

Secretary of Labor v. Wal-Mart Stores, Inc.  
OSHRC Docket No. 09-1013  
Respondent's Opening Brief

Exhibit D  
Expert Report of James W. Stanley

Filed on June 20, 2011



## Expert Report of James W. Stanley

February 19, 2010

In the matter of Secretary of Labor, Complainant, v. Wal-Mart Stores, Inc.,  
Respondent, OSHRC Docket No. 09-1013



My name is James W. Stanley, and I have personal knowledge of the facts and opinions contained herein and they are true and correct.

I have served with the United States Department of Labor, Occupational Safety and Health Administration (OSHA) for nearly twenty-five (25) years. In 1971, I joined the Occupational Safety and Health Administration as a Compliance Safety and Health Officer (CSHO). In 1971, I, along with other CSHOs, began enforcing the Occupational Safety and Health Act in general, construction and maritime industries. My primary responsibilities as a CSHO included inspections for compliance with OSHA regulations.

In 1972, I was promoted to Assistant Area Director for the Pittsburgh Area Office, which had jurisdiction in Western Pennsylvania and West Virginia. I was responsible for the day-to-day enforcement operations, including scheduling inspection assignments by all compliance officers and review of all inspection reports.

In 1976, I was promoted to Area Director for the newly created Harrisburg, Pennsylvania Area Office. My responsibilities included overseeing all inspection activities conducted by the CSHOs of the Area Office, training of CSHOs, assignment of inspections and issuance of citations.

In 1981, I was promoted to Deputy Regional Administrator for OSHA's Region III (Pennsylvania, Delaware, Maryland, Washington, D.C., Virginia and West Virginia). My primary responsibilities were to assist the Regional Administrator in the overall administration of the OSHA Region, which included ten (10) area offices and two (2) district offices.

In 1987, I was promoted to Regional Administrator for OSHA's Region II based in New York City. This region (one of the most industrialized regions in the Country) included New York, New Jersey, Puerto Rico, and the American Virgin Islands. As a Regional Administrator, administering OSHA's largest Region, I had the overall responsibility for enforcing the OSHA Act in both the Federal and State jurisdictions. During this time, I supervised Robert Kulick in his various roles in the Area Offices and Regional Office.

In 1994, I was appointed Deputy Assistant Secretary of Labor for the Occupational Safety and Health Administration. This was the highest career position in OSHA and I was responsible for the entire enforcement program throughout the United States in both Federal and State jurisdictions. Many of the current OSHA policies and procedures were implemented during my tenure as Deputy.

Effective January 15, 1996, I retired from the Occupational Safety and Health Administration after 25 years and was elected Vice President, Safety and Health for AK Steel located in Middletown, OH. AK Steel is a major integrated steel producer with approximately 9,000 employees. It consistently led the US Steel Industry in virtually every category of employee safety performance during my tenure. After retiring from AK Steel in February 2004, I accepted the position of President of FDRsafety located in Brentwood, TN.

In January 2003, the United States Secretary of Labor, Elaine L. Chao, appointed me to the National Advisory Committee on Occupational Safety and Health (NACOSH), which is a twelve (12) person committee advising the Secretaries of Labor and Health and Human Services on occupational safety and health programs. I have recently completed two terms on this committee.



I have recently served on the National Safety Council's Board of Directors as well as the National Safety Council's Executive Committee as Chairman of the Trustees. I am a member of the Association for Iron and Steel Technology (AIST) and American Society of Safety Engineers (ASSE). I am an honorary advisor to the Board of Trustees for the Safety and Health for Industrial Education and Labor Development (SHIELD) and also have served on the National Safety Council's Editorial Advisory Board. I lecture extensively throughout the United States on Occupational Safety and Health programs, procedures and policies, and I am generally recognized as an expert in safety and health by employers' unions, and my peers in the safety and health industry.

I am thoroughly familiar and an expert with respect to all aspects of the enforcement provisions of the OSH Act including the parameters for issuing citations under Section 5(a)(1), the General Duty Clause.

