The Legal Document & Evidence in SAFETY-RELATED PROCEEDINGS

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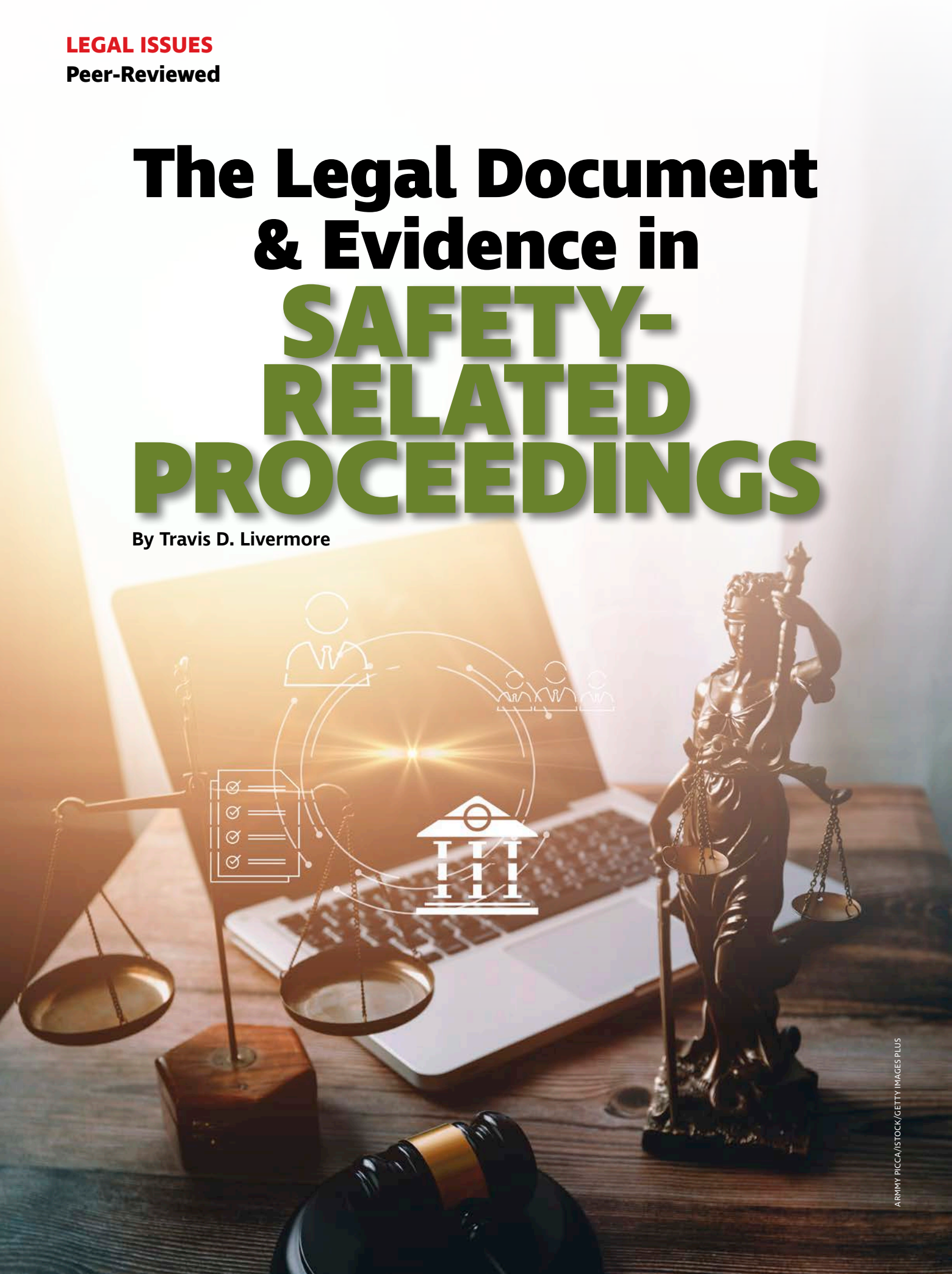


ARMMY PICCA/ISTOCK/GETTY IMAGES PLUS

SAFETY ISSUES OFTEN LEAD to legal proceedings. For example, an injured employee may file a workers' compensation claim that is ultimately litigated before a workers' compensation commission and may result in a later appeal to a state court. An injured employee may sue an employer in state or federal court for gross negligence and may also sue the manufacturer of a product that contributed to the injury. An employer may be cited by OSHA and litigate the citation before the Occupational Safety and Health Review Commission (OSHRC). In any of these proceedings, each side would present evidence such as training materials, safety policies and incident reports, which are prepared by safety professionals.

It is not uncommon to hear safety professionals refer to a document as a "legal document." This term often comes up in the context of training acknowledgments or a safety task assessment. However, the term "legal document" has no real significance. In fact, one might argue that all documents are legal documents because any document that meets the requirements for admissibility in a court proceeding may have significant legal impact.

This article strives to briefly explore the extent to which documents and other evidence pertaining to safety may be used in legal proceedings, for what purposes and under what circumstances. Additionally, this article seeks to clarify a somewhat complex subject in a way that will assist safety professionals in thinking strategically about how documents they author or maintain may affect their companies from a legal standpoint. The federal rules of evidence will primarily be used in this article. States have their own evidentiary rules, but many have adopted the federal rules in one form or another. The author will not necessarily identify whether the federal or a state's rules are being applied in legal proceedings discussed in this article.

