OSHA and Texas Safety Standards

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I. Introduction

Are OSHA violations or OSHA standards admissible in Texas, and why or why not? The answer is a firm "maybe," or perhaps the better answer is "it depends." The case law is all over the place, and tends to be very fact specific, but generally *citations* are not going to be admitted unless the case is for a work injury brought by an employee against a non-subscribing employer, or a Part B gross negligence wrongful death claim brought by the deceased employee's wrongful death beneficiaries. OSHA citations will also likely be admitted into evidence when the Plaintiff's employer is submitted as a responsible third party in an action brought by an injured employee against somebody other than the employer.

OSHA *regulations* are generally admissible whenever they are relevant. OSHA regulations are usually relevant to establish a standard of care, or to show that an employer should have known of a hazard. The relevance of an OSHA standard is that it, and the ANSI standards which form the bases for most OSHA standards, are the cumulative wisdom of the industry on what is safe and what is unsafe. *Front Engineered Solutions, Inc. v. Rosales*, 512 S.W.3d 357, 385 (Tex. App.—Corpus Christi 2015, pet. filed); *Wal-Mart Stores, Inc. v. Seale*, 904 S.W.2d 718, 720 (Tex. App.—San Antonio 1995, no writ). Remember that all admissibility issues must clear the "relevance" hurdle under TRE 401. Remember also that relevance rulings are reviewed on an "abuse of discretion" standard.

Texas courts have also held that the common law duties imposed by state law are not expanded by OSHA regulations. A violation of OSHA standards does not create a duty where none exits. OSHA frequently holds general contractors liable for injuries to sub-contractors, but just because there is an OSHA citation does not mean that there is a negligence claim. Duty is still analyzed in those cases under a control test, as a premises claim, or by applying Chapter 95 of the

Texas Civil Practice and Remedies Code. In *Richard v. Cornerstone Constructors, Inc.*, the court expressly ruled that OSHA statutes do not expand the common law of Texas. 921 S.W.2d 465 (Tex. App.—Houston [1st Dist.] 1996, writ denied). For a general contractor or owner to be held liable, an accident must occur because of a premises defect or negligent activity. It is also important to note that employees are the exclusive class of persons protected by OSHA regulations. *Kraus v. Alamo Nat'l Bank of San Antonio*, 586 S.W.2d 202, 208 (Tex. Civ. App.—Waco 1979), *aff'd*, 616 S.W.2d 908 (Tex.1981).

Practice Tip: when you get hired on a non-subscriber case or gross negligence death case against the employer, make sure the incident was reported to OSHA. Employers have a duty to report fatalities and incidents that result in three or more individuals being hospitalized, but they don't always comply. The investigative material in the OSHA file can be helpful. The investigative file is available using a FOIA request, but as a practical matter, OSHA's turnaround on FOIA requests is so slow that they will often not produce the requested documents before your case is going to trial. To help, make your request as soon as possible. You can depose the OSHA investigators, but it's difficult, more on that below.

If you have an employer who is enjoying workers' compensation immunity and you are trying to make a third-party action, then you are not going to want any OSHA citations being issued or being admitted into evidence against the employer. In this scenario, it makes little sense to report the incident to OSHA if they are not yet involved.

The best way to appreciate the legal landscape involving the admissibility of OSHA citations and regulations is to look closely at some of the leading cases on the subject – so that's what we are going to do.

II. Admissibility of OSHA Citations and Regulations

Valenzuela v. Heldenfels Bros.

The case of *Valenzuela v. Heldenfels Bros.*, was a third party wrongful death work injury case. No. 13-04-241-CV, 2006 WL 2294562 (Tex. App.—Corpus Christi Aug. 10, 2006, no pet.). Valenzuela worked for Haas-Anderson Construction and died while trying to load an emulsion tank manufactured by the defendant Heldenfels. *Id.* at *1. Heldenfels offered into evidence OSHA citations issued to the employer Haas-Anderson arising from the fatal accident. *Id.* The trial court's ruling of admitting the citations was reviewed under an "abuse of discretion" standard.

