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Edwin G. Foulke Jr.

Scott H. Strickler

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THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION: AN OVERVIEW

By Edwin G. Foulke, Jr. and Scott H. Strickler¹

Congress enacted the Occupational Safety and Health Act of 1970 " to assure so far as possible . . . safe and healthful working conditions [for] every working man and woman in the nation. " ² Enforcement and adjudicatory powers are divided primarily between two agencies under the Act. The United States Department of Labor has enforcement authority and the Occupational Safety and Health Review Commission (OSHRC) has adjudicatory authority.

The Secretary of Labor has delegated many of her powers under the Act to the Assistant Secretary for Occupational Safety and Health, who heads the Occupational Safety and Health Administration (OSHA). Therefore, OSHA is the agency within the Department of Labor that is responsible for enforcing most of the key provisions of the Act.

The Act provides the Secretary (and thus OSHA) with a broad array of enforcement and regulatory powers. Specifically, the Secretary has the power to: " promulgate, modify, or revoke any occupational safety or health standard; " conduct investigations and worksite inspections to assure compliance with safety and health standards and regulations, as well as with the Act's " general duty clause; " and issue citations to employers whenever she believes that an employer has violated its duty under § 5 of the Act or any standard, rule, regulation, or order promulgated by the Secretary. ³ The principal obligations of employers under the Act are set forth in § 5 (a) of the Act:

Each employer (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; (2) shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct. ⁴

Section 5 (a)(1) is commonly referred to as " the general duty clause. "

¹Edwin G. Foulke, Jr. is Chairman of the Occupational Safety and Health Review Commission and Scott H. Strickler is Chief Counsel to Commissioner Velma Montoya. This article first appeared in *Labor Law Journal*, January 1991, and is reprinted here with permission.

²29 U.S.C. 651(b); Public Law 91-596, 84 Stat. 1590, codified at 29 U.S.C. 651 et seq. (1970).

³29 U.S.C. 655(b); 857(a); 658.

⁴29 U.S.C. 654(a).

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In addition to authorizing the issuance of citations, the Act, also, authorizes the Secretary to propose penalties for the violations she alleges in her citations and to establish abatement requirements for those violations. The obligations to pay penalties and to abate violations are suspended when administrative review proceedings are instituted in good faith. " If the Secretary has reason to believe that an employer has failed to correct a violation for which a citation has been issued within the period permitted for its correction . . ." she may issue a notification of failure to abate and propose additional daily penalties.⁵

Independent Adjudicatory Agency

The Occupational Safety and Health Review Commission was created for the purpose of " carrying out adjudicatory functions " under the Act. The Review Commission is an independent adjudicative agency that is part of the Executive Branch. However, it is not associated with the Department of Labor. The agency is headed by a three-member Commission, consisting of a Chairman and two Commissioners, who are appointed by the President with the advice and consent of the United States Senate. The Review Commission, which is located in Washington, D.C., utilizes Administrative Law Judges (ALJs) to hear cases. The ALJs are distributed among four regional offices in Atlanta, Boston, Dallas, and Denver, and the national office in Washington.⁶

When an employer receives a citation from OSHA, the employer has the option of either contesting the citation within fifteen (15) working days of receipt or allowing the citation to become a final order of OSHRC by operation of law. The employer also has the option of contesting only the proposed penalties. An employee or authorized representative (labor organization) may contest the amount of time allowed by the Secretary for abatement of the allegedly violative conditions. Any party contesting a citation or proposed abatement date is entitled to a hearing before an ALJ.⁷

Proceedings before the Commission are governed by the Commission's Rules of Procedure.⁸ In addition to the employer that was cited, " affected employees " or their " authorized representatives " are allowed under the Commission's Rules to elect party status in a proceeding initiated by an employer's notice of contest. There are also

⁵29 U.S.C. 658(a); 659(a) and (b); 666(d).

⁶29 U.S.C. 659(b)(3); 661(a).

⁷29 U.S.C. 659(a) and (c); 661(j).

⁸29 CFR 2200 et seq.

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provisions permitting intervention by other non-parties.⁹ Once review has been directed and a case is docketed, following transmission of the notice of contest and underlying citation to the Commission's Executive Secretary, the case proceeds to the pleading stage. However, if both parties are agreeable, pleadings and other formalities may be dispensed with, and the case can proceed under "Simplified Proceedings," which are provided for in Subpart M of Part 2200.

If Simplified Proceedings are not agreed to, then the case will be reviewed through conventional proceedings. A complaint must be filed by the Secretary and a response in the form of an answer is required to be filed by the employer.¹⁰ Discovery normally follows the initial pleading stage. Discovery is governed by Subpart D of the Commission's Rules of Procedure. OSHRC discovery rules are similar to, but not identical to, those found in the Federal Rules of Civil Procedure.

Disputes concerning discovery are normally resolved by the ALJ, who is assigned responsibility for the case shortly after it is docketed with the Commission. The ALJ conducts the hearing in accordance with the procedures set out in Subpart E of the Commission's regulations. Subpart E also governs the filing of post-hearing briefs and petitions for interlocutory review.¹¹ Interlocutory review is "discretionary with the Commission" and may be granted only where the petition asserts and the Commission finds: that the review involves an important question of law or policy about which there is substantial ground for difference of opinion and that immediate review of the ruling may materially expedite the final disposition of the proceedings; or that the ruling will result in a disclosure before the Commission may review the ALJ's report of information that is alleged to be privileged.¹² The issue of privileged information generally arises in the context of interpreting and applying the Commission's Rule on the confidentiality of trade secrets.¹³ After the hearing, the ALJ makes a decision on the merits, including findings of fact and conclusions of law, and files a decision and order with the Commission affirming, modifying, or vacating the Secretary's citation or proposed penalty.¹⁴ While the Act gives authority to the Secretary to propose penalties, it gives authority to the Commission to assess penalties: "The Commission shall have authority to assess all civil

⁹29 CFR 2200.20(a) and 2200.21.

¹⁰29 CFR 2200.33-36.

¹¹29 CFR 2200.73 and 2200.74.

¹²29 CFR 2200.73(a).

¹³29 CFR 2200.11.

¹⁴29 U.S.C. 659(c).

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penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations. "¹⁵

Discretionary Review

If no review of the case is directed by the Commission within thirty (30) days of the filing of the ALJ's decision, it becomes a final order of the Commission by operation of law. Any one of the three Commissioners can direct that the ALJ's decision be reviewed by the full Review Commission. A party may petition the Review Commission to review the ALJ's decision, if the party believes that: the ALJ made findings of material facts that are not supported by the evidence; the decision is contrary to law; a substantial question of law, policy, or abuse of discretion is involved; or a prejudicial error was committed. This is accomplished by the filing of a petition for discretionary review (PDR).

Usually, a case does not come before the Commission until the ALJ has issued his final decision. Post-hearing procedures are set forth in Subpart F of Part 2200. In accordance with statute, the Commission has a thirty-day period, beginning at the time the ALJ's report is docketed with the Commission, to decide whether to direct the case for full Commission review. Any Commission member may direct a case for review, either at the request of a party or on his or her own motion (*sua sponte*). However, " in the absence of a petition for discretionary review, a Commissioner will not normally direct review unless the case raises novel questions of law or policy, or questions involving conflict in Administrative Law Judges' decisions. "¹⁶

Most often, review is directed in response to the filing of a PDR by one or more of the parties. " A petition should state why review should be directed, including: Whether the Judge's decision raises an important question of law, policy or discretion; whether review by the Commission will resolve a question about which the Commission's Judges have rendered differing opinions; whether the Judge's decision is contrary to law or Commission precedent; whether a finding of material fact is not supported by a preponderance of the evidence; (and/or) whether a prejudicial error of procedure or an abuse of discretion was committed. "¹⁷ A PDR may be filed with the ALJ before his decision is docketed or with the Executive Secretary of the Commission up to twenty (20) days following docketing. Cross-petitions and oppositions to petitions may be filed during

¹⁵29 U.S.C. 666(j).

¹⁶29 CFR 2200.92(b).

¹⁷29 CFR 2200.91(d).

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the review period.¹⁸

Under the Act, " review by the Commission is not a right. " Usually, the PDR or a subsequent briefing notice will state the issues to be reviewed, giving the parties the opportunity to address those issues in briefs to the Commission. Nevertheless, " [u]nless the Commission orders otherwise, a direction for review establishes jurisdiction in the Commission to review the entire case. " ¹⁹

Adverse decisions of the Commission (including ALJ decisions that have become final without review) may be appealed to the U.S. courts of appeals. The Secretary must file her appeal either in the circuit where the alleged violation occurred or in the circuit where the employer has its principal office. The employer or " [a]ny [other] person adversely affected or aggrieved " by the Commission's decision has these same two options, as well as the third option of filing the appeal in the U.S. Court of Appeals for the District of Columbia Circuit.²⁰

In consideration of such appeals, the appellate courts are governed by the following restrictions: " No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record as a whole, shall be conclusive. " ²¹

The Congressional intent in establishing the Commission as an independent agency, and the legislative history leading up to this decision, were recently described by an appellate court as follows: " When first proposed, the Occupational Safety and Health Act vested the power to adjudicate alleged safety violations with the Secretary. However, in response to business concerns that combining prosecutorial and adjudicative authority in the Secretary would produce decisions biased against employers, Congress created the Commission by adopting a floor amendment which withdrew adjudicative authority from the Secretary. Congress envisioned the Commission as an autonomous, independent, and quasi-judicial body. Subsequent judicial interpretation has emphasized that the prosecutorial power vested in the Secretary remains separate and distinct from the adjudicative power vested in the Commission . . . Congress sought to endow the Commission with the normal complement of adjudicative powers possessed by traditional

¹⁸29 CFR 2200.91.

¹⁹29 CFR 2200.91(a); 2200.93; 2200.92(a).

²⁰29 U.S.C. 660(a) and (b).

²¹29 U.S.C. 660(a).

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administrative agencies. Such an adjudicative function necessarily encompasses the power to 'declare' the law. " ²² Among the " normal complement of adjudicative powers " granted the Commission by Congress are the powers to compel the attendance of witnesses, the production of documents, and the taking of evidence.²³

Case law emphasizes the importance of the Commission's independence from the Department of Labor. Prosecutorial and adjudicative responsibilities are divided so that the Commission may act as a check on the Secretary's enforcement powers. For example, the Supreme Court held in *Cuyahoga Valley Railway v. United Transportation Union* that " [t]he Commission's function is to act as a neutral arbiter and determine whether the Secretary's citations should be enforced over employee or union (or, more commonly, employer) objections. " ²⁴ In *Donovan v. Amorello & Sons, Inc.*, the Court explained that the Review Commission's " role is to hear charges of violations . . . and it seeks to guarantee that those charges are adjudicated fairly—in particular without the bias that can arise from placing prosecutorial and adjudicative functions within a single agency. " ²⁵

The Commission has statutory responsibility to develop and integrate a national body of occupational safety and health law. In ruling on the effect of adverse appellate court decisions, the Commission stated: " Congress established the Occupational Safety and Health Review Commission in an effort to achieve uniformity in adjudications involving national occupational safety and health policy In fulfilling this statutory purpose, the Commission, like the National Labor Relations Board, adheres to the principle that an administrative agency charged with the duty of formulating uniform and orderly national policy in adjudications is not bound to acquiesce in the views of U.S. courts of appeals that conflict with those of the agency Naturally, the Commission gives due deference to the views of the circuits, but unless reversed by the U.S. Supreme Court, the commission is obligated to establish its own precedent in carrying out its adjudicatory functions under the Act. Thus, the Commission must independently decide the issues presented " ²⁶

The Commission has also held that unreviewed ALJ decisions are

²² *Dole v. OSHRC*, 891 F.2d 1495, 1498 (CA-10, 1989), cert. granted No. 89-1541 (June 25, 1990), citing S. 2193, 91st Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970*, at 11-13, 462-465 (1971) and *Brennan v. Giles Colting*, 504 F.2d 1255, 1261-62 (CA-4, 1974).

²³ 29 U.S.C. 661(h) and (j).

²⁴ 1985 OSHD ¶ 27,413; 474 US 3,7; 106 S.Ct. 286, 288 (S.Ct., 1985).

²⁵ 781 F.2d 61, 65 (CA-1, 1985).

²⁶ *S & H Riggers & Erectors, Inc.*, 1979 CCH OSHD ¶ 23,480; rev'd 1981 CCH OSHD ¶ 25,733; 659 F.2d 1273 (CA-5, 1981).

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binding only on the parties to the case. They have no broader precedential effect.²⁷ The net effect of these rulings is that only the Commission (or the Supreme Court) has the ability to make legal pronouncements with respect to occupational safety and health law that are to be applied consistently and uniformly throughout our Nation.

²⁷*Leone Construction Co.*, 1975-76 CCH OSHD ¶ 20,387 (No. 4090, 1976).