Probative Evidence & Limits

The most significant question relating to the legal implications of a document is whether it is admissible in a legal proceeding. To be admissible, a document must be probative and must not violate other evidentiary rules (Fed. R. Evid. 401; 402). A document is probative if "it has any tendency to make a fact [of consequence] more or less probable" than it would be without the document (Fed. R. Evid. 401). For example, when an employee attends fall protection training and signs a document acknowledging that the individual attended and understood the training, such a document would be probative of whether the employer met its obligation to properly train employees under applicable OSHA standards in a citation contest before the OSHRC.

KEY TAKEAWAYS

- **A company's safety-related documents may have great impact beyond the organizational context, especially in post-incident legal proceedings.**
- **The admissibility of a safety document in a court proceeding depends on many factors such as relevance, whether the document includes statements by people other than the author, and how damaging the document may be to a party in the case.**
- **Safety professionals have the capacity to, and should, think strategically about how documents they produce may affect their company in future legal proceedings.**

Once that threshold question is answered, the proponent of admitting a document must overcome other obstacles to admission. For example, a document would not be admissible "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence" (Fed. R. Evid. 403). In a gross negligence suit brought by an injured employee against an employer following a fall, a court or judge may choose not to admit the employee's written acknowledgment of fall protection training for each of the previous 10 years, instead limiting admission to the 3 years leading up to the incident. Nonetheless, the probative value must be substantially outweighed by another issue such as unnecessary cumulative evidence (see Fed. R. Evid. 403). This burden is difficult to meet, so in most instances, probative evidence is generally not excluded under this rule.

In one contest before the OSHRC in which the employer was challenging a citation for allegedly failing to properly slope or otherwise support trench walls, the administrative law judge (ALJ) had excluded the employer's expert testimony and report on the basis of unfair prejudice (Broshear Contractors, 1992). The ALJ had determined that first, the evidence was not relevant, and second, the re-excavation, upon which the expert's report was based, was performed without notice to OSHA and would therefore be inadmissible because the danger of unfair prejudice to OSHA would substantially outweigh the probative value of the evidence. On review of the ALJ's decision, however, the commission disagreed, finding that the report and testimony were relevant and that the lack of notice alone was not sufficient for exclusion on the basis of unfair prejudice.

Hearsay, the Business Records Exception, Double Hearsay & Admissions

Probative evidence is subject to yet other obstacles to admission. Such evidence must not be hearsay or must meet an exception to the hearsay rule (see Fed. R. Evid. 801-807). Hearsay is an out-of-court statement that is later offered in court to prove the truth of what was said or written out of court (Fed. R. Evid. 801). See Table 1 (p. 24) for definitions of terminology and speakers of hearsay.

There are more than 25 exceptions to the hearsay rule under the Federal Rules of Evidence (see Fed. R. Evid. 803-804, 807). Some of these exceptions only apply when the person who made the out-of-court statement is unavailable to testify in court (Fed. R. Evid. 804). However, most exceptions apply without regard to whether the out-of-court speaker is available to testify (Fed. R. Evid. 803). Of note, many statements in written or other form may be admissible to prove something other than the truth of what was actually said. For example, in a suit by an injured worker against a third party whose forklift struck the worker, a statement by a witness that is captured in the incident report of the worker's company to the effect that the witness had noticed the forklift earlier in the day might be admissible to impeach the witness's testimony in court that the witness never noticed the forklift before it struck the worker. In other words, the statement might be admissible to attack the witness's credibility. If the state-

TABLE 1
TERMINOLOGY & SPEAKERS OF HEARSAY

Statement	Assertion: oral, written or nonverbal if intended as an assertion
Declarant	Person who makes the statement (while not testifying as a witness in court)
Offered as evidence in court	May be offered in a document, or another witness may testify to hearing the statement
To prove the truth of the matter asserted	To prove in court that the statement made out of court is true

ment is admissible, the worker's attorney would be able to obtain a limiting instruction for the jury to the effect that it may only consider the statement as to whether the witness is a truthful person and not specifically with regard to whether the witness actually saw the forklift earlier in the day. On the other hand, if the statement meets an exception to the hearsay rule, it would also be admissible to show that the witness actually saw the forklift.

If the witness is the worker themselves, the statement would also be admissible as an admission and for full consideration by the jury [see Fed. R. Evid. 801(d)(2)]. An admission is any statement made by a party to litigation or made by an authorized representative of the party (Fed. R. Evid. 801). Admissions are generally admissible under hearsay rules [see Fed. R. Evid. 801(d)(2)]. In the example above, the worker would be a party to the litigation, so anything the worker said leading up to litigation would generally be admissible as an admission.

Like in the previous example, safety professionals frequently prepare reports such as cause maps or root-cause analyses following incidents. The reports themselves, if probative, are typically admissible under the business records exception to the hearsay rule (see Fed. R. Evid. 803). This exception permits admission of hearsay in the form of reports and records, if made by a person with knowledge and kept as a regular practice of the business (Fed. R. Evid. 803). While incident reports generally meet such requirements, statements made by an injured employee or witness that are included in the report require additional scrutiny (see Fed. R. Evid. 805). If offered to prove the truth of what was said, then they are hearsay and must independently meet another exception to the hearsay rule or be redacted (see Fed. R. Evid. 805).