Practice Tip: This case is a good example of how a defendant in a third-party work injury case might use OSHA violations as a defense, to shift responsibility onto the employer who may have immunity under Workers' Compensation laws but may nonetheless be submitted to the jury at the defendant's request as a "responsible third party."

Appellant argued that OSHA violations should be excluded as mere citations, analogizing them to traffic tickets. *Id.* Traffic tickets are only admissible when the defendant has plead guilty to the citation. The argument is that OSHA citations are not final judgments. Rather, they are merely the beginning of an adversarial legal process. The court of appeals disagreed, noting that appellants "provided no authority for extending the law related to traffic citations to OSHA citations, and we have found none." *Id.*

Practice Tip: It's not clear from the opinion whether the citations at issue had become "final." The author of this paper has had Courts exclude violations from evidence when the defendant has offered testimony that the citation is being appealed or has not become final. Citations are often compromised and "settled." This case can be distinguished in cases where the

defendant can produce evidence that the citation is being contested. Counsel may want to do discovery on the finality of the citations at issue in a case.

The *Valenzuela* Court also addressed the Plaintiff's hearsay objection to the citations, and the exception under Rule 803(8) argued by the Defendant. The Court stated:

> Moreover, Texas Rule of Evidence 803(8) permits the admission of records and reports of public offices or agencies, which set forth (1) the activities of the office or agency, (2) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, and (3) in civil cases, factual findings as to any party resulting from an investigation made pursuant to authority granted by law, unless the sources of information indicate lack of trustworthiness. Tex. R. Evid. 803(3). Here, the custodian of records for the United States Department of Labor certified that the copies of documents contained in Defendant's Exhibit 41, which includes the OSHA citations at issue, were true copies of the official documents. The OSHA citations, which also include a notice of penalty, set forth (1) activities of the agency related to the citations and penalties, (2) matters observed during the investigation of the accident giving rise to the underlying suit, and (3) factual findings resulting from an investigation of the accident in question conducted pursuant to the Occupational Safety and Health Act of 1970. Therefore, the OSHA citations met the requirements of Texas Rule of Evidence 803(8), and thus, were admissible into evidence.

Id. at *2.

In an opinion piece in the Texas Bar Journal, the authors argued that the *Valenzuela* Court got it wrong.

> What the *Valenzuela* court ignored in its entirety was the last clause of 803(8)(C), which reads, "unless the sources of information or other circumstances indicate lack of trustworthiness." … In applying the facts of the case to 803(8), the *Valenzuela* court failed to address whether the sources of information or other circumstances indicated a lack of trustworthiness.

Jessica G. Garely & Brett J. Young, *UNTRUSTWORTHY AND IRRELEVANT Why OSHA Citations and Related Materials Should Not Be Admissible to Prove Liability*, 78 TEX. B.J. 136 (2015).

The authors revive the argument that an OSHA citation is not "trustworthy" because it is merely a citation, more like a traffic ticket than a conviction. *Id.* Secondly, they point out that it can be extremely difficult to take the deposition of OSHA investigators to explore their findings

and determine the basis for their conclusions. *Id.* at 137, (citing *Ferto v. Fielder*, No. 10cv1729, 2010 WL 3168293. at *2 (N.D. Ill. Aug. 5, 2010) (citing OSHA's Touhy regulations—29 C.F.R. § 2.20 et seq.—requiring the Deputy Solicitor of Labor's approval before OSHA investigators may be deposed and noting that state courts lack jurisdiction to compel OSHA investigators to testify absent a waiver of sovereign immunity)); *Baker v. U.S., Dep't of Labor*, 31 F. Supp. 2d 985, 987-88 (S.D. Fla. 1988) (affirming the Department of Labor's Touhy denial that OSHA investigators may be deposed in a state wrongful death suit), *amended on reconsideration on other grounds*, No. 97-7387-CIV, 1998 WL 1085734 (S.D. Fla. Oct. 7, 1998).

