

## Use of OSHA as Standard of Care in Negligence Cases-Expert Safety Witness Role

Greg Gerganoff, ASP, CSP, Esq.  
Rocky Mountain Safety Consulting, Inc.  
Copyright 2016, All rights reserved.

When personal injury events occur legal negligence actions may arise.

Common law negligence is established by plaintiff showing defendant owed plaintiff a legal duty, to conform to a standard of care, defendant breached that duty, plaintiff suffered injury and there is a causal relationship between the breach and injury. FN 1 But what sources of standard of care proofs are available? How does a litigant go about proving standard of care?

While the Restatement of Torts and Colorado common law have long been a historical source of offering examples of standard of care a relatively new additional potential source of this crucial element has arisen in Colorado (and some other states), namely the safety standards of the Occupational Safety Health Act of 1970 ("OSH Act"). The OSH Act is a body of federal safety rules and procedures applied to certain businesses and industries relative to employee safety. As originally designed the OSH Act was developed and implemented as federally (or states using State OSHA) enforceable safety guidelines for employee safety in the U.S. work place.

The OSH Act is administered by the federal agency Occupational Health and Safety Administration ("OSHA") (or OSHA Approved State Plans) and divided into four parts: General Industry, Construction Industry, Maritime and Agriculture. (The OSH Act specifically excludes mining which governed by its "little brother", Mine Health Safety Administration, "MSHA", pursuant to the Federal Mine safety & Health Act of 1977.) OSHA through one of these four parts enforces compliance in the workplace venue upon employers.

Are the OSH Act safety standards available for use in private negligence actions? In Colorado the answer is a qualified "yes".

A brief history of the use of the OSH Act in negligence cases in Colorado may assist in understanding the path leading to "yes".

Attempts in the past to use the OSH Act as a jury instruction in negligence per se have met judicial resistance. In a leading case on this point a plaintiff an independent contractor on a job site, fell through a roof hole loosely covered by plywood and sustained injuries. FN2 Plaintiff argued the roof condition violated federal safety rules under the OSH Act, thereby making defendant contractor responsible for his injuries. FN3 The *Canape* court ruled that use of the OSH Act (in jury instructions) under a theory of negligence per se was contrary to the OSH Act under 29 CFR 653 (b) (4).

The *Canape* court reasoned that negligence per se may be established where 1) defendant's action violates a statute and plaintiff's injury was proximately caused by that violation, and 2) plaintiff can show he/she is a member of the protected class under the statute. FN 4 The *Canape* court ruled the OSH Act focuses strictly on employer/employee relationships and that plaintiff's services to defendant were rendered as an independent contractor. In support of this conclusion, the Court noted

applicability of the OSH Act applicability to specific working relationships is limited to employer/employee relationships. FN 5

The *Canape* court further ruled the OSH Act prohibits its use where there may be an enlargement of common law rights. FN 6 The court's raised the concern that negligence per se jury instruction using the OSH Act would exceed its statutory limitation. Colorado courts have consistently held Congress specifically legislated the OSH Act to NOT be available to injured employees claiming a violation that would bypass applicable state worker's compensation benefits via a court action. FN7 Furthermore, Colorado courts hold that accepting a negligence per se jury instruction via OSH Act would alter a contractor's duty at common law in the exercise of reasonable care thereby enlarging his burden under OSHA. *Canape's* defendant's tort liability would have been enlarged by allowing *Canape* to proceed with a negligence per se theory." FN8

Did *Canape* completely remove the OSH Act from negligence actions in Colorado?

No. In *Scott* an independent contractor fell from atop a tanker owned by defendant Matlack sustaining injuries. Plaintiffs sought to introduce OSH Act safety regulations to prove a standard of care breach by defendant. Defendant argued the OSH Act could not be put forth as a standard of care pursuant to OSH Act section 653 (b) (4). (This section of OSH Act provides it may not be used to change an employees or employers common law liability.)

In *Scott* the trial court denied plaintiffs proposed jury instruction of negligence per se via the OSH Act in lieu of rather allowing an instruction of general common-law negligence. The Colorado Supreme Court granted certiorari to determine if the *Canape* ruling excludes all OSH Act related evidence (pertaining to the appropriate standard of care) in negligence actions.