In *Rivera v. Palm Beach County* (2021, p. 2), the plaintiff sued the defendant for wrongful termination, alleging discrimination on the basis of race and sex. The defendant employer asserted that it had a legitimate reason for terminating the employment of the plaintiff bus driver as he had "threatened to physically fight a passenger" (p. 12). The plaintiff argued that other similarly situated individuals were not terminated under the same or similar circumstances (p. 33). Palm Beach County asserted that the other employees' circumstances were different, offering its report that one of the other bus drivers was not terminated for defending himself when a passenger hit him in the face and later spat on him (pp. 33-47). The plaintiff argued that this report was inadmissible hearsay, but the court found that such a report met the requirements of the business records exception, finding that the employee submitted the report in accordance with the bus operator's handbook requirement that such a report be submitted to the safety and training department within 24 hours of such an incident (pp. 16-20).

In *Lingefelt v. International Paper Co.* (2010, at 121-122), contractor employees who were injured while performing work at an International Paper facility sued International Paper and its safety manager for negligence and wantonness. Specifically, the employees claimed that the defendants "had failed to maintain a safe premises, had failed to warn of a dangerous condition, . . . and had failed to repair [the] dangerous condition . . ." (at 122). The contractor was in the process of disassembling equipment around a lime kiln when a duct came loose and fell on an employee, causing severe injuries (at 121-122). Another employee claimed an injury from falling off a ladder while trying to rescue the first injured employee (at 121-122).

The appellate court affirmed the trial court's grant of summary judgment in favor of the defendants, along with the trial court's exclusion of the report of the contractor's safety manager (*Lingefelt v. Int'l Paper Co.*, 2010, at 121). The report stated that "[c]lose inspection by [International Paper] . . . determined that . . . no activity by [the injured employees or contractor company] was the cause of the failure" (at 128).

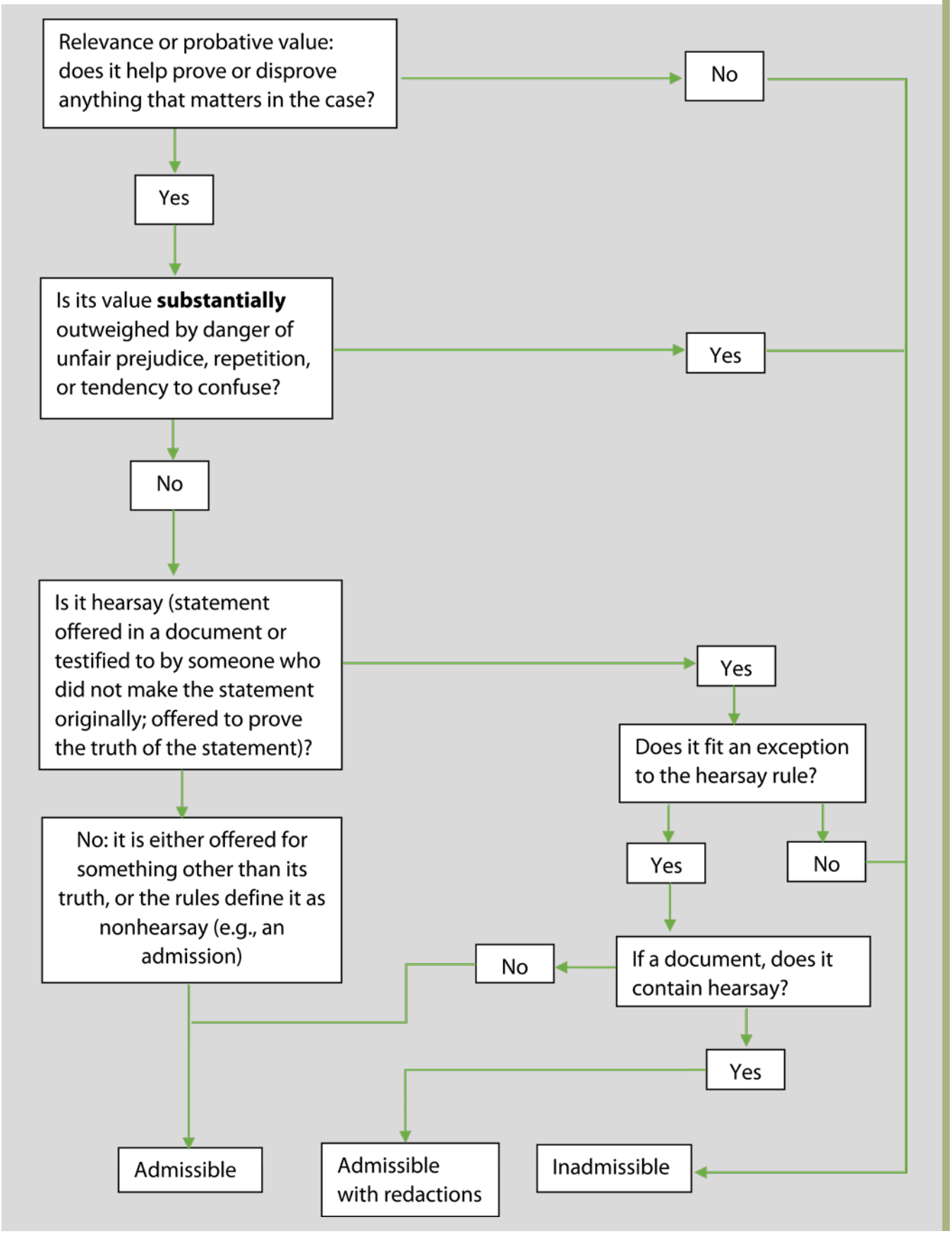
The court noted that, even if the report met the business records exception, it would have to satisfy other rules relating to opinion by, for example, coming from a recognized expert (*Lingefelt v. Int'l Paper Co.*, 2010, at 127-128). As the statements did not meet the opinion rule, they were inadmissible. The injured employees attempted to argue that the opinions in the report were based on statements made by International Paper's safety manager and should therefore be admissible as an admission by a party opponent (at 128). The court rejected this argument, noting that the report consisted of conclusions drawn by the contractor's safety manager based on discussions with International Paper's safety manager rather than consisting directly of statements by International Paper's safety manager, and therefore did not meet the exception (at 128-129).