Practice Tip: The author has deposed OSHA investigators in a non-subscriber injury case. (It was 25 years ago, but it happened). I took a trip to Dallas to meet with an OSHA lawyer to request permission, which was granted on the condition that the deposition be conducted at the OSHA lawyer's office and that the witness only testify to facts and not to opinions. If you really need something from the OSHA file and cannot get the file in a timely fashion through a FOIA request, then maybe request a deposition, and settle for an expedited production of the file.

Duncan v. First Texas Homes

In *Duncan v. First Texas Homes*, Duncan was employed as a construction superintendent by First Texas. 464 S.W.3d 8 (Tex. App.—Fort Worth 2015, pet. denied). Duncan fell down a set of exterior stairs while leaving an office trailer on a construction site located in Frisco, Texas, and suffered a herniated disk. *Id.* at 12. OSHA issued a citation against First Texas because the platform at the top of the stairs was too narrow. *Id.* Duncan filed suit against his employer First Texas, a non-subscriber. This was Ted Lyon's and Marquette Wolf's case. The trial court granted First Texas' broad motions for summary judgment, and the Fort Worth Court of Appeals reversed,

holding that OSHA citation was some evidence of the employer's negligence, reasoning as follows:

> First Texas next argues that even if [the OSHA regulation] applies to this case, deviations from the standard set forth therein are no evidence that a condition posed an unreasonable risk of harm. *See Richard v. Cornerstone Constructors, Inc.*, 921 S.W.2d 465, 468 (Tex. App.—Houston [1st Dist.] 1996, writ denied) (op. on reh'g) ("A state's common law duties are not expanded by OSHA regulations.") … OSHA standards, however, are generally relevant as the cumulative wisdom of the industry on what is unsafe. *Wal–Mart Stores, Inc. v. Seale*, 904 S.W.2d 718, 720 (Tex. App.—San Antonio 1995, no writ). Because whether a condition met applicable safety standards is a relevant consideration when determining whether that condition posed an unreasonable risk of harm, we conclude that deviations from the standards prescribed in section 1926.1052(a)(4) are some evidence that the condition in this case posed an unreasonable risk of harm.

Id. at 20.

Practice Tip: This is a good example of using an OSHA citation to establish non-subscriber liability. It works!

The case of *Carrillo v. Star Tool Co.*, is a good example of an OSHA "finding" that is not coming into evidence. No. 14-04-00104-CV, WL 2848190 (Tex. App.—Houston [14th Dist.] 2005, no pet.). The decedent Carrillo was working as a floor hand for Sierra Well Service, on a location owned by McDonald Operating, using a tool rented from the Defendant Star Tool. *Id.* at *1. This was attorney Richard Hardy's case, from Faddoul Cluff & Hardy in Lubbock, Texas. An OSHA investigator had written a letter to Sierra Well Services, the decedent's employer, stating that there were no OSHA violations and no citations were issued, but the letter contained the investigators recommendations about the type of tool that would be appropriate for that type of work. *Id.* at *2. The Plaintiffs urged that the letter be admitted arguing that it showed industry knowledge and offered it to impeach the defendant employee's testimony. *Id.* at *3. The trial court excluded the letter from evidence on relevance grounds. *Id.* at *1. The jury found that Star Tool was not negligent, and Plaintiffs appealed. *Id.* The Court of Appeals affirmed on an abuse of discretion

standard, holding that the letter was not relevant, because it was "based on the opinion of one OSHA investigator who did not testify at trial. Unlike an OSHA regulation, the excluded letter does not carry with it the indicia of reliability that is inherent in a government adopted safety standard." *Id.* at *3.

Practice Tip: Good try at admissibility, too bad it didn't work. There is more than one way that evidence can be relevant, so be creative.