All of my opinions are to a reasonable degree of professional certainty.

My hourly rate is \$300.00. A list of cases in which I have testified is attached to this report. The publications I have authored within the last ten years consist of FDRsafety newsletters and blog postings available on [www.fdrsafety.com](http://www.fdrsafety.com).

In preparation for this report, I have reviewed and considered the following list of documents and information concerning the above referenced matter:

- a. OSHA Standards for General Industry (29CFR 1910)
- b. OSHA Act (Public Law 91-596)
- c. OSHA Field Inspection Reference Manual CPL2.103
- d. United States Department of Labor Complaint re OSHRC Docket No. 09-1013
- e. OSHA Citation and Notification of Penalty, Inspection Number 3111135933, issued 5/26/09
- f. OSHA 1B Worksheets
- g. Respondent's Responses to the Secretary's First Set of Interrogatories Nos. 1-21

## FINDINGS AND OPINIONS

1. Prior to 11/28/08, the Occupational Safety and Health Administration (OSHA) did not have any provision within its regulations, standards or Directives that regulated or referenced crowd management, crowd management training or crowd control procedures and techniques.
2. During my 25 years specific work experience at OSHA (1971-1998), General Duty Clause (5(a)(1)) violations were never alleged for failing to furnish employees a safe place to work free from the hazard of being struck or asphyxiated by crowd crush, crowd surge or crowd trampling.
3. In my opinion, as a former OSHA enforcement officer--which has included Compliance Officer, Area Director, Regional Administrator and Deputy Assistant Secretary--OSHA and the safety industry before 11/28/08 did not recognize that alleged hazards to employees of asphyxiation or being struck due to crowd crush, crowd surge or crowd trampling were subject to enforcement under the OSHA Act.
4. Based on my OSHA knowledge and my search of OSHA's citation database, although OSHA has conducted thousands of inspections at Wal-Mart locations throughout the U.S., OSHA has not previously issued a general duty citation for crowd related hazards to employees or received a complaint or referral, as those terms are defined in OSHA Directives, related to crowd conduct; nor did OSHA independently conduct an inspection concerning this alleged recognized hazard. To the best of my knowledge, these same observations apply to the entire retail industry of which Wal-Mart is a part.
5. In my opinion, the OSHA Act does not require employers to protect their employees against violent acts of the general public. The issue of crowd control and crowd management is clearly a public safety issue regulated by local law enforcement. The alleged hazards described in



OSHA's General Duty Clause violation were dependent on the actions and behavior of the individuals waiting to enter the Wal-Mart store and in my opinion, Wal-Mart management did not have the law enforcement authority to control their actions.

6. I have reviewed the abatement recommendations in OSHA's General Duty Clause citation. OSHA has based thousands of general duty clause citations on consensus standards. In the absence of any consensus standard in the retail industry that establishes the efficacy of OSHA's recommended abatement methods, and in the absence of the retail industry having recommended or adopted these measures, in my former enforcement capacities, I would have rejected the feasibility of these measures to materially reduce the alleged significant risk of asphyxiation or being struck due to crowd crush, crowd surge or crowd trampling allegedly related to a crowd entering a retail establishment.
7. I am familiar with and participated in numerous discussions related to and development of OSHA's workplace violence guidance. If an employer were to be put on notice by OSHA that "crowd crazing" or "marketing mayhem" related to crowd ingress during sales events constitutes a recognized hazard requiring the implementation of complex and costly crowd management programs, the workplace violence guidance would contain such information. To the best of my knowledge, OSHA's guidance contains no specific reference to the alleged dangers of crowd ingress, or to measures to prevent sociopathic conduct (described in other contexts in OSHA's workplace violence guidance).

The above findings and opinions are based on the information available to me at the time of this report. I reserve the right to modify and/or supplement these findings and opinions should additional information become available.

Respectfully submitted,

A handwritten signature in black ink that reads "James W. Stanley". The signature is written in a cursive, flowing style with a large, prominent initial "J".