Other Hearsay Exceptions

Some other frequently applied and noteworthy exceptions to the hearsay rule include those of present sense impression, excited utterance, statements of then-existing

FIGURE 1

SIMPLIFIED SUMMARY OF ADMISSIBILITY OF DOCUMENTS & TESTIMONY ABOUT OUT-OF-COURT STATEMENTS



mental, emotional or physical condition, and statements made for medical diagnosis or treatment. A present sense impression is a "statement describing or explaining an event or condition, made while or immediately after the [the person who made the statement] perceived it" [Fed. R. Evid. 803(1)]. An excited utterance is a "statement relating to a startling event or condition, made while the [person who made the statement] was under the stress of excitement that it caused" [Fed. R. Evid. 803(2)].

In *Tercero v. Oceaneering International Inc.* (2018, pp. 1-2), the plaintiff sought recovery after being injured during a fall from a ladder while working. The court considered whether the written statement of the employee's supervisor, describing the "thump" he heard when the worker landed, and the statement the plaintiff made relating to back pain were admissible (pp. 3-7). One argument asserted was that the statements qualified as present sense impressions. The court found, however, that the statements were inadmissible because the supervisor did not observe the event, and the worker's statement was made the day after the incident, that is, that it was not made close enough to the time of the event.

In *Reyes v. Campo Brothers* (2016), a worker sought recovery from the managing company of a construction site after sustaining injuries from a fall while employed by a subcontractor. One issue was the admissibility of a hospital record indicating that the worker had stated he fell from a ladder. The worker wanted to exclude the record because of his contention that the fall was from a roof. The court found the statement admissible as it related to the diagnosis or treatment of the plaintiff and also as an admission.

Five of the exceptions to the hearsay rule only apply when the person who made the out-of-court speaker is unavailable [see Fed. R. Evid. 804; (A declarant is unavailable if her testimony would be privileged, she refuses to testify despite a court order to do so, she testifies that she is unable to remember, she cannot be present or testify because she is dead or suffering some other physical or mental infirmity, or she is not present at trial and cannot be served with a subpoena)]. One such exception is often referred to as the dying declaration (Fed. R. Evid. 804), as the exception involves a statement a person makes about the cause or circumstances of the person's death while believing death is imminent. The statement is admissible despite its hearsay character, but only in homicide and civil cases.

In *Park Construction Company* (1975), the employer challenged its citation before the OSHRC following an incident in which an employee was killed while oiling the track of a crawler crane when the operator moved the crane, unaware of the other employee's presence. Before dying, the employee told the operator that he "got caught between the counterweight and the track," and that he "hurt real bad" [*Park Construction Co.* (internal quotation marks omitted)]. The ALJ admitted these statements, finding that they met the requirements of the dying declaration exception. (Note: the statement that the employee "got caught between the counterweight and the track" would also likely qualify as a present sense impression, while the "hurt real bad" comment would constitute a statement of then existing physical condition.)

Nonhearsay & Imputation

In addition to explicit exceptions to the hearsay rule, some statements are defined as nonhearsay even though they might otherwise meet the definition of hearsay (see Fed. R. Evid. 801). One such statement is the admission. In addition to the forklift incident example noted, another example of this highly utilized nonhearsay statement would be an internal company email from a company supervisor explaining to a corporate safety manager that lockout/tagout was not properly implemented following a workplace injury.

In *Regina Construction Company* (2017), the employer was cited after a compliance officer observed an employee doing concrete work while being exposed to a potential fall of 24 feet. Noting that OSHA had the burden of proving that the employer had knowledge of the violative condition, the commission recognized that "the actual or constructive knowledge of an employer's foreman can be imputed to the employer" [*Regina Construction Company* (citations omitted)]. OSHA had established knowledge before the ALJ by introducing statements of an employee indicating that the foreman was aware of the fall hazard. The compliance officer testified that the employee told him his foreman had been to the work area with him, had given him the work assignment and had recently departed the area. The commission affirmed the ALJ's decision that the employee's statement was admissible as an admission given that it related to the scope of his employment. The employer argued that the statements made by the foreman to the employee, to which the compliance officer testified, constituted double hearsay and would therefore be inadmissible. The commission affirmed the ALJ's rejection of this argument, noting that the foreman's statement would also be an admission imputable to the employer and would therefore be admissible.

With so many exceptions to and workarounds for the hearsay rule, one might wonder if the rule is swallowed by the exceptions, rendering it largely impotent. In practice, however, such is not the case, and evidence is frequently excluded or redacted under the rule. Figure 1 (p. 25) provides a simplified summary of admissibility of documents and testimony about out-of-court statements.

Documentary Evidence Generally

Another rule relating to documentary evidence is the requirement that a document must be the original (see Fed. R. Evid. 1002). This rule is far more lenient, however, than it appears as electronic copies, printouts and duplicates are generally admissible (Fed. R. Evid. 1001-1003). Under this rule, a safety training sign-in sheet that has been scanned and is stored electronically could be printed out and would generally be admissible in legal proceedings. Similarly, a photograph of the work area where an injury occurred that is stored on a computer and later printed would also generally be admissible.