4Front Engineered Solutions, Inc. v. Rosales

In the case of *4Front Engineered Solutions, Inc. v. Rosales*, the Plaintiff Rosales was an electrician who went to repair a sign at the Defendant's warehouse. 512 S.W.3d 357 (Tex. App.—Corpus Christi 2015, pet. filed). The Defendant's warehouse manager loaned Rosales a forklift, which fell over dropping Rosales 25 feet to the ground. *Id.* at 361. Plaintiff hired a "safety expert" Jerome Spear, who testified that OSHA regulations found at 1910.178(l) of Title 29 of the Code of Federal Regulations require training for a forklift operator, and that the Defendant violated that standard. *Id.* at 362. The Jury found the Defendant landowner was negligent and awarded in excess of Ten Million Dollars. *Id.* at 361.

Practice Tip: File your lawsuits in Hidalgo County whenever you get the chance. The author once had a trial court grant a directed verdict for the Plaintiff in a non-subscriber case *sua sponte*, over everyone's objection.

Interestingly, the Court of Appeals rejected the Warehouse Defendant's Chapter 95 defense, holding that:

> We agree with Rosales that, according to its strictly-construed plain meaning, chapter 95 does not apply to this case. *See Smith v. Sewell*, 858 S.W.2d 350, 354 (Tex.1993) (noting that, if a statute "deprives a person of a common-law right," it "will be strictly construed in the sense that it will not be extended beyond its plain meaning or applied to cases not clearly within its purview"); *see also Carpenter v. First Tex. Bancorp*, No. 03–12–00004–CV, 2014 WL 2568494, at *1 (Tex. App.—

> Austin June 5, 2014, no pet.) (mem. op.) (construing chapter 95 strictly pursuant to *Smith*). Rosales was injured while in the process of repairing an improvement to 4Front's real property—the illuminated sign—but it cannot be said that his claim arose "from the condition or use" of the sign. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 95.003. Rather, his claims arose from the use of a forklift, which is not an improvement to real property.

Id. at 375.

The Court then went on to hold that the Defendant's failure to comply with the OSHA training requirement was sufficient evidence of negligent entrustment and sustained the verdict. Sadly, the case was reversed by the Texas Supreme Court in *4Front Engineered Solutions, Inc. v. Rosales*, 505 S.W.3d 905 (Tex. 2016), holding that:

> We agree with 4Front that none of Rosales's evidence supports the jury's negligent-entrustment finding…Even if Reyes was not formally trained and certified, and even if 4Front knew that he was not, a lack of formal training and certification does not establish that the operator was incompetent or reckless. Even the lack of a required legal license does not establish incompetence or recklessness.

The Court did not reach any arguments about the admissibility of the OSHA regulations.

Practice Tip: It's better to be lucky than good. We settled our uncertified forklift driver negligent entrustment case shortly before this opinion came out.

Garrett v. Patterson-UTI Drilling

The case of *Garrett v. Patterson-UTI Drilling Co*., L.P., is especially instructive since the author tried the case. 299 S.W.3d 911 (Tex. App.—Eastland 2009, pet. denied). This was a Part B gross negligence claim, brought by the decedent's daughter against his employer Patterson Drilling. *Id.* at 914. The suit was filed in Lubbock County, and was lost when venue was transferred to the Scurry County seat, Snyder, Texas, which was very proud of being the birthplace of Patterson Drilling, at the time the largest land-based drilling company in the world.

Practice Tip: Do not sue the largest employer in a small town unless you cannot sustain venue elsewhere.

The fatal injury occurred when the crew was trying to repair a bent brake handle, and at the same time Brandon Garrett was replacing the guard on the spool. *Id.* The brake handle was inadvertently dropped on the accelerator, winding Brandon up in the spool line. *Id.*

Patterson filed a no evidence Motion for Summary Judgment, and Garrett responded with an OSHA citation Patterson received for failing to follow lockout procedures. *See* 29 C.F.R. 1910.147(a)(3). The Court sustained the trial judge Ernie Armstrong's summary judgment, holding:

> White testified that they could not utilize a lockout/tagout procedure while they were working on the equipment. … Garrett replies by pointing to an OSHA citation Patterson received for failure to follow lockout procedures. Patterson responds that an OSHA citation is no evidence of negligence and that we may not consider it. We need not resolve this question because the record establishes that Patterson and OSHA entered into a settlement agreement and that OSHA withdrew its allegation. Because Garrett presented no evidence that White could have utilized a lockout/tagout procedure, his failure to do so is no evidence of gross negligence.

