

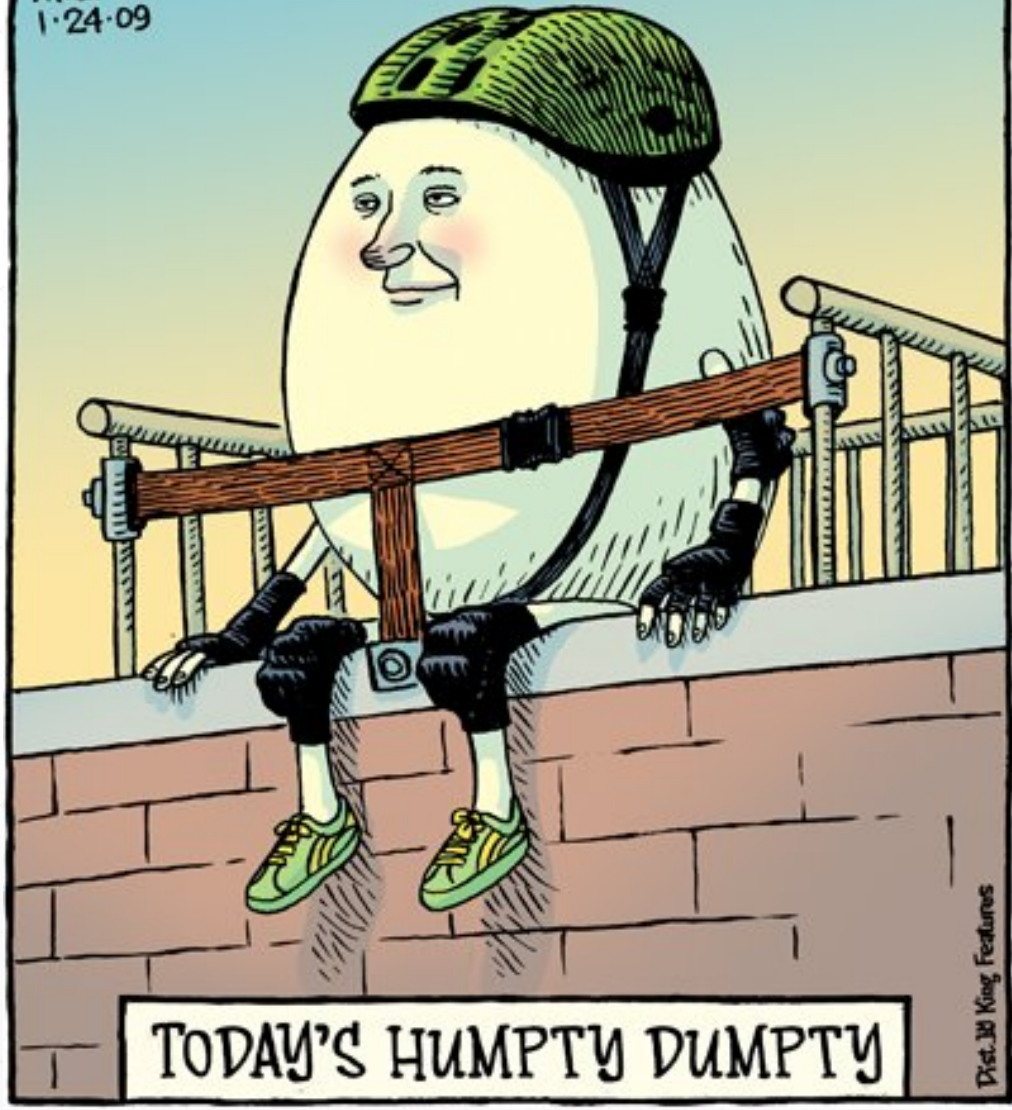
# OSHA and Texas Safety Standards

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TODAY'S HUMPTY DUMPTY

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## OSHA and Texas Safety Standards

- Admissibility of OSHA citations and regulations
  - That time when OSHA regulations were not helpful
  - Don't make a negligence case into a regulatory case
  - Using OSHA regulations in depositions
-

# **Admissibility of OSHA citations and regulations**

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# **Standard of Review for Admissability**

- Abuse of discretion
  - Harmless Error Standard
-

## Citations

- Generally not admissible *unless* the citation is being offered to show the employer breached a duty to the employee, such as:
    - Employee vs non-subscribing employer,
    - Part B gross negligence wrongful death claim, or
    - When employee's employer is submitted as RTP by defendant.
  - Can only be used to establish employers' liability
-

## Non-Subscriber Cases

Costco

Home Depot

Macy's

Taco Bell

Wal-Mart

McDonald's

Dollar General

Lowe's

Target

Kroger

HEB

Whole Foods

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# Regulations

- Generally admissible whenever relevant
    - To establish standard of care
    - To show employer should have known of hazard
  - “These regulations 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)
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# **OSHA 29 CFR 1910 – General Industry**