Physical and documentary evidence must be authenticated, or otherwise fall within a self-authenticating category (see Fed. R. Evid. 901). Evidence is authenticated when the proponent of admission produces "evidence sufficient to support a finding that the item is what the proponent claims it is" (Fed. R. Evid. 901). In the case of a safety manager's report, the report could be authenticated

by the safety manager testifying in court that it is a safety report that the safety manager prepared. To meet the business records exception to the hearsay rule, the safety manager (or possibly someone else within the company) would need to testify regarding when the report was made, that the report was kept in the course of a regularly conducted activity of the business, such as following investigation of a safety-related incident, and that making such a report was a regular practice.

Safety professionals often author, maintain or control documents that are ultimately used in legal proceedings to the benefit or detriment of their employers.

Hazard Assessments, Training Records & Signatures

In *Mayet v. Energy XXI Gigs Services* (2019), a worker sought recovery for injuries incurred while working on the defendants' mineral exploration and production platform. The worker was using a crane to transfer boxes from a vessel. The worker claimed that he suffered a hernia while moving a 40-lb object onto a rack. He argued that "the location and configuration of the rack and configuration of platform equipment, specifically the location of a speaker in the area where the cargo box was to be placed, 'constituted an unsafe and unreasonably dangerous condition.'" The applicable law would preclude recovery if the condition leading to the injury was "open and obvious" [*Mayet v. Energy XXI Gigs Servs.*, 2019, at 13 ("Under Louisiana law, when a condition is deemed 'open and obvious' it does not, as a matter of law, constitute an unreasonably dangerous condition"), citing *George v. Nabors Offshore Corp.*; *Eisenhardt v. Snook*]. Among the defendants' arguments against liability was the assertion that the condition of which the worker complained was open and obvious to the worker because of his experience and the fact that he signed the job safety analysis (JSA), acknowledging the risk (at 4-5). The worker's arguments referenced the conclusions of the incident report and its stated root causes, which included the positioning of the speaker interfering with the use of lifting slings in conjunction with the sling rack's position (at 7-8).

The defendants were seeking summary judgment, which dispenses with the need for a trial and dismisses the action (*Mayet v. Energy XXI Gigs Servs.*, 2019, at 1-2). Summary judgment is only appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law [*Mayet v. Energy XXI Gigs Servs.*, 2019, at 10, citing Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 1986; *Little v. Liquid Air Corp.*, 1994]. In other words, it is only appropriate where no facts are in dispute and the law as applied to those undisputed facts entitles the movant to judgment (see *Mayet v. Energy XXI Gigs Servs.*, 2019). The court denied the defendants' motion finding that a jury could still find that the condition was not open and obvious despite the plaintiff's experience and the JSA, in consideration of the safety report's conclusions, among other factors (*Mayet v. Energy XXI Gigs Servs.*, 2019, at 15-20). However, the court indicated that it would be proper at trial, to consider the plaintiff's experience and "familiarity with the premises and its dangers" [*Mayet v. Energy XXI Gigs Servs.*, 2019, "CIVIL ACTION CASE NO. 17-9568 SECTION: 'G' (2) (E.D.La. 2019), quoting *Walker v. Union Oil Mill Inc.*, 1979].

In *Mayet* (2019), hearsay was not at issue with respect to the signature on the JSA. Nonetheless, in some cases, signatures may be construed as hearsay. As the District Court for the District of Columbia declared, "signatures are written assertions and nonverbal conduct intended as assertions, which makes them statements" under the rules of evidence (*WYE Oak Tech. Inc. v. Republic of Iraq*, 2019, p. 21). However, as the court recognized, signatures are not always hearsay if they constitute admissions or if offered for something other than to prove the truth of the matter asserted [*WYE Oak Tech. Inc. v. Republic of Iraq*, 2019; see also *Silva v. State*, 1982, citing *Wilson v. State*, 1980 ("Appellant's second ground of error asserts that the bank signature card containing Mrs. Silva's signature was also inadmissible hearsay. Again, because the purpose of its introduction was simply to make possible a handwriting comparison, this card was not being offered to prove any statement contained therein and was not hearsay.")]. Additionally, signatures may constitute verbal acts such that "the legal effects of the statements flow just by virtue of the fact that they were made," rather than based on some assertion associated with the signature (*WYE Oak Tech. Inc. v. Republic of Iraq*, 2019). This scenario is similar to statements made in the context of forming a contract, such as an offer to purchase, which constitutes a verbal act and is therefore nonhearsay (see *WYE Oak Tech. Inc. v. Republic of Iraq*, 2019, at 21-22).

Whether the signature of a trained employee constitutes hearsay may depend on the surrounding context and statements of the document. For example, a simple training sign-in sheet with the title of a class calling for the signature, contact information and company name may not constitute hearsay; however, a training acknowledgment signed by an employee stating that the employee understood or accepts the material would be hearsay if offered to prove that the employee actually understood and accepted the material [see *Silva v. State*, 1982, citing *Wilson v. State*, 1980 ("Appellant's second ground of error asserts that the bank signature card containing Mrs. Silva's signature was also inadmissible hearsay. Again, because the purpose of its introduction was simply to make possible a handwriting comparison, this card was not being offered to prove any statement contained therein and was not hearsay")]. If the employee is a party to the litigation, then the signature would be admissible as an admission.

In *Clear Channel Outdoor Inc., v. International Union of Painters and Allied Trades, Local 770* (2009), the Seventh Circuit Court of Appeals evaluated the argument that the district court erred when it upheld an arbitrator's decision that Clear Channel's termination of an employee for violating its fall protection rules was without just cause, in violation of the terms of the collective bargaining agreement between Clear Channel and the union.

