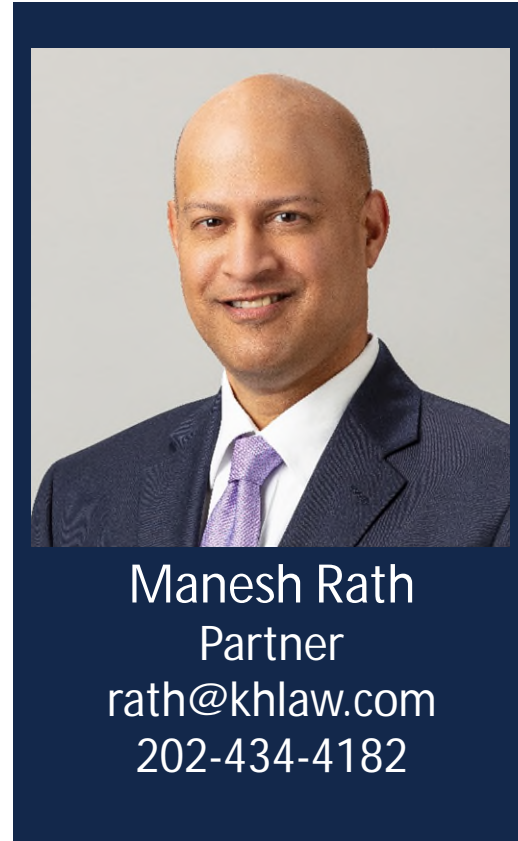


Manesh Rath is a partner in Keller and Heckman's litigation and OSHA practice groups. He has been the lead amicus counsel on several cases before the U.S. Supreme Court including *Staub v. Proctor Hospital* and *Vance v. Ball State University*.

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 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 *Ward Vessel & Exchanger Corporation v. Secretary of Labor*
- ◆ OSHA's citation and arguments
- ◆ Ward's contest and counters
- ◆ LOTO Standard Overview
- ◆ Analysis of ALJ Decision
- ◆ What Employers Should Do

Facts of *Secretary v. Ward Vessel & Exchanger*

- ◆ Employee was cleaning a plate rolling machine and got the tips of his fingers pinched
- ◆ Supervisor activated machine during troubleshooting process while employee was cleaning
- ◆ Employee was brought to the emergency room – treated and sent home following morning
- ◆ Three days later, Ward received a report from insurance company, indicating employee suffered an amputation of his fingertips



Ward Vessel and Exchanger v. Secretary of Labor: Cleaning Process



ROUND

- ◆ One employee uses a controller to lower bottom two rollers to lowest setting
- ◆ Eight-inch gap between two bottom rollers and top roller
- ◆ Two employees wipe down rollers with acetone
- ◆ One employee rotates and stops the rollers with the controller until clean
- ◆ One employee wraps plastic wrap halfway on rollers
- ◆ Controller employee slows speed to 1-3 revolutions per minute and other employee finishes the wrapping

Secretary v. Ward Vessel & Exchanger: **OSHA Investigation and Citation**

- ◆ OSHA initiated an inspection of Ward's worksite in Houston, Texas and issued three LOTO citations and one recording citation:
 - ◆ Ward failed to implement a specific lock-out/tag-out system to the plate roller
 - General procedure was insufficient because roller motor used hydraulics
 - ◆ Ward failed to report an amputation to OSHA within 24 hours



Ward Vessel and Exchanger v. Secretary of Labor: Ward Arguments



- ◆ LOTO exception for single source cord-and-plug machines
- ◆ No stored potential energy to create a pinch point
- ◆ Proper implementation of the work processes removed the hazard
- ◆ Employee and Supervisor violated cleaning and troubleshooting policy – unpreventable employee misconduct
- ◆ Ward reported the amputation as soon as it was aware of the formal classification

OSHA's Burden of Proof

- ◆ The primary dispute is whether the plate roller machine is governed by the LOTO standard
- ◆ Do exceptions apply?
- ◆ With respect to reporting violation, when did Ward have knowledge of the formal classification of "amputation"?