- **D – Walking Working Surfaces**
    - **Ladders**
    - **Stairways**
    - **Scaffolds**
    - **Fall protection**
-

## **29 CFR 1910, cont.**

- F – Powered Platforms, lifts
  - H – Hazmat
  - I – PPE, Fall Protection
  - O – Machinery Guarding
  - P – Hand Tools
-

## 29 CFR 1910, cont.

- Q – Welding
  - R – Special Industries
    - Grain elevators
    - Laundry
    - Bakery
  - S – Electrical
  - Z – Toxic and Hazardous substances
-

## **1926 Construction and 1928 Agriculture**

Lots of specialized regulations –

Hire a Workplace Safety expert witness

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# Regulations

- OSHA regulations do not expand upon, or create, common law duties. Regulation does not create a duty.
  - Analyze contractor/sub-contractor duties on a control test or by applying Ch 95 of TX CPRC.
  - For a general contractor or owner to have a duty, they must exercise control.
  - *Once you establish a duty by statute or common law, then the regulation defines the standard of care.*
-

## In a Part B or Non-Subscriber – Report to OSHA

- Employers have a duty to report fatalities and incidents that result in in patient hospitalization (2) an employee's amputation, or (3) an employee's loss of an eye. 29 CFR 1904.39. **But they don't always comply.**
  - Obtain this using FOIA request (slow), or by deposing the OSHA investigators (difficult).
  - If third-party case with employer immunity, don't involve OSHA if they're not already involved.
-

## **Martino v. Kiewit NM Corp 5<sup>th</sup> Cir 2015**

- WD Texas –Border Wall construction
  - D ran over P with a skid steer – not trained
  - SJ for D – Affirmed
  - Negligence Per Se only when suing employer
  - OSHA standards were excluded under Rule 403 -
-

## **Perez v Smart Corp., WL 6203358 COA San Antonio 2013**

- Sub sued general contractor over a ladder fall
  - Jury – 55% on P, 45% on D
  - Evidence of “No OSHA citation” is not admissible to exculpate D
  - Harmless Error since jury found D negligent
-



## *Valezuela v. Heldenfels Bros.*

No. 13-04-241-CV, 2006 WL 2294562 (Tex. App.—Corpus Christi Aug. 10, 2006, no pet.).

- Third-party wrongful-death case. .
  - Heldenfels offered, and TC admitted OSHA citations issued to employer
  - Argument: should have been excluded analogy to traffic citations unless D pleaded guilty.
  - Holding: Affirmed. There is no authority for extending traffic citations law to OSHA citations, and citations are admissible when relevant.
  - Not clear whether OSHA citation was final.
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## *Valezuela v. Heldenfels Bros. (continued)*

No. 13-04-241-CV, 2006 WL 2294562 (Tex. App.—Corpus Christi Aug. 10, 2006, no pet.).

- Additional holding: OSHA records not hearsay 803(8).
- P should argue OSHA citations are not “reliable” under 803(8)(B), admissible if “the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness”
- Opponent to admissibility bears the burden of proof to show lack of trustworthiness.

Hard to depose OSHA, and Reports may contain “opinions”

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## *Duncan v. First Texas Homes*

464 S.W.3d 8 (Tex. App.—Fort Worth 2015, pet. denied)

- Duncan was employed as a construction superintendent by First Texas Homes, a non-subscriber.
  - Duncan fell down stairs which OSHA issued cited as too narrow.
  - First Texas filed a MSJ, which was granted by the trial court.
  - Holding: Reversed—OSHA citation is some evidence of the employer's negligence.
-

## *Carrillo v. Star Tool Co.*

No. 14-04-00104-CV, WL 2848190 (Tex. App.—Houston [14th Dist.] 2005, no pet.)

OHSA wrote letter to D, stating that there were not OSHA violations, but recommending a certain type of tool

- Holding: no abuse of discretion excluding the letter because the letter was not relevant - 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.
-

# 4Front Engineered Solutions, Inc. v. Rosales

512 S.W.3d 357 (Tex. App.—Corpus Christi 2015, pet. filed)

- Plaintiff Rosales was an electrician who went to repair a sign at D's warehouse, using D's lift
  - Plaintiff's Safety expert testified OSHA regulation 1910.178(1) required training for a powered lift operator, and that D violated that *standard*.
  - Jury verdict for \$10M.
  - Tip: file your lawsuits in Hidalgo County whenever possible.
  - Reversed by Texas Supreme Court. Lack of training or licensure does not establish incompetence or recklessness for the OSHA-required purpose of negligent entrustment law.
-

# *Garrett v. Patterson-UTI Drilling*

299 S.W.3d 911 (Tex. App.—Eastland 2009, pet. denied)

- This was a Part B gross negligence claim.
- Crew was trying to repair a bent brake handle, while decedent was replacing the guard on the spool. Garret was wound up in the spool.
- Case was lost when venue transferred from Lubbock County to Scurry County

Patterson filed a no-evidence MSJ for negligence. Garrett responded with an OSHA citation for tagout violations

Summary judgment granted and affirmed. OSHA citation was “withdrawn” under settlement between Patterson and OSHA.