The employee had been terminated after the company president observed him not being tied off while working on a billboard (*Clear Channel v. International Union*, 2009, at 673). The proffered evidence before the arbitrator included a training acknowledgment signed by the employee to the effect that he had been trained in fall protection equipment and that he understood that "the use of the body harness and other personal fall arrest equipment is mandatory." A separate signed acknowledgment provided that the employee understood "that improper use or not using prescribed equipment in a safety-sensitive environment will be grounds for immediate termination of employment" (*Clear Channel v. International Union*, 2009). No arguments were before the court regarding the admissibility of the acknowledgments. One possible reason for the lack of arguments is that in arbitration, where this case originated, the rules of evidence generally do not apply (Turner, 2010). Additionally, even if the case originated in a forum where the rules of evidence would apply, given that the employee was a party in the case, the signed acknowledgments would qualify as admissions and be admissible.

Table 2 describes the general admissibility of documents such as safety incident reports, notes and photographs.

Simplified Proceedings & Hearsay

As noted, the rules of evidence do not apply in some proceedings such as arbitration. The rationale behind not applying the rules in certain types of proceedings is that they may "have an adverse impact on the effective and speedy resolution" in cases where a single individual or commission with specialized knowledge in the field presides over the case (Turner, 2010). While the rules generally apply in OSHRC proceedings, they do not apply in simplified proceedings. Cases may be appropriate for simplified proceedings if they have "relatively simple issues of law or fact," relatively small, proposed penalties, the hearing is expected to be short, or a small employer is involved (OSHRC, 2020). Cases involving willful violations, repeat violations or fatalities are not appropriate for simplified proceedings (OSHRC, 2020).

While otherwise inadmissible evidence may be admitted in simplified proceedings, it may not be viewed with the same level of reliability and weight as other evidence. In *HCI Industrial & Marine Coatings Inc.* (2019), the employer was cited after one of its employees who was not wearing fall protection fell. The citation alleged a violation of 29 CFR 1915.152(a), which requires, in part, that the employer provide and ensure use of fall protection if fall hazards exist. For the citation to stand, the government was required to prove that the employer "knew or, with the exercise of reasonable diligence, could have known of the violation" [*HCI Industrial & Marine Coatings Inc.*, 2019, citing *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986) (internal quotation marks omitted)]. An employer's knowledge may be proved by showing the actual or constructive knowledge of its supervisors. In other words, "if a supervisor is, or should be, aware of the noncomplying conduct of a subordinate, it is reasonable to charge the employer with that knowledge" (*HCI Industrial & Marine Coatings Inc.*, 2019, citing *Mountain States Tel. & Tel. Co. v. OSHRC*, 1980).

The ALJ noted that the government's evidence of the employer's knowledge consisted in large part of the compliance officer's testimony of what he was told by unidentified employees and managers, along with an unauthenticated photograph of two workers who were not using fall protection but that did not identify the time and location of the activity (*HCI Industrial & Marine Coatings Inc.*, 2019). The ALJ further noted that the compliance officer had selectively relied on statements by employees who indicated that fall protection requirements were not enforced while ignoring employee and supervisor statements to the contrary. The ALJ wrote, "Although hearsay, and in this case double hearsay, may be admissible in Simplified Proceedings, it is not auto-

TABLE 2
GENERAL ADMISSIBILITY OF SAFETY INCIDENT REPORTS, NOTES & PHOTOGRAPHS

Documents or photographs	Potential relevance	Admissibility, generally	Possible limitations on admissibility
Workplace safety incident reports	• in a lawsuit to show the cause of an injury • in OSHRC proceedings to show noncompliance with OSHA standard • in some situations, corrective actions from report may be admitted to show feasibility of these actions before the incident	• admissible under business records exception to hearsay rule	• may constitute work product if prepared in anticipation of litigation • hearsay statements within report must be redacted or meet an exception to the hearsay rule
Safety manager's notes regarding an incident or other matter	• in a lawsuit or OSHRC proceeding to show employer's knowledge of unsafe condition	• if obtained during discovery, may be admitted as admission of the employer • if not admissible, safety manager may use notes to refresh memory	• not admissible to prove the truth of the notes unless used as an admission or meets exception to hearsay rule
Photographs of workplace incident scene	• in a lawsuit or workers' compensation proceeding to show cause of incident • in OSHRC proceeding to show knowledge of violative condition	• Admissible if authenticated (someone with knowledge of the incident or area testifies about what the photo shows)	

matically persuasive or reliable." The court found in the in-court, live testimony of the employer's representatives that the employer regularly discussed the need for fall protection in safety meetings and posted signs, as persuasive, and concluded that the government had not demonstrated the knowledge element necessary to sustain the citation.

Attorney-Client Privilege, Work Product

"Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged" [*Fisher v. United States v. Kasmir*, 1976 (citation omitted)]. Similarly, the work product doctrine "protects from disclosure certain materials prepared by attorneys or their agents acting for clients in anticipation of litigation" (*St. Lawrence Food Corp.*, 2006, citing *Hickman v. Taylor*, 1947). The doctrine:

> applies when the materials in question are shown to be 1. documents or other tangible things, including an attorney's mental impressions, conclusions, opinions, or legal theories, 2. prepared in anticipation of litigation or trial, and 3. gathered by or for a party or by or for that party's representative. [(St. Lawrence Food Corp., 2006, citing Wright & Miller, 1987 § 2024; Continental Oil Co, 1981 (internal quotation marks omitted)]

An attorney's mental impressions, conclusions, opinions, or legal theories enjoy nearly absolute protection under the doctrine (*St. Lawrence Food Corp.*, 2006, citing *In re Murphy*, 1977; *In re Doe*, 1981). Ordinary work product (i.e., work product that does not contain an attorney's mental impressions, conclusions, opinions or legal theories), "is generally discoverable upon a showing of substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship" [*In re Green Grand Jury Proceedings*, 2007, quoting *In re Murphy*, 1977 (internal quotation marks omitted)].