James W. Stanley  
President



**James W. Stanley, President, FDRSafety, LLC**

Mr. Stanley presently resides at 7123 Tradition Cove Lane West, West Palm Beach, Florida 33412. He started his career in 1966 after graduating with a BS Degree in Business Administration from Elizabethtown College in Elizabethtown, Pennsylvania.

His first employer was Liberty Mutual Insurance Company located in Bala Cynwyd, Pennsylvania. Mr. Stanley was responsible for investigating accidents and handling workers' compensation claims for stevedoring company employees (longshoremen) working on the Philadelphia waterfront. He became very knowledgeable in Maritime safety requirements as regulated by the United States Department of Labor, especially those areas concerning material handling and rigging of cranes and other equipment used in the loading and unloading of ocean going vessels.

In 1968, Mr. Stanley joined the law firm of Rawle and Henderson in Philadelphia, Pennsylvania as a safety and health/accident investigation specialist. Rawle and Henderson represented approximately 50% of the ships visiting the port of Philadelphia, and Mr. Stanley was responsible for auditing for safe working conditions aboard these vessels during the loading and unloading of cargo. He also was the primary investigator of accidents and illnesses that occurred to longshoremen and sailors during the stevedoring operations. During this timeframe (1966 to 1971) longshoring was generally recognized as the most hazardous occupation in the United States. Mr. Stanley became thoroughly familiar with the applicable Federal and State regulations and became recognized as an expert in material handling, rigging, mobile and fixed cranes.

In May 1971, Mr. Stanley joined the Occupational Safety and Health Administration as a Compliance Safety and Health Officer (CSHO). He was based in the Philadelphia, Pennsylvania area office and was one of the original enforcement officers for OSHA. In September 1971 Mr. Stanley, along with other CSHOs, started enforcing the Occupational Safety and Health Act in General industry, Construction industry and Maritime industry. His primary responsibilities included inspection of companies for compliance with the OSHA regulations. In addition, Mr. Stanley became the primary spokesman for OSHA in Region III, which included Pennsylvania, West Virginia, Delaware, Maryland, and the District of Columbia. As an OSHA compliance officer, Mr. Stanley continued to become expert in all OSHA safety and health regulations as they applied to covered industries.

In 1972, Mr. Stanley was promoted to Assistant Area Director for the Pittsburgh OSHA area office, which had jurisdiction in Western Pennsylvania, and West Virginia. He was responsible for the day-to-day enforcement operations. His responsibilities included scheduling inspection assignments by all the compliance officers and review of all inspection reports. He also conducted numerous conferences with employers and was called on to testify on numerous occasions to the validity of OSHA citations/violations issued by the Pittsburgh area office.

In 1976, Mr. Stanley was promoted to Area Director for the newly created Harrisburg, Pennsylvania OSHA area office. His responsibilities included overseeing all activities conducted by the employees of the area office including training of compliance officers' assignment of inspections, issuance of citations, and settlement of cases and where necessary testifying on behalf of the government as an expert witness.



In 1981, Mr. Stanley was promoted to Deputy Regional Administrator for OSHA's Region III. His primary responsibilities were to assist the regional administrator in the overall administration of the OSHA program. The region included ten area offices and ten district offices. Mr. Stanley was required to speak/lecture at numerous venues throughout Region III on the OSHA Act, and the administration of the program within Region's III jurisdiction.

In 1987, Mr. Stanley was promoted to Regional Administrator for OSHA's Region II based in New York City. This region (one of the most industrialized regions in the country) included New York, New Jersey, Puerto Rico, and the American Virgin Islands. As the Regional Administrator, administering OSHA's largest region, he had the overall responsibility for enforcing the OSHA Act in both the Federal and State jurisdictions. He was intimately involved in the most complex cases and was instrumental in creating many of the current OSHA policies and procedures.

In 1994, Mr. Stanley was appointed Deputy Assistant Secretary of Labor for the Occupational Safety and Health Administration. This was the highest career position in OSHA and he was responsible for the entire enforcement program throughout the United States in both Federal and State jurisdictions. Many of the current OSHA policies and procedures were implemented and initiated during Mr. Stanley's tenure as Deputy. He lectured extensively throughout the United States on Occupational Safety and Health programs, procedures, and policies, and was generally recognized as an expert in safety and health by employers' unions, and his peers in the safety and health arena.