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**When the OSHA  
regulation is not helpful**

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# SAFETY AT WORK

Sometimes it's really important!

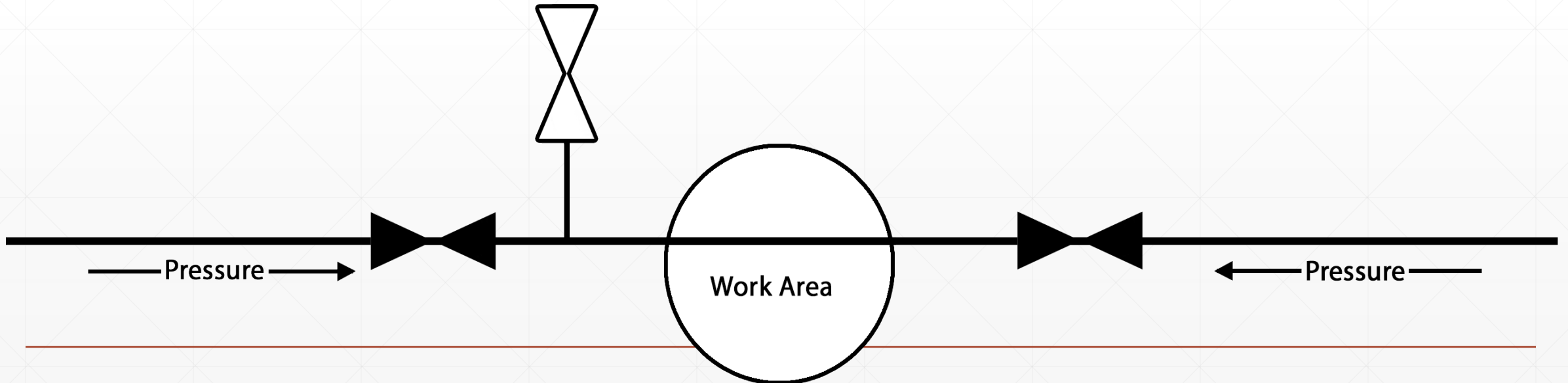


## Recent case – settled before trial

- Pipeline explosion - Workers were cutting a pipe when the valve box was flooded with water and gas..
  - Defendant tried to argue that it had followed the OSHA regulation for double block and bleed (below), and therefore it could not be negligent.
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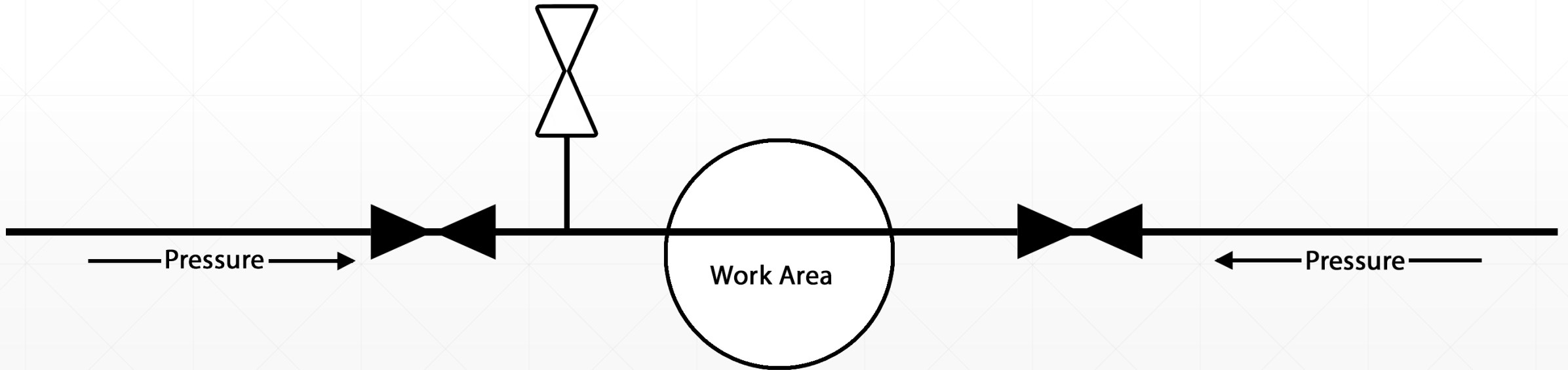
## Single block and bleed

- What is “double block and bleed.” ?
- The industry would consider D’s method “single block and bleed”.
- The “single block and bleed” method fits OSHA’s definition of “double block and bleed.”



