

OSHA 30/30[®]

A thirty minute update
on OSHA law every thirty days

with
Manesh Rath

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Judge Vacates Citation for Failure to Establish Exposure

April 29, 2026

Manesh Rath

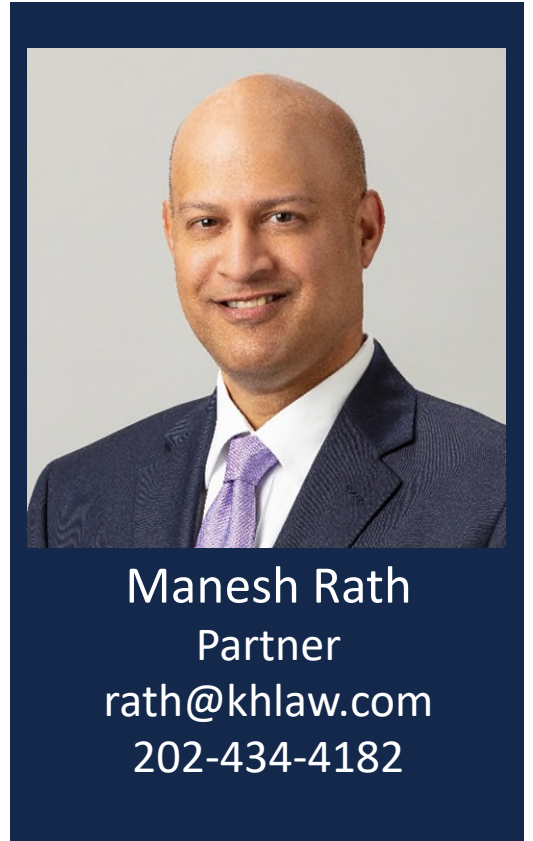


Manesh Rath is a partner in Keller and Heckman’s litigation and OSHA practice groups. He has been the lead amicus counsel on several cases before the U.S. Supreme Court. He has been called to testify before Congress in several hearings relating to OSHA law.

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.



Manesh Rath
Partner
rath@khlaw.com
202-434-4182

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.



Topics to Be Discussed

- ◆ Facts of the Case
- ◆ The Citation
- ◆ OSHA's Argument
- ◆ Pooler's Defenses
- ◆ ALJ's Decisions
- ◆ What Employers Should Do



Facts of the Case

- ◆ OSHA conducted an inspection of a construction worksite in Penfield, New York
- ◆ The Compliance Officer (“CO”) performed a walkaround inspection with the site’s general contractor
- ◆ Came across an excavated trench, which housed a main water line, dug by subcontractor Pooler Enterprises
- ◆ The trench was not supported by any cave-in protections



The Citation

- ◆ CO interviewed Pooler's site foreman, Todd Jackson, and its pipe foreman, Charlie Kinsman
- ◆ CO was informed that Pooler was conducting testing on the water line to isolate a leak
- ◆ CO assumed that Kinsman entered the trench while water line testing was taking place
- ◆ Issued a citation under trenching and excavation standard



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

OSHA's Arguments

- ◆ Standard applies to man-made trenches greater 5 ft in depth.
- ◆ Pooler's trench did not have any cave-in protections
- ◆ CO Testimony: Jackson and Kinsman told him that Kinsman was in the trench prior to the inspection to test water pressure



Pooler's Defenses

- ◆ Conceded that standard applies and no cave in protections were present
- ◆ No employee were exposed to hazard
- ◆ Testing did not require employees to enter the trench
- ◆ On cross examination: CO admitted that Jackson's and Kinsman's statements were not in field notes
 - ◇ Admitted that he did not ask Jackson why Kinsman needed to enter the trench



ALJ's Decision

- ◆ Employees must have been actually exposed to the danger that the standard was designed to protect or that exposure to danger was reasonably predictable
- ◆ The case turned entirely on the credibility of the witnesses
- ◆ CO's testimony was not credible
- ◆ By contrast, ALJ credited Jackson's and Kinsman's testimony
- ◆ **Citation vacated**



What Employers Should Do

- ◆ Document inspection contemporaneously
- ◆ Be prepared to provide OSHA with a detailed description of the activity at issue
- ◆ When practicable, encourage more than one employee to participate in walk around inspection
- ◆ If a citation is issued, work with qualified counsel to test OSHA's legal theory and gather potential exculpatory evidence
- ◆ Endeavor to present more than one witness if case goes before an ALJ






Please join us at 10:00 AM Eastern U.S.
June 10, 2026
www.khlaw.com/REACH-3030



Please join us at 1:00 PM Eastern U.S.
May 13, 2026
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Thank You

Manesh Rath

Partner

1001 G Street N.W. Ste. 500W

202.434.4182

rath@khlaw.com



Benjamin Idzik

Associate

1001 G Street N.W. Ste. 500W

202.434.4308

idzik@khlaw.com