In *St. Lawrence Food Corporation* (2006), the OSHRC heard OSHA's appeal from an ALJ's order that OSHA turn over certain documents to the employer. The issue arose during a pretrial deposition of two OSHA compliance officers by the employer's attorney. The government's attorney instructed the compliance officers not to respond to certain questions, but rather to assert privilege. The government's attorney argued before the ALJ that certain memoranda and emails between government attorneys and compliance officers relating to the lockout/tagout standard and alternative citation theories based on the facts of the case were not discoverable by the employer because they were protected by attorney-client privilege, the work product doctrine or both. The OSHRC reversed the ALJ's decision, noting that "compliance officers are 'clients' for purposes of determining whether their communications with the Solicitor's attorney are protected by attorney-client privilege" (*St. Lawrence Food Corp.*, 2006, citing *Upjohn v. United States*, 1981) and that the employer had not met its burden of overcoming work product protection by arguing that it needed the documents "to prepare for the hearing, understand the actions of various OSHA personnel, and prepare for cross-examination of witnesses," things the OSHRC noted "could be cited in almost any OSHA case."

At issue in *Bally's Park Place Hotel & Casino* (1991) was whether a report containing iodine emission testing results for a washing machine constituted work product such that the employer was protected from providing the report to OSHA. OSHA had directed Bally's to investigate iodine emissions from the washing machine located at a bar in its casino following an employee complaint. Following OSHA's directive, Bally's general counsel ordered that the testing occur and that a confidential report containing results be sent to him.

Bally's refused to produce the report even after OSHA subpoenaed it. OSHA then issued willful citations to Bally's under sections 1910.20(e)(1)(i)(3) and 1910.20(e)(3)(i)(4) for failing to provide the results to a union representative and to OSHA as required by those standards. The ALJ affirmed the citations, and Bally's appealed to the full commission. The OSHRC found that the work product doctrine, which is codified in the Federal Rules of Civil Procedure, was controlling, despite the requirements of the cited OSHA standards, and further found that OSHA had not met its burden of showing that it could not obtain substantially equivalent test results without undue hardship, despite the agency's complaint of a backlog of scheduled inspections (*Bally's Park Place Hotel & Casino*, 1991).

Subsequent Remedial Measures

Evidence of measures taken following an incident or injury that are designed to prevent recurrence and that "would have made an earlier injury or harm less likely to occur," is "not admissible" to show "negligence," "culpable conduct," "a defect in a product or its design," or "a need for a warning or instruction" (Fed. R. Evid. 407). Nonetheless, evidence of such subsequent remedial measures is admissible for other purposes, such as "impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures" (Fed. R. Evid. 407).

In *Coastal Drilling East LLC* (2018), the employer contested a citation under the General Duty Clause. To succeed on such a citation, OSHA must show that:

> a condition or activity in the workplace presented a hazard, that the employer or its industry recognized this hazard, that the hazard was likely to cause death or serious physical harm, and that a feasible and effective means existed to eliminate or materially reduce the hazard. (Coastal Drilling East LLC, 2018)

With respect to the last element, the existence of an alternate means that is feasible and effective, the ALJ noted that, while OSHA had proposed compliance with an American Petroleum Institute standard as an alternative means, evidence was also adduced by the employer that it had developed its own alternative means (*Coastal Drilling East LLC*, 2018). The ALJ noted that such evidence of subsequent remedial measures is typically inadmissible but that it had been offered in this case without objection. In affirming the citation, the ALJ found that the feasible and effective means element would be satisfied by either OSHA's proposed method or the employer's method.

Recollection Refreshed

Some documents may be useful even if not ultimately admitted into evidence. A witness in a legal proceeding may refresh their memory by reviewing a writing such as their handwritten notes (Fed. R. Evid. 612). When a witness does refresh their memory by reviewing a writing, the other party is entitled to inspect the writing and cross-examine the witness about it (Fed. R. Evid. 612). In *Witco Chemical Company* (1979), the employer faced citations relating to exposing employees to chemicals in excess of OSHA exposure limits. The employer objected to admission of a report of a chemist testifying for OSHA that stated the exact exposure levels revealed during testing on the basis that it had not been turned over to the employer prior to the hearing. The ALJ rejected this argument based on its determination that not having the report did not prejudice the employer and that the employer did not accept the ALJ's offer of additional time when the report was disclosed. The court further buttressed its conclusion by indicating that the document could have been used by the chemist in any event to refresh her recollection and could ultimately have been admitted as past recollection recorded in the event the witness's memory was not refreshed (Note that past recollection recorded is an exception to the hearsay rule).

Conclusion

Safety professionals often author, maintain or control documents that are ultimately used in legal proceedings to the benefit or detriment of their employers. Having a basic knowledge of how and to the extent these documents may be admitted in future legal proceedings will allow OSH professionals to better protect their companies by engaging in proper documentation practices and appropriately using attorney-client privilege and the work product doctrine in the post-incident context. **PSJ**

References

Broshear Contractors Inc., OSHRC Docket No. 91-2125, May 14, 1992, Order granting petition for interlocutory review and remand. https://bit.ly/3BYXfsw

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23. (1986).