Id. at 918.

Side note from the author – oil and gas drilling and servicing operations are exempt from lockout/tagout procedures. *See* 29 CFR 1910.147(a)(1)(ii)(E).

III. Sources of Regulations and Standards other than OSHA

In oilfield cases, you should note that some OSHA regulations do not apply when a certain type of work is being performed. For example, the lockout/tagout regulation states that it does not cover "oil and gas well drilling and servicing." When there is no applicable OSHA regulation, or you do not like the OSHA regulation on point, you should shift your focus to industry customs. In negligence cases, industry custom is some evidence of the standard of care within that industry.

Organizations such as the American Petroleum Institute (API) and the American National Standards Institute (ANSI) publish safety standards used across several industries. As its name implies, API standards are safety standards covering the oil and gas industry. ANSI safety standards cover a broader range of industries and include safety standards relating to construction safety, ladder safety, fall protection, and workplace surface safety.

One thing that is easy to overlook and can be quite helpful, is what the Defendant's competitors are doing. This is true especially in the oil and gas industry. See what the big companies are doing when it comes to safety standards. Check to see what Chevron, ExxonMobil, and Conoco Phillips are doing. Does Chevron require 100% tie-off when working above a specified number of feet? When does ExxonMobil require hot work permits? Does Conoco Phillips require that a Job Safety Analysis (JSA) sheet be conducted before every job?

When handling oilfield cases in Texas, you should also keep the Railroad Commission of Texas' Regulations in mind. Despite its name, the Railroad Commission of Texas regulates the oil and gas industry and pipeline safety. While a lot of the regulations seem to be written with environmental concerns in mind, there are several regulations related to safety. Violations of Railroad Commission regulations can be quite helpful in showing the defendant had a disregard for safety and provides you with the argument that ultimately, the lack of compliance led to the plaintiff's injuries.

IV. When the OSHA Regulation is not Helpful

A good example of a case where an OSHA regulation was more harmful than helpful is a case my firm handled recently. The case arose out of a pipeline explosion that occurred when two men were cutting a 12-inch pipeline. The pipeline operator had failed to properly isolate the energy from the pipeline before hiring another company to decommission the gas line. While the two

men were cutting the pipe, the pipeline came apart at a connection in the valve box a few feet from the location causing a large pressure release of hydrocarbons and H_2S. One of the men was able to escape from the valve box, but the other was pinned inside the valve box and drowned.

As discovery progressed, we discovered that the method of energy isolation used by the pipeline operator was unsafe. The pipeline operator swore that it had followed OSHA's "double block and bleed" regulation on energy isolation and, therefore, it could not have been negligent in the operation of the pipeline. The defendant tried making the case into a regulatory one. The pipeline operator believed that if it could show that it was following the OSHA definition of "double block and bleed" then there was no way we could prove it was negligent.

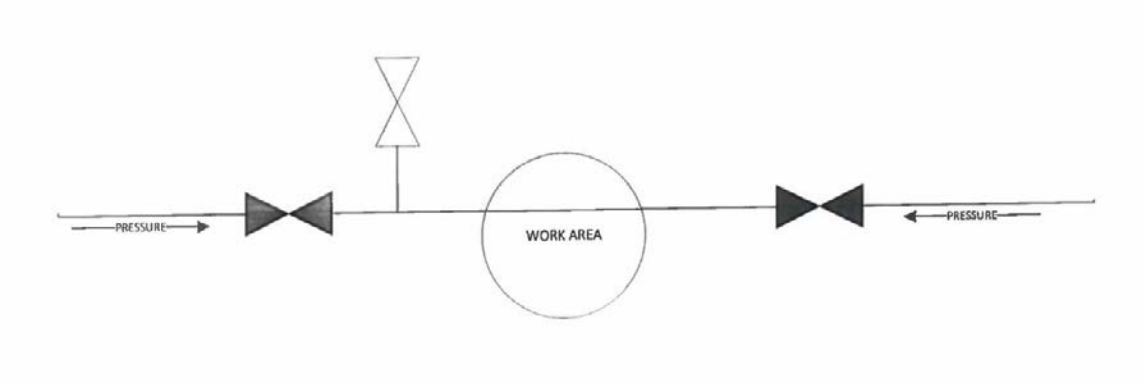
The pipeline operator argued that because it had blocked the pressure from two sides and bled the pressure therein, it had properly followed the "double block and bleed" procedure. OSHA defines "double block and bleed" as follows:

> "Double block and bleed" means the closure of a line, duct, or pipe by closing and locking or tagging two in-line valves and by opening and locking or tagging a drain or vent valve in the line between the two closed valves.

29 CFR 1910.146-147.

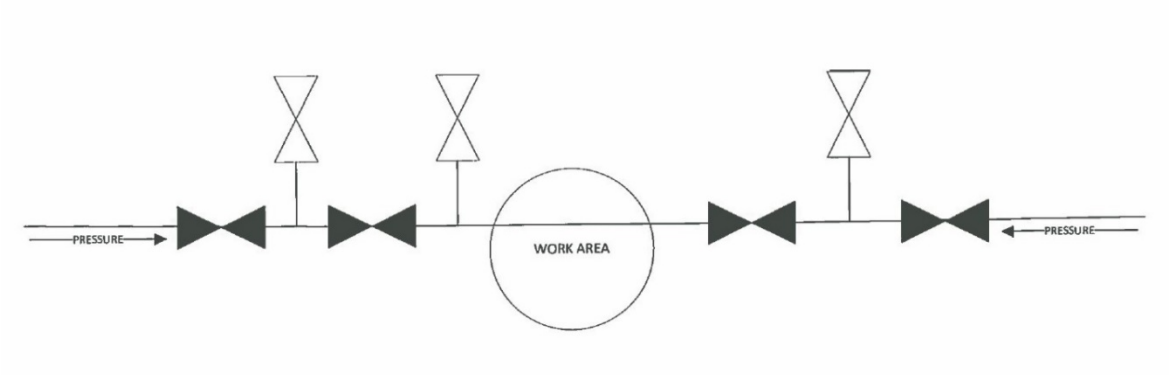
At first glance, it appeared that the pipeline operator had in fact followed the OSHA regulation on "double block and bleed." However, unconvinced that the "double block and bleed" method was correctly utilized, we did some research on what the oil and gas industry considers to be a "double block and bleed." We discovered that the method utilized by the pipeline operator was in fact the "single block and bleed" method. To our surprise, the "single block and bleed" method fits OSHA's definition of "double block and bleed."

This diagram shows an example of single block and bleed. The shaded touching triangles represent one closed valve.



In a "single bock and bleed" you have the closure of a pipe by tagging two in-line valves and draining the line in between the closed valves labeled as the "work area." This is exactly what the definition of OSHA's "double block and bleed" seems to require. However, major players in the oil and gas industry define "double block bleed" as requiring two blocks from each pressure source. In our case, we had pressure coming in from both sides of the pipeline so the proper way to "double block and bleed" would have been to close two valves from each side of the work area and bleed both the areas between the blocks and the work area.

This diagram illustrates double block and bleed because two or more valves are closed between the pressure and the work area. The shaded touching triangles represent closed valves.



Because we did not rely on the OSHA definition of "double block and bleed" and found out what other major oil companies were doing regarding energy isolation of a pipeline, we were

able to show that the pipeline operator was negligent and obtain a large settlement for the deceased's family.

V. Don't Make a Negligence Case into a Regulatory Case

It is important to make sure that everyone involved in your case, from the judge to the jury, understands the purpose of you using violations of OSHA regulations in your case. You want the judge to understand it for purposes of admissibility. It is critical that the jury understands that your case is based on negligence and all OSHA regulations do is help establish the standard of conduct deemed to be reasonable under a particular set of circumstances. You should make sure the jury knows that in the event the defendant can show that it did not violate an OSHA regulation, that does NOT mean the defendant was not negligent.