Effective January 15, 1996, Mr. Stanley retired from the Occupational Safety & Health Administration after 25 years and was elected Vice President, Safety & Health for AK Steel located in Middletown, Ohio. AK Steel is a major integrated steel producer with approximately 9000 employees. It consistently led the U. S. Steel Industry in virtually every category of employee safety performance during Mr. Stanley's tenure. After retiring from AK Steel in February 2004, he was elected President of FDRSafety located in Nashville, Tennessee.

Mr. Stanley has recently served on the National Safety Council's Board of Directors as well as the National Safety Council's Executive Committee as Chairman of the Trustees. He is a member of the Association for Iron and Steel Technology (AIST). He is an honorary advisor to the Board of Trustees for the Safety and Health for Industrial Education and Labor Development (SHIELD) and also has served on the National Safety Council's Editorial Advisory Board.

## **TESTIMONY AS AN EXPERT**

RPC Mechanical, Inc vs. AK Steel Corp.

Court of Common Pleas, Butler County, Ohio

Case No. 2003 98 2338

Dec. 15, 2004 – date of testimony

Contract Dispute

General nature of testimony: My testimony in this case revolved around the safety and health program for contractors working in AK Steel's facilities.

Martin Chavez, et al vs. United Masonry et al

Civil Action No. 03CA954

Superior Court of the District of Columbia

Deposition – Feb. 17, 2005

Judge: Unknown

General Nature of Case: Personal Injury Case

General Nature of Testimony: My testimony in this case was related to the OSHA regulations concerning the erection and support of masonry walls in construction.

Crystal Roberts vs Marion Steel Company, et al.

Case No. 02 CV 0437

Court of Common Pleas, Marion County, Ohio

testimony (Deposition) Feb. 28, 2005

Judge: Unknown

General Nature of Case: tort/Personal Injury

General Nature of Testimony: My testimony in this case involved the OSHA requirements and recognized industry practice concerning the appropriate personal protective equipment worn by employees

Lazard Rodriguez, Carmen Rodriguez vs. Nellson Neutraceutical, Inc.; Littleford Day, Inc.; J. H. Day Co.; J. H. Davis Co.; and Does 1 through 50, Inclusive

Case No. KC 043-048 0

Superior Court of the State of California for the County of Los Angeles

Deposition: March 30, 2001

General Nature of Case: Personal Injury

General Nature of Testimony: My testimony in this case involved lockout procedures

Renee Pauley and Kelsey Pauley vs. Geoenergy International Corp., et al.



United States District Court for the Western District of Missouri  
Western Division  
August 26, 2005 – Date of Testimony  
Personal Injury Case  
General Nature of Testimony: My testimony in this case related to confined space entry

Charles Spurlock, et al., vs. Buckeye Boxes, Inc., et al.  
Court of Common Pleas of Franklin County, Ohio  
Case No. 03CV-04-04023  
Date of Testimony: 6/2/05  
Personal Injury Case  
General Nature of Testimony: My testimony in this case related to machine guarding.

James Manganella, Plaintiff vs. Waterside Condominium Association, Inc., a Florida Corporation, et al, Defendants  
Case No. 62-2234-CA-JBR  
Personal Injury Case  
General Nature of Testimony: My testimony in this case is related to construction “material lifts”.