The *Scott* court ruled on several points regarding the use of the OSH Act in negligence cases. First, the *Canape* ruling does not "...preclude the admission of the Occupational Safety and Health Act evidence in a negligence suit, therefore; (2) "...it is proper for the trial court to admit Occupational Safety and Health Act regulations as evidence of the standard of care in an industry..." FN 9 The *Scott* court holding further states 1) the OSH Act could not create a private cause of action and hence plaintiffs are prohibited from using OSH Act to establish negligence per se; and 2) that use of the OSH Act in common law negligence claims is not prohibited under *Canape*. In short the trier of fact is allowed to hear evidence of the OSH Act as "...some, nonconclusive, evidence of the standard of care in the relevant industry." FN 10

So what does it all mean?

Common-law negligence cases now have a slightly broader source of potentially useable standard of care tools in the form of 29 CFR 1910, 1926, 1928, 1915, 1917 and 1918. Additionally, the *Scott* ruling raises the question of whether any other federal safety regulatory scheme, such as the MSH Act, might be useful in the same manner.

Who benefits from this ruling? Any litigant (plaintiff or defendant) may avail itself of the OSH Act in proving of standard of care.

So how can the OSH Act be introduced and used in a common-law negligence case? A litigant seeking to demonstrate an actor did or did not satisfy "standard of care" toward another may use the OSH Act as

“some” evidence of an industry standard in its case. This is a good point in the discussion to examine the role of a safety expert witness.

First, what is a safety expert? A safety expert is typically someone who through education and field safety work has learned safety regulations (OSH Act/MSH Act), industry practices and customs. Each industry possesses unique working conditions and situations leading to hazards commonly encountered and proper or customary methods of dealing with hazards. Each part of the OSH Act Part has its own rules of jurisdictions, functions and specific safety standards. To make a finer point here is some of the OSH Act Parts deal with a common hazard but offer differing regulations.

The safety profession encompasses multiple activities undertaken by business regarding “safety”. These include: Safety program management, field safety auditing, statistical analysis (worker’s compensation and OSHA Recordable), OSH Act record keeping, training and hazard identification, etc. Safety personnel typically work for companies overseeing, directing and orchestrating safety systems designed to minimize injury risk to employees and equipment damage.

So what role would a safety expert play in a negligence case? There are several phases in a law suit where a safety expert could assist legal counsel.

First, case assessment from a safety perspective.

Is there a supportable basis for the claim or defense using a safety standard of care? Knowing this fairly early on in the case’s progression may assist in determining the suitability of an anticipated claim or defense using the OSH Act. Knowing the answers to certain questions may be beneficial: Did an act or condition satisfy an applicable OSH Act standard? If yes or no, why or how? What should have been done that wasn’t or what was done? Were safety steps or processes undertaken according to common industry custom or OSH Act standards? In short an OSH Act perspective relative to negligence case assessment can offer some early guidance to legal counsel. After all, legal disputes are essentially comprised of evidence woven into arguments in support of a position and an early case determination of the OSH Act’s application may be beneficial.

Second, discovery considerations. Like many industries and professions safety has developed many unique elements. Familiarity with the various elements comprising the world of safety is helpful in knowing what to ask for in the discovery phase. What should a certain industry safety program cover topic wise? Is something missing from the program, field safety management or training? Was something done that shouldn’t have been done or something not done that should have been done? What OSH Act regulations are applicable? What industry section of the OSH Act is applicable to the case scenario?

An example here may help highlight the use of a safety expert in discovery in negligence case. A person falls from the height of five feet while working and his lawyer wants to use the OSH Act as a standard failed or satisfied regarding standard of care. In one industry the standard of care for working at height is 4 feet while another industry standard is 6 feet. (But more on this in a moment.) Some questions to ask include: What type of work was being performed? What was the nature of the project? Why are these questions potentially important? Because the nature of the work will determine which of the OSH Act Parts apply.

The OSH Act was implemented to identify safe procedures for hazardous work place conditions by specifically listing correct, acceptable, safe conditions and practices. It is comprised of four (4) parts, 29

CFR 1910-General Industry, 29 CFR 1926-Construction, 29 CFR 1915, 1916, 1917-Maritime/shipyard and 29 CFR 1928-Agriculture. While these safety regulations have a certain level of commonality there are differences in compliance for each industry OSH Act part even though an identical hazard exists. It is important to be mindful of these industry distinctions when considering use of the OSH Act to establish a standard of care element in a case.

For convenience of this article let's examine the differences between two of the OSH Act sections, Construction (1926) and General Industry (1910).

