



# OSHA 30/30®

A thirty minute update  
on OSHA law every thirty days

with  
**Manesh Rath**

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## Contractor's Testimony Ruled Insufficient to Rebut Alleged Excavation Violations

July 16<sup>th</sup>, 2025

# 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. He has been called to testify before Congress in several hearings relating to OSHA law.

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 interviewed in The Wall Street Journal, Bloomberg, Smart Money, Entrepreneur, on PBS's Nightly Business Report, and C-SPAN.

Mr. Rath served on the Board of Advisors for the National Federation of Independent Business (NFIB) Small Business Legal Center and on the Society For Human Resources (SHRM) Special Expertise Panel for Safety and Health law for several years.

He was voted by fellow members to The Best Lawyers in America 2016-2025 (in 2023, was voted as Lawyer of the Year); selected by Super Lawyers 2016 – 2023; and by corporate counsel as the 2017 Lexology winner of the Client Choice Award.



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# Benjamin Idzik



Benjamin (Ben) Idzik advises Keller and Heckman clients on regulatory compliance matters under state and federal environmental, occupational safety and health, transportation, and employment laws.

Specifically, Ben assists clients on issues arising under the Occupational Safety and Health (OSH) Act, Federal Motor Carrier Safety Administration (FMCSA) regulations, and U.S. Environmental Protection Agency (EPA) regulations, such as the Toxic Substances Control Act (TSCA) and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

Prior to joining Keller and Heckman, Ben focused on regulations affecting trade associations and their members. While in law school, Ben served as a legal intern for an advanced nuclear reactor and fuel company and was the Note & Comment Editor for the Catholic University Law Review. He also completed a clerkship at the Montgomery County Circuit Court.



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# Topics to Be Discussed

- ◆ Facts of *Sec'y of Labor v. Montroy Development, LLC*
- ◆ Establishing an OSHA Citation
- ◆ Montroy's Arguments
- ◆ OSHA's Arguments
- ◆ ALJ's Decision
- ◆ What Employers Should Do



# Facts of *Sec'y of Lab. v. Montroy Development, LLC* – Background

- ◆ Montroy Development, LLC is a contractor based in Syracuse, New York
- ◆ On May 8, 2023, Montroy was performing excavation work on a residential building project in Camillus, New York
- ◆ An OSHA Compliance Officer (CO), who was in the area, observed an individual standing at the edge of a pit appearing to speak someone inside, whose height was less than the depth of the excavation





# Facts of *Sec'y of Lab. v. Montroy Development, LLC* – The Inspection

- ◆ CO entered the worksite and confirmed that the man standing over pit was speaking to a worker who was inside
- ◆ Observed that two spoil piles and CAT excavator were near the excavation pit
- ◆ CO took some measurements, photos, and utilized her phone's recording feature to document parts of the inspection



# Facts of *Sec'y of Lab. v. Montroy Development, LLC* – The Citations

- ◆ CO issued two citations under the excavation standard after finding:
  - ◆ One of the spoil piles, and the excavator, were less than 2 feet from the excavation pit
  - ◆ The excavation pit was more than 5 feet deep



# Establishing an OSHA Citation

- ◆ OSHA must prove, by a preponderance of evidence, that:

1) The standard applies to the cited condition;

2) The terms of the standard were violated;

3) One or more of the employees had access to the cited condition; and

4) The employer knew, or with the exercise of reasonable diligence could have known, of the violative condition



# Montroy's Arguments

- ◆ Montroy: CO admitted that she did not take measurements. She deemed it unsafe.
- ◆ Mr. Montroy and an employee present during the inspection testified that the excavator was more than 2 two feet from the pit
  - ◆ Presented a photograph that he took showing a different perspective from the CO's video
- ◆ Excavator operator: Spoil pile had to have been at least 5 feet from the pit because it would have otherwise interfered with the operation of the excavator



# Montroy's Arguments (cont'd)

- ◆ Montroy: The excavator was not “equipment” within the meaning of the excavation standard
- ◆ Montroy: Employee only entered the pit to determine its depth
- ◆ Montroy: The excavation site was exempt from the standard because it was less than 5 feet in depth, the soil was firm  
Montroy: the spoil pile was more than two feet away



# OSHA's Arguments

- ◆ CO was not able to take measurements of the excavator's and spoil pile's locations due to safety concerns
- ◆ The excavator was not in motion when the CO conducted the inspection
- ◆ CO recorded Mr. Montroy speaking to the worker inside for 30 seconds
- ◆ CO used multiple sources of information and concluded that the pit measured 5ft, 3 inches deep.
- ◆ Video corroborated her finding





# ALJ's Decision:

- ◆ Testimony offered by Montroy on the location of the excavator and spoil pit was not supported by other evidence
- ◆ The standard applies to excavators
- ◆ OSHA is not required to show that an employee was exposed to a violative condition for a particular length of time
- ◆ The CO's estimated measurement of the depth of the pit were reasonable and not contradicted by Montroy
- ◆ Citations affirmed





# What Employers Should Do

- ◆ Ensure that a supervisor, or qualified employee, accompanies the Compliance Officers
- ◆ Record the inspection process, take the same measurements, same samples as the Compliance Officer
- ◆ Conduct factual investigation, assess valid defenses with employer's OSHA law counsel, at initial stage, prior to issuing a notice of contest





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at 1:00 p.m., Eastern Time

**August 20<sup>th</sup>, 2025**

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Please join us at 10:00 AM Eastern U.S.  
August 27<sup>th</sup>, 2025  
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# Thank You

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