Kenneth Johnson, Sr., et al., plaintiffs vs. Bay West Corporation and GL&V Paper Group Canada Inc., defendants  
Date of testimony: May 23, 2006  
United States District Court, Southern District of Ohio, Cincinnati Division  
Case No. 1:04-CV-091  
Judge: Susan J. Dlott  
General nature of case: Personal Injury  
General nature of testimony: Machine Guarding

State of Ohio Ex Rel City of Cleveland Director of Law, plaintiff vs. General Environmental Mgmt. LLC, et al, defendant  
Date of testimony: June 15, 2006  
Cleveland Municipal Court, Housing Division, Cuyahoga County, OH  
Case No. 06-CVG-12977  
General Nature of Case: Issues surrounding hot work programs  
Cleveland, OH 44114

William Dobson, Plaintiff vs. W.O. Grubb Steel Erection, Inc., et al  
Date of Testimony: November 17, 2006  
The Circuit Court of Maryland for Prince George's County  
Case No. CAL05-24454  
General Nature of Case: Personal Injury  
General Nature of Testimony: Multi-employer Worksite Policy/OSHA Requirements

Tropicana Parking Garage Collapse Litigation  
Superior Court of New Jersey  
Docket NO. ATLL 1551.04  
General Nature of Case: Personal Injury  
General Nature of Testimony: Multi-employer Worksite/OSHA Regulations

Melanie Gray as Personal Representative of the Estate of Vernon Gray, and a Next Friend of Adrian Gray, a minor, Plaintiffs vs. American Buckle Company V.I., d/b/a National Frame Rail Company, and Armco Inc., d/b/a AK Steel, defendants  
Date of Testimony: March 6, 2007  
District Court of Cooke County, Texas  
Cause No. 03-421  
General Nature of Case: Personal Injury  
General Nature of Testimony: OSHA Regulations concerning Fall Protections, Exposure to Electric Conductors and Lock-Out

John Halek, Plaintiff vs. Kingsport Development, LLC Defendants  
Circuit Court of Cook County  
Case No. 02 L 8695  
General Nature of the Case: Personal Injury  
General Nature of Testimony: Fall Protection and Multi-employer worksite

James Terry Parker and Marilyn Parker, Plaintiffs vs. The Lamar Company, LLC, Defendants, Lamar Advantage GP Co. LLC, Third-Party Plaintiff vs. Extreme Sign Maintenance, Third-Party Defendant  
Circuit Court of Cook County, Illinois  
County Department – Law Division  
Case No. 02L011314  
Date of Deposition: March 30, 2007  
General Nature of Deposition Testimony: OSHA Regulations and Requirements for Fall Protection.

Sharon Smith, Administrator of the Estate of Marvin Smith and Sharon Smith, Plaintiffs  
vs. Anthony Dewey and All Transport Co. and Thyssen Krupp Budd Company,  
Defendants

Shelby Kentucky Circuit Court  
Case No. 04-C1-00134  
Date of Testimony: June 15, 2007  
General Nature of Case: Personal Injury  
General Nature of Testimony: OSHA Regulations and Requirements

Charles Clark, et al, Plaintiffs vs. W and M Kraft. Inc., et al, Defendants

United States District Court  
Southern District of Ohio  
Western Division  
Case No. 1:05CV725  
Judge Arthur S. Spiegel  
Nature of Testimony: Describe my Findings and Opinion regarding an accident  
that occurred at a maritime workplace.

Cain v. Speedy Discount Mufflers & Brakes, Inc.

Daviess Circuit Court  
Civil Action No. 02-CI-01277  
Date of Testimony: November 28, 2007  
Personal Injury Case  
General Nature of Testimony-OSHA Fall Protection Requirements

Secretary of Labor v. Erickson Air-Crane, Inc

Occupational Safety and Health Review Committee  
OSHRC Docket No. 07-0645  
December 6, 2007: Date of Hearing Testimony for OSHA Citation  
General Nature of Testimony-Fall Protection on Tank Trucks

Christopher D. Earnhardt v. The Martin-Brower Company

284<sup>th</sup> Judicial District Court, Montgomery County, Texas  
Cause No. 05-07-06346-CV  
Date of Trial Testimony: January 9, 2008  
General Nature of Testimony-My Assessment of Company Safety Program

Delores Hickman, et al. v. United Foundries, Inc. et al.

Court of Common Pleas, Stark County, OH  
Case No.: 2007-CV 02268  
Judge Taryn Heath

Date of Deposition: March 25, 2008  
Personal Injury Case  
General Nature of Testimony-Fall Protection

Poneris v. A & L Painting, L.L.C. et al.  
Butler County Court of Common Pleas  
Case No. C V – 2004 04 1309  
Date of Trial Testimony: March 14 2008  
Personal Injury Case  
General Nature of Testimony – Construction Industry Fall Protection

Harvey v. Brennan, et al.  
Indian River County Circuit Court  
Case No. 2006 0245 – CA 11  
Personal Injury Case  
General Nature of Testimony – Construction Industry Fall Protection

Holbrook vs. Woodham, New Enterprise Stone and Lime and Robert Kimball and  
Assoc.  
United States District Court For The Western District of Pennsylvania  
Civil Action No. 3:05CV304  
Date of Testimony-June 24, 2008  
Personal Injury Case  
General Nature of Testimony – Construction Industry OSHA Regulations and  
Multi-Employer Worksite Policies

Smithfield Foods Inc. vs United Food And Commercial Workers International Union  
United States District Court For The Eastern District Of Virginia Richmond Div.  
Civil Action No. 3:07CV641  
Date of Testimony – July 18 2008  
General Nature of Testimony – Evaluation of the company Safety and Health  
Program

Faulkner v. Wheeling-Nisshin, Inc  
Brooke County W V Circuit Court  
Civil Action No. 07-C-255  
Date of Testimony – February 23, 2009  
General Nature of Testimony – Walking/Working Surface Fall Protection

Jason Jenkins v. Sperian Eye & Face Protection, Inc., Et Al


District Court of Harris County Texas 295<sup>th</sup> Judicial District  
Case No. 2007-73468  
Date of Testimony – June 4 2009/June 25 2009  
General Nature of Testimony – Personal Protective Equipment Requirements  
And Hazard Assessments

OSHA, Division of Occupational Safety and Health vs. Progressive Services, Inc. dba,  
Progressive Roofing  
Industrial Commission of Arizona  
Case No. S2603-312623762  
Deposition-10/12/09  
Hearing-1/27/10  
ADOSH Citation  
General Nature of Testimony-My testimony in this case involved Fall Protection.


Gigi Goodson, et al. vs. SPX Corporation, et al  
Cause No. 2007-12-0916, 2<sup>nd</sup> Judicial District Court, Cherokee County, Texas  
Deposition-6/23/09  
Personal Injury Case  
General Nature of Testimony-Multi-employer worksite, confined space entry,  
training of employees and hazard assessment.

Kim Dodson, Plaintiff vs. Bunge North America, Inc., et al, Defendants  
Civil Action No.: CV-2008-900144  
Circuit Court of Morgan County, Alabama  
Deposition-9/1/09  
Personal Injury Case  
General Nature of Testimony-Lockout/Tagout and Machine Guarding

Secretary of Labor v. Thomas Industrial Coatings  
Occupational Safety and Health Review Commission  
Deposition-9/5/08  
Hearing-9/25/08  
General Nature of Testimony-Working over water/lifesaving procedures

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**washshrcommission**

**From:** Rathbun, Daniel Patrick [DRathbun@gibsondunn.com] **Sent:** Mon 6/20/2011 4:24 PM  
**To:** washshrcommission  
**Cc:** Darling, Jr., Ray H.; gottlieb.ronald@dol.gov; phillips.heather@dol.gov; james.charles@dol.gov; Willis Goldsmith (wgoldsmith@jonesday.com); Jacqueline Holmes (jholmes@JonesDay.com); Fellner, Baruch A.; Schwartz, Jason C.; Martin, Scott P.; Rathbun, Daniel Patrick  
**Subject:** OSHRC Docket No. 09-1013: Exhibit D to Filing by Respondent Wal-Mart Stores, Inc.  
**Attachments:**  [09-1013 Respondent's Exhibit D to Respondent's Opening Brief.pdf\(597KB\)](#)

Attached please find Exhibit D to the Opening Brief for Respondent in the above-captioned matter.

**Daniel P. Rathbun**

**GIBSON DUNN**

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