General Industry and Construction Industry address safety issues of two separate industries. Construction Industry, as the name implies, deals with all work related activities involving the construction of buildings, roadways, bridges, industrial plants, etc. General Industry on the other hand deals with manufacturing, oil and gas and maintenance activities.

These distinctions are not intuitive based but rather a creature of the OSH Act, OSHA's Letters of Interpretation, rulings of the Occupational Safety and Health Review Commission and federal court interpretation of the OSH Act. For example, an activity that appears to be "maintenance" may actually be a "construction" activity. Take for example the activity of repairing a boiler in a manufacturing plant. Such a repair would appear to be "maintenance" and the activity is taking place in a manufacturing plant so one might logically conclude such an activity would fall under General Industry. There are several instances where an activity initially appears to be maintenance (General Industry) but in fact is deemed Construction Industry (1926). Such distinction can have very significant impact to an employer for a number of reasons. FN 11

Effective lobbying is likely the cause of distinguishing Construction Industry (1926) and General Industry (1910) but that is the point for discussion beyond the purpose of this article. The distinction between these two OSH Act sections exists when addressing identical hazards.

Let's continue the example started a few paragraphs above regarding the employee falling from a height of 5 feet. A prime example of differing safety regulations for an identical hazard is "falls from heights". Construction Industry (1926) work occurring at six feet height above the next lower surface requires fall protection (29 CFR 1926.500-503, Subpart M) while under General Industry (1910) that distance is four feet. (29 CFR 1910.23 (c) (1)). Even though gravity exists at all times how the hazard it poses is addressed under the OSH Act is different for these two industries.

How do you tell which OSH Act section applies to a specific case? Look to OSHA. This government agency, like many other agencies issues opinions on how it views certain activities or conditions. These determinations are called Letters of Interpretation ("LOI"). In the case of falls OSHA has issued several LOI making the distinction between Construction Industry activities vs. General Industry activities. FN 12 Therefore once the appropriate industry is identified the applicable safety rules can be identified.

There are other sources of safety guidance or rules that the OSH Act adopts through incorporation by reference. (For example, the American National Standards Institute ("ANSI"). 29 CFR 1910.6 and 29 CFR 1926.6 incorporate by reference certain standards for the OSH Act in the General industry and Construction Industry portions, respectively.

Returning to the earlier injury scenario concerning the employee falling five feet let's add a few more facts. Let's say the employee was painting a section of a manufacturing plant. The company typically repainted walls on a fixed time schedule. The area being painted was recently upgraded, however, and an old boiler was replaced with a new boiler necessitating the wall repaint. Issue: Whether the painting activity was a General Industry (1910) (4 feet) or Construction Industry (1926) (6 feet) activity. Depending on the application of the OSH Act Part, (1910 or 1926), use of the safety standard as outlined in Scott will be impacted significantly. Consequently under one Part the safety standard of care was triggered while under the other part not.

Discovery may be used to gather facts to help clarify which OSH Act Part applies (or not) which, in turn, govern the standard of care available for use in the negligence action.

Third, the manner of use of experts. An expert is "A person that has knowledge and skills learned over years of experience in a subject. Their opinion can be helpful in problem solving."

FN 13. Expert testimony is defined as "Testimony related to a professional or scientific subject. It is based on training and experience in a subject area. The expert must give their opinion to aid the court in a decision or judgment." FN 14

Expert opinions. Either party to a negligence claim may hire an expert to generate a written opinion demonstrating to opposing counsel the strengths of its case. Written opinions will lay out the facts of the case, apply appropriate OSH Act sections, and opinion(s). Such opinions founded in undisputed facts can clarify the basis for the plaintiff or the defendant. By showing the facts as they relate to the appropriate OSH Act parts and subparts and conclusions, settlement or trial efforts may be influenced.

The Scott court held that to show common-law negligence a plaintiff need show that the defendant owed a duty to plaintiff based on a standard of care and that use of the OSH Act may be admitted as "some evidence" of that standard of care in an industry. In short, evidence of industry safety standards is relevant and admissible to determine whether a defendant complied with the duty of care he owed the plaintiff. Or that a defendant's action(s) did comport with a standard of care. FN 15

The role of the safety expert witness is to explain how the facts of a negligence case fit to the OSH Act standard of care. The Scott court defined the role of expert testimony by saying " ... we adopt the reasoning in Miller. Therefore, to be admissible in such a situation, the safety standards must be relevant, offered in support of expert testimony, objective, and recognized and accepted in the industry involved." FN 16

Therefore use of a safety expert to substantiate an industry standard of care via safety regulation(s) may be a useful tool in a party's case involving common-law negligence either in case assessment, discovery, deposition or trial.