Clear Channel Outdoor Inc. v. International Unions of Painters and Allied Trades Local 770, 558 F.3d 670 (7th Cir. 2009).

Continental Oil Co., 9 BNA OSHC 1737, 1741, 1981 CCH OSHD ¶ 25,371. No. 79-570. (1981).

Eisenhardt v. Snook, 08-1287 (La. 3/17/09), 8 So. 3d 541 (La. 2009). https://casetext.com/case/eisenhardt-v-snook

Fed. R. Civ. P. 56. (n.d.). Summary Judgment.

Fed. R. Evid. 401 (eff. Dec. 1, 2011), Test for Relevant Evidence.

Fed. R. Evid. 402. (eff. Dec. 1, 2011). General Admissibility of Relevant Evidence.

Fed. R. Evid. 403 (eff. Dec. 1, 2011), Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons.

Fed. R. Evid. 407. (eff. Dec. 1, 2011). Subsequent Remedial Measures.

Fed. R. Evid. 612. (eff. Dec. 1, 2011). Writing Used to Refresh a Witness.

Fed. R. Evid. 801. (eff. Dec. 1, 2014). Definitions That Apply to This Article; Exclusions from Hearsay.

Fed. R. Evid. 802 (eff. Dec. 1, 2011). The Rule Against Hearsay.

Fed. R. Evid. 803 (eff. Dec. 1, 2017). Exceptions to the Rule Against Hearsay.

Fed. R. Evid. 804. (eff. Dec. 1, 2011). Hearsay Exceptions; Declarant Unavailable.

Fed. R. Evid. 805. (eff. Dec. 1, 2011). Hearsay Within Hearsay.

Fed. R. Evid. 806 (eff. Dec. 1, 2011). Attacking and Supporting the Declarant.

Fed. R. Evid. 807 (eff. Dec. 1, 2019). Residual Exception.

Fed. R. Evid. 901. (eff. Dec. 1, 2011). Authenticating or Identifying Evidence.

Fed. R. Evid. 1001. (eff. Dec. 1, 2011). Definitions That Apply to This Article.

Fed. R. Evid. 1002. (eff. Dec. 1, 2011). Requirement of the Original.

Fed. R. Evid. 1003. (eff. Dec. 1, 2011). Admissibility of Duplicates.

Fisher v. United States v. Kasmir, 425 U.S. 391, 48 L.Ed.2d 39, 96 S. Ct. 1569 (1976).

George v. Nabors Offshore Corp., 464 F. App'x 298, 301 (5th Cir. 2012).

Hickman v. Taylor, 329 U.S. 495, 508 n.11 (1947).

In re Doe, 662 F.2d 1073 (4th Cir. 1981).

In re Green Grand Jury, 492 F.3d 976 (8th Cir. 2007).

In re Murphy, 560 F.2d 326 (8th Cir. 1977).

Lingefelt v. International Paper Co., 57 So. 3d 118 (Ala. Civ. App. 2010).

Little v. Liquid Air Corp., 37 F.3d 1069 (5th Cir. 1994).

Mayet v. Energy XXI Gigs Servs., LLC. (E.D. La., 2019, Feb. 11).

Mountain States Telephone & Telegraph Co. v. Occupational Safety & Health Review Commission, 623 F.2d 155 (10th Cir. 1980).

Occupational Safety and Health Review Commission (OSHRC). (2020). Guide to simplified proceedings. https://bit.ly/3QDV81q

Park Construction Company, OSHRC Docket No. 2044. (1975, April 24). www.oshrc.gov/assets/1/18/Docket_No._2044.htm

Reyes v. Campo Bros., 2016 N.Y. Slip Op. 50985 (N.Y. Sup. Ct. 2016).

Rivera v. Palm Beach County, 19-CV-81111 (S.D.Fla., 2021).

Secretary of Labor v. Bally's Park Place Hotel & Casino, OSHRC Docket Nos. 87-1849 & 88-0337. (1991, Nov. 7).

Secretary of Labor v. Coastal Drilling East, LLC., OSHRC Docket No. 17-1179. (2018, Dec. 13).

Secretary of Labor v. HCI Industrial and Marine Coatings, Inc., OSHRC Docket No. 17-1424. (2019, Feb. 14).

Secretary of Labor v. Regina Construction Company, OSHRC Docket No. 87-1309. (2017, May 18). www.oshrc.gov/assets/1/18/87-1309.html

Secretary of Labor v. St. Lawrence Food Corp. d/b/a Primo Foods, OSHRC Docket Nos. 04-1734 and 04-1735. (2005, Nov. 2).

Secretary of Labor v. Witco Chemical Corp., OSHRC Docket No. 78-4674. (1979, Nov. 20).

Silva v. State, 635 S.W.2d 775 (Tex. Ct. App. 1982).

Tercero v. Oceaneering Int'l, Inc. (E.D. La., 2018, May 28).

Turner, W.C. (2010). A brief overview of the use of evidence in arbitration. *Nevada Lawyer*. https://bit.ly/3dreg4p

Upjohn Co. v. United States, 449 U.S. 383 (1981).

Walker v. Union Oil Mill, Inc., 369 So. 2d 1043 (La., 1979).

Wilson v. State, 605 S.W.2d 284, 287 (Tex. Crim. App. 1980).

Wright, C.A. & Miller, A.R. (1986). *Federal practice and procedures* (2nd edition).

WYE Oak Tech., Inc. v. Republic of Iraq, Civil No. 1:10-cv-01182-RCL (D.D.C., 2019, Aug. 17).

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