The defense may try to make the case into a regulatory case. This is a trap. The defense may make it a goal for the trial to become so focused on whether the defendant was in violation of OSHA regulations that the jury starts seeing the case as a regulatory case: if the defendant violated an OSHA regulation, then the defendant was negligent; if the defendant did not violate an OSHA regulation, then there was no negligence. You want to avoid this line of thinking from the jury. The defendant can be negligent even if the defendant somehow proves that it did not violate the regulations you said it did. A lack of regulatory violation is not equivalent to lack of negligence. When faced with this situation, a good example to use with a jury is the texting ban in Texas. Texting was not made illegal across the state until 2017. If someone was texting while driving and crashed prior to the texting ban, she would still be guilty of negligence because it is not reasonable to be texting while driving.

VI. Using OSHA Regulations in Depositions

One of my firm's favorite ways to use OSHA regulations in workplace injury cases is in the deposition of the defendant's head safety person, usually titled the "safety manager."

You begin the deposition by getting the safety manager to admit that the OSHA regulations are in place to ensure a safe work environment. You then get the safety manager to admit that the defendant must abide by the OSHA regulations. You follow up with the safety manager admitting that it would be dangerous for the defendant to violate the regulations. Once you have laid this groundwork you can get into whether the safety manager taught the relevant regulations to the negligent employee. The line of questioning for a typical safety manager's deposition would go something like this:

Q. You're familiar with OSHA regulations providing for workplace safety?

Q. These are safety rules the company must live by, correct?

Q. It would be dangerous for your employees not to know the OSHA regulations applicable to your line of work, wouldn't it?

Q. As the safety manager for X Defendant Company, it is your responsibility to teach the employees the relevant OSHA regulations, isn't it?

Q. Did you teach (name of negligent employee) the regulation on (name of regulation violated)?

If safety manager responds that he did:

Q. Do you have any documentation showing the training?

If the safety manager responds that he did not teach the negligent employee the relevant regulation, then you have what you need. Since the deposition of the defendant employee is usually taken before the safety manager's, you want to make sure to have asked the employee

whether he was trained on the applicable regulation(s). Often, the employee will say that he was never told anything about the requirements of the regulation(s). If you have the safety manager saying one thing, and the employee saying another, the defendants have impeached themselves. You have your jury argument: either the safety manager never taught the applicable OSHA regulations, or the employee willfully, wantonly, and recklessly disregarded the regulation(s) on which he had been trained and caused the incident in question. It is a win-win for the Plaintiff.

VII. Other Sources of Safety Standards

OSHA standards are just one source of safety standards. One approach is to hire a "safety expert," usually an engineer as an expert witness who can point to various regulations and standards. In our experience, an industry specific expert will usually be more helpful than a jack of all trades.

The courts will not allow an expert to create an *Ipse Dixit* safety rule. The Supreme Court in *K–Mart Corporation v. Honeycutt*, 24 S.W.3d 357 (Tex. 2000), excluded Way Johnson's testimony as a "safety expert" as not "helpful" under TRE 702, where he simply examined a shopping cart rack and determined that it was "unsafe" without reference to any standards.

Nearly every major industry has some widely available standards. These may come from professional organizations affiliated with the particular industry or more cross-industry standards groups like ANSI. A good internet search and even review of published papers concerning the industry should lead you to some potential sources. Other sources for standards include:

ANSI Standards

ASTM Standards

ASME Standards

NIOSH recommendations

Building Codes

American Petroleum Institute Standards

Railroad Commission regulations

CSPC Regulations

Industry Customs and Competitor Policies

Industry Association Standards

Defendant's own safety rules

Product Manuals related to the mechanism of injury

National Model Codes such as the National Electrical Safety Code

FMCSA regulations including Hazmat rules

Finally, and most importantly, remember: "We don't need no stinking standards." A negligence claim is based on common sense, and ordinary care. You don't have to prove a violation of any standard other than ordinary care. So, don't try so hard to establish a violation of standards that you confuse the jury about your burden of proof, or build error into your record.