Summary:

One of the key elements establishing common-law negligence is the standard of care. In 2002 the Colorado Supreme Court recognized the admission of the OSH Act as some evidence of identifying standard of care in common-law negligence cases.

A logical application of the OSH Act could include written opinion and testimony of a safety expert who can explain the hazard of a given situation or condition and describe the suitable safety regulation(s) given the facts of the case.

Safety experts also offer other benefits in common-law negligence cases, such as in the initial case assessment phase, discovery phase and trial.

Footnotes:

1. *Randy A. Scott and Ann C. Scott v. Matlack, Inc., and Conoco, Inc.*, 39 P. 3d 1160, 1166 (Colo. 2002), and FindLaw.com, Elements of a Negligence Case, <http://injury.findlaw.com/accident-injury-law/elements-of-a-negligence-case.html>) and *Randy A. Scott and Ann C. Scott v. Matlack, Inc., and Conoco, Inc.*, 39 P. 3d 1160, 1166 (Colo. 2002)
2. *Canape v Peterson*, 897 P.2d 765, (Colo.) 1995
3. Plaintiff's argument; Defendant contractor negligence arising out of its failure to follow OSH Act responsibilities under 29 CFR 1926.500 (b) (1), (1990)
4. (Canape citing *Lyons v Nasby*, 770 P.2d 1250, 1257 (Colo.1989)
5. (OSHA LOI May 18 1992. May also be found on the worldwide web at [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=20672](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=20672))
6. 29 CFR 653 (b) (4) of the OSH Act states "Nothing in this shall not be constructed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the *common law or statutory rights, duties, or liabilities of employers and employees* under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." (Emphasis added)
7. Canape, 897 P.2d at p765-766.
8. Canape, 897 P.2d at p 767.
9. Scott, 39 P.3d at 1160.
10. Scott, 39 P.3d at 1166
11. *Secretary of Labor v Ryder Transportation Services*, OSHRC No. 10-0551, September 29, 2014. 24 O.S.H. CAS. (BNA) 2061 (O.S.H.R.C.), 2014 O.S.H.D. (CCH) P 33412, 2014 WL 5025979 OSHA issued a citation to an employer under 29 CFR 1910.23 (a) (4). Employer successfully challenged the work categorization by OSHA in its enforcement citation as General Industry. The OSHA Review Commission determined the work activity fell under "Construction Industry", 29 CFR 1926, therefore vacating the citation.
12. (One such LOI is OSHA Letter of Interpretation, November 18, 2003, available at [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=24789](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=24789)).
13. (Black's Law Dictionary, <http://thelawdictionary.org/expert/>)
14. (Black's Law Dictionary, <http://thelawdictionary.org/expert-evidence/>)
15. (Scott Court citing *Yampa Valley Electric Association v. Telecky*, 862 P.2<sup>nd</sup> 252 (Colo. 1993) Scott, *ibid*, p 1167
16. Scott, *ibid*, p. 1167

Greg Gerganoff, ASP, CSP, Esq., has been a safety professional for 17 years. He has worked for companies handling heavy civil construction, road building, pipeline, utilities, trenching/excavation, mining, and oil and gas. He started Rocky Mountain Safety Consulting, Inc., in 2014 providing services to oil and gas services companies, electric contractors, manufacturing, public schools, fracing operations, presented safety training courses in a variety of industries, coal fired power plant outages, and expert safety witness services.

His formal credentials in safety include Associate Safety Professional (ASP-23669) and Certified Safety Professional (CSP-30252).

He received the Traveling Safety Award from the Colorado Contractors Association in 2003 and was named Risk Management Committee Chairman of the Year Award 2008.

He is admitted to the Colorado Supreme Court after passing the Colorado Bar in 1983. Greg practiced general civil law and as corporate counsel for small and large publically traded companies in Colorado. After 12 plus years in law practice he discovered the professional challenges and pleasure of the safety profession.

Greg Gerganoff, 303 330 4616, rkymtnsafety.com, [greg@rkymtnsafety.com](mailto:greg@rkymtnsafety.com)  
Your comments regarding this article are appreciated.