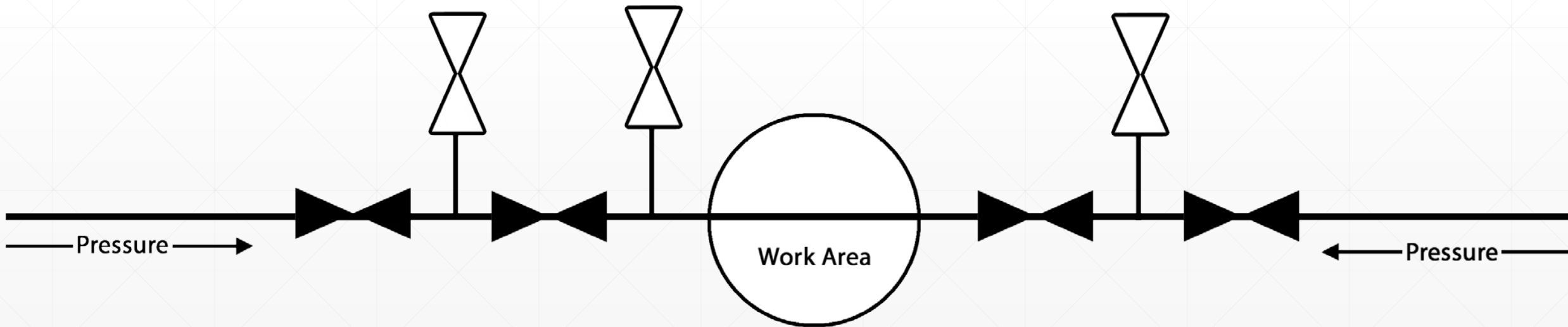
## OSHA definition of “double block and bleed”

- “Double block and bleed” means closing 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(b).



## Industry definition of “double block and bleed”

- Major players in the oil and gas industry define “double block and bleed” as requiring two blocks from *each* pressure source.



**Don't make a negligence  
claim into a regulatory case**

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There are over 4 million  
workplace injuries  
reported every year.

Play it safe... call in  
sick tomorrow.

somee cards  
user card



## What's the purpose of OSHA regulations in your case

OSHA regulations help establish the standard of conduct.

- Jury—make sure they know that just because the defendant did not violate an OSHA regulation, that does NOT mean the defendant was not negligent.
  - The defense may try to make it into a regulatory case in the jury's mind: if the defendant violated the OSHA regulation, then there is negligence; if the defendant did not violate the OSHA regulation, then there is no negligence. **AVOID THIS.**
  - E.g. In the past, texting and driving did not violate state or local law, but it was still negligent.
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# Using OSHA regulations in depositions

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## Depose the negligent employee first

- Often times they will say they were never trained about OSHA regulations.
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## Depose the defendant's safety manager

- Get them to admit:
    - The OSHA regulations are in place to ensure a safe work environment.
    - They must abide by the regulations.
    - It would be dangerous for the defendant to violate the regulations.
  - Ask whether they taught relevant regulations to the negligent employee.
-

## Impeachment

- If the safety manager and the negligent employee conflict about whether they were training on OSHA regulations - .
  - Jury argument: “Either the safety manager never taught the OSHA regulations, or the employee willfully, wantonly, and recklessly disregarded the regulations”
-

## Cotton Gin Case

Q. Okay. Are you aware that cotton gins are governed by safety rules and regulations from OSHA?

A. Yes.

Q. ...who was responsible for making sure that the gin was in compliance with OSHA safety rules?

A. Me. To the best of my ability, I was.

Q. And were you aware that lint cleaners saws must be to prevent hand contact with the saws?

A. Yeah.

Q. And were you aware of that prior to this incident?

A. Yes.

Q. You were aware that there was no guard, weren't you?

A. Yeah.

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## Cotton Gin Case

Q. Okay. Have you read the OSHA standard? Have you ever read that standard that I was talking about a moment ago?

A. No.

Q. Were you aware that it says -- and I'm going to read it to you -- that lint cleaners shall be guarded to prevent hand contact with the saws while they were in motion? Were you aware that that's what it says?

A. No.

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# Sources of non-OSHA regulations and standards

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- **Other sources**

- 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
-



## Other Uses of OSHA records

OSHA 300, injury logs to excessive injury rates

Could you use the reportable injury rate to show that an employer has a weak safety program? Prior accidents to show knowledge?

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- 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.
  - Don't turn your negligence claim into a regulatory enforcement case.
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