Lockout Tagout Standard Primer



Covers servicing and maintenance of machines and equipment in which unexpected energization or release of stored energy *could cause injury to employees*

Exposure to the hazard is the critical element

Normal production operations are not covered

Exception for cord and plug connected electric equipment

Ward Vessel & Exchanger v. Secretary of Labor ALJ Decision



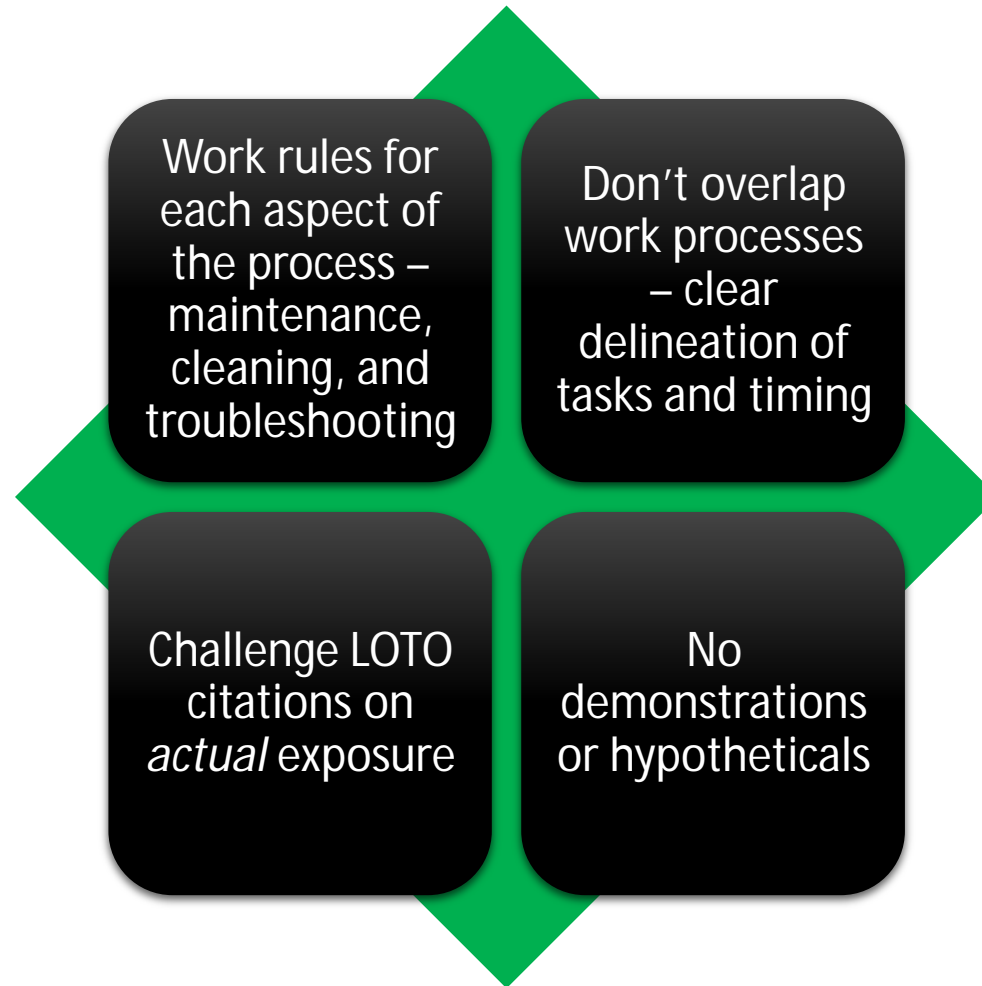
- ◆ ALJ divided the LOTO analysis into three tasks: a) maintenance b) cleaning c) troubleshooting
- ◆ Maintenance – cord and plug exception
- ◆ Cleaning – OSHA failed to prove exposure to the hazard
 - ◇ First step in cleaning process is to drop bottom rollers to remove pinch point.
- ◆ Troubleshooting – occurrence of an injury on its own does not establish a LOTO violation
 - ◇ Machine cannot be locked out during the troubleshooting process
 - ◇ Company policy required supervisor to clear the area surrounding the machine

Ward Vessel & Exchanger v. Secretary of Labor ALJ Decision

- ◆ ALJ vacated all citations
- ◆ ALJ found that OSHA failed to prove its *Prima Facie* case:
 - ◆ Failed to explain how the hydraulics worked, how they served as an additional source of hazardous energy, or how employees were exposed to any purported hazard
 - ◆ Failed to prove how preparation process exposed employees to injury
 - ◆ Failed to distinguish between various processes at work and how each are governed by the LOTO standard
- ◆ Ward reported amputation within 24 hours of learning it was formally categorized as an amputation



What Employers Should Do





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Thank you

Any questions?

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