

Hearings Before the Occupational Safety and Health Review Commission

The Occupational Safety and Health Act (the "Act") is administered by the Occupational Safety and Health Administration of the United States Department of Labor ("OSHA"). Under the Act, OSHA has the authority to issue citations and propose penalties under §5(a)(1) or §5(a)(2) of the Act to ensure compliance with safety and health regulations promulgated pursuant to the Act. As noted in the Act, Congress found that personal injuries and illnesses arising out of work situations impose a substantial burden upon and are a hindrance to interstate commerce in terms of lost production, wage loss, medical expenses and disability compensation payment. Congress enacted the Act to encourage employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment and to stimulate the employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions. Congress also authorized the Secretary of Labor to establish mandatory occupational safety and health standards applicable to businesses affecting interstate commerce.

In order to carry out the purposes of the Act, OSHA upon presenting appropriate credentials to the owner, operator or agent in charge is authorized to enter without delay at reasonable times any factory, plant, establishment, construction site or other area workplace or environment where work is performed by an employee of an employer and to inspect and investigate . . . any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein and to question privately such employer, owner, operator, agent or employee.

If upon inspection or investigation OSHA believes that an employer has violated a requirement of the Act of any standard, rule or order promulgated pursuant to the Act or of any regulations prescribed pursuant to the Act, it shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation or order alleged to have been violated. In addition, the citation shall establish a reasonable time for the abatement of the violation and shall assess a proposed penalty to the employer.

If the employer wishes to contest the citation, abatement period or proposed penalty, or all three matters, the employer must within fifteen (15) working days from receipt of the citation issued by OSHA file a written notice of contest with OSHA. The notice of contest, assuming the employer wishes to contest all aspects of the citation, should specifically state that the employer contests the citation, abatement period and proposed penalty. As a practical matter, the employer should mention each citation and standard alleged to be violated as contested. A vague or incomplete notice of contest could be held to contest only certain aspects of the citation, such as only abatement or the proposed penalty. Therefore, to avoid this potential dilemma, the notice of contest should be as specific as possible. The notice of contest should be mailed to the OSHA Area Director, certified mail, return receipt requested, or it may be faxed to the Area Director. Proof of receipt by the Area Office should be obtained and should be retained in the

employer's file in case OSHA later argues that the notice of contest was never received or was untimely. Because the citation must be contested within fifteen (15) working days, an employer should look at a calendar and count the working days to make sure that the notice of contest is timely filed or made. If the fifteenth (15th) working day falls on a federal holiday, the deadline for filing the notice of contest would be the next working day.

Informal conferences with the OSHA Area Office do not toll the fifteen (15) working day time limit to file a notice of contest. Therefore, informal conferences should be conducted as quickly as possible after receipt of the citation or if held toward the end of the fifteen (15) working day time frame, a notice of contest should be prepared and taken to the Area Office for presentation at the end of the informal conference if the parties cannot agree to a resolution of the citation. If the notice of contest is not timely filed, the Commission can overlook the late filing if the employer can prove excusable neglect, a very difficult burden.

The Area Director may reduce the proposed penalties up to 40% to settle a case at an informal conference. Therefore, if the penalties are the major concern and not the citations themselves, an early informal conference is recommended.

Presently, penalties for citations can be up to \$7,000.00 for a non-serious violation, up to \$7,000.00 for a serious violation which is defined as a violation which could cause serious bodily injury or death to an employee, and up to \$70,000.00 for a willful or repeated violation, but not less than \$5,000.00 for each willful violation. A repeated violation is if when a violation is committed, there is a final order against the employer for a substantially similar violation. The substantially similar violation can be at a different workplace than the original citation. A willful violation is defined as a violation committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety. Therefore, an employer who receives multiple citations can be at risk for substantial penalties. Furthermore, there is the distinct possibility that these proposed penalties will be amended upward in future legislation, making it imperative that an employer docket the last day to file a notice of contest and comply with the fifteen (15) working day statutory requirement or face potentially severe financial penalties, if dilatory.

Congress has established the Occupational Safety and Health Review Commission (the "Commission") to provide judicial review of contested citations. The mission of the Commission is to provide fair and timely adjudication of workplace safety and health disputes between OSHA and employers. The Commission is an independent agency and is not part of any other federal department. The Commission has been established this way to ensure parties to agency cases receive fair and impartial hearings.

Upon receipt of a notice of contest, the OSHA Area Director will forward the notice to the Commission. The Commission then creates a case file and a docket number is assigned to each new case. All affected parties are then notified by mail of the docketing of the case. Thereafter, the Chief Administrative Law Judge assigns the case to a judge ("ALJ") in Washington, D.C. or at one of the agency's regional offices in Atlanta or Denver.

The Commission's rules and procedures provide for two levels of adjudication. The first level is before an ALJ and the second level is review of the ALJ's decision by the Commission in Washington if one of the parties petitions for review. Essentially, review by an ALJ is a formal hearing just like a trial before a Federal District Court Judge or State Court Judge. The hearing is begun by the filing of a complaint by OSHA's attorney from the Office of the Solicitor with an answer filed by the employer or the employer's attorney pursuant to the procedural rules of the Commission. Because a contested case before the Commission is in reality litigation, discovery will probably be conducted and the employer is entitled to a full evidentiary hearing with the right and ability to file a post-hearing brief and to make oral arguments. Employers are not entitled to a jury trial in OSHA cases. All cases are heard by an ALJ.

The Commission's rules also provide for a less formal method of adjudication called simplified proceedings. Simplified proceedings employ fewer legal procedures and is permitted in certain less complex cases and can be requested by either party. In simplified proceedings there are no formal pleadings and early discussions are required among the parties to narrow the disputed issues. Simplified proceedings cannot be used if the citations involve an employee fatality.

Once the Commission assigns the case to an ALJ, the ALJ sets a hearing date and selects a hearing site as close as possible to the inspected workplace. A cited employer or an affected employee, who has the right to appear as a party in the hearing, may appear with or without legal counsel. However, OSHA will at all times be represented by an attorney from the Office of the Solicitor. It is highly recommended that an employer retain competent counsel to represent its interests in a hearing before an ALJ since the employer will be facing a skilled government attorney on the opposite side.

The hearing is a trial with objections to evidence made during the hearing by the parties and rulings by the ALJ on the objections. The Federal Rules of Evidence are followed, except that hearsay is allowed. In most cases, the parties file post-hearing briefs. Upon hearing all of the evidence and after considering the post-hearing briefs, the ALJ will issue a written decision including findings of fact and conclusions of law. As part of the ALJ's decision, the citations will be either affirmed, modified or vacated. The same will also be true for the abatement dates contested and the proposed penalties which may be affirmed as issued, reduced or vacated by the ALJ. The decision of the ALJ becomes final in thirty (30) days unless within the 30-day time frame one of the parties requests that the decision be directed for review by the Commission in Washington, D.C. This is a discretionary review and one of the three members of the Commission, if not all three, must direct that the case be reviewed. If a case is reviewed, the Commission reviews all of the evidence, briefs, arguments and the ALJ's decision. Oral argument before the Commission is very rare. The appeal is conducted on the basis of appellate briefs filed by each party to the proceeding. Thereafter, the Commission renders a decision to affirm, modify or vacate citations and penalties that have been proposed by OSHA.

If review of the ALJ decision by the Commission is not directed, the petitioning party may request review by an appropriate United States Circuit Court of Appeals. Any person who is adversely affected or aggrieved may also appeal the decision of the Commission to an

appropriate United States Circuit Court of Appeals. Review by a Court of Appeals must be sought within sixty (60) days after the Commission's final decision is issued.

As previously noted, affected employees and authorized employer representatives may elect party status in any matter in which the Act confers a right to participate. A notice of election filed less than ten (10) days prior to the hearing is ineffective unless good cause can be shown for not filing a timely notice. The notice of election must be served on all parties to the hearing. Participation means the affected employee or employer representatives may put on evidence and cross-examine witnesses.

The procedural rules of the Commission track the Federal Rules of Civil Procedure. Upon receipt of the complaint from OSHA, the employer's attorney or the employer must carefully review the complaint to determine if there are any typographical errors or mistakes of fact. The employer must file an answer admitting or denying each allegation made by OSHA. The employer may also state affirmative defenses, such as isolated incident, employee misconduct or other similar affirmative defenses. The employer should be diligent in reviewing and pleading all affirmative defenses at the time the complaint is served upon it. The rules do not provide for the unlimited amendment of the employer's answer and amended answers with affirmative defenses or additional defenses may only be granted by leave of the ALJ. The answer should be filed with the ALJ. In addition to filing the answer, the employer, if it is a corporation, must file a separate declaration listing all parents, subsidiaries and affiliates of that corporation or stating that the corporation has no parents, subsidiaries or affiliates, whichever is applicable. The ALJ has the discretion to refuse to accept for filing an answer or other initial pleading that lacks the disclosure declaration and a party that fails to file an adequate declaration may be held in default after being given an opportunity to show cause why it should be held in default. Furthermore, a party subject to the disclosure requirements has a continuing duty to notify the Commission or the ALJ of any change in the information on the disclosure declaration until the Commission issues a final order disposing of the proceeding.

The rules of procedure provide for discovery similar to that allowed under the Federal Rules of Civil Procedure. A party may initiate all forms of discovery at any time after the filing of the first responsive pleading or motion that delays the filing of an answer, such as a Motion to Dismiss. Discovery must be initiated early enough to permit completion of discovery no later than seven (7) days prior to the date set for hearing unless the ALJ orders otherwise. Discovery may concern any matter that is not privileged and is relevant to the subject matter involved in the pending case. It is not grounds for objection that the information or response sought will be inadmissible at the hearing. If the information or response appears reasonably calculated to lead to the discovery of admissible evidence, regardless of which party has the burden of proof, the discovery is permissible. In OSHA cases, OSHA has the burden of proof on all citations, while the employer has the burden of proof in establishing its affirmative defenses. In certain circumstances, the employer or OSHA may make a claim of privilege. The claim of privilege shall specify the privileged claimed and the general nature of the material for which the privilege is claimed. In response to an order from the ALJ or the Commission or in response to a Motion for Compel, the claim shall identify the information that would be disclosed, set forth the privilege that is claimed and allege the facts showing that the information is privileged. The

claim shall be supported by affidavits, deposition or testimony and shall specify the relief sought. The claim may also be accompanied by a Motion for Protective Order or for an inspection in camera, which means the ALJ will review the disputed materials in chambers and make a decision.

The rules allow for a request for production of documents, which may be filed at any time after the filing of the first responsive pleading or motion that delays the filing of an answer. The request shall set forth the items to be inspected, either by individual item or by category and describe each item in a category with reasonable particularity. It shall specify a reasonable time, place and manner for making the inspection and performing related acts. The party upon whom the request is served shall serve a written response within thirty (30) days after service of the request for production. From a litigation standpoint, it is highly recommended that the initial discovery request in a contested hearing be a request for production of documents requesting virtually everything from the OSHA investigation file. The request should seek the investigator's notes, all photographs, all tests made by the investigator, all materials relied upon by the investigator in arriving at his or her decisions in the matter, copies of all witness statements (witness statements will be expunged of identifying information based upon OSHA's claim of the informant's privilege), all worksheets reflecting how proposed penalties have been calculated and all reference materials used by the investigator to form his or her conclusions. Obtaining the investigation file is vitally important because the investigator has the burden of proving the case in a hearing. In many instances, the investigation file will reflect shortcuts taken by the investigator or misstatements of fact, both legal and otherwise. There may also be language such as "may" or "could" used in the narrative or with photographs that could be turned against the investigator to prove that a violation may not have occurred. Simply, obtaining the investigation file and allowing the company safety officer and consulting experts to peruse it and discuss shortcomings in the investigation with the company attorney should greatly affect how the case will proceed.

A second means of valuable discovery are interrogatories. The number of interrogatories shall not exceed 25 questions, including subparts, without an order of the ALJ. Although the rules provide that all answers shall be made in good faith and as completely as the answering party's information will permit, it is my experience that the attorney assigned to the case will not respond directly to interrogatories, but will merely refer the employer vaguely to the investigation file to find answers to the interrogatories. However, interrogatories can be used to determine salient facts such as identifying all persons exposed to the alleged hazards, since oftentimes the investigation file will not reflect this information, and can be used to identify any expert witnesses OSHA may call. In theory, an OSHA investigator is an expert on safety and health. However, it has been my experience that OSHA rarely designates its investigators as experts. Therefore, this is a very valuable tool in limiting expert testimony by OSHA.

The rules also provide for a request for admissions. Request for admissions shall not exceed 25, including subparts. I have found that request for admissions are of little value in litigating an OSHA case. When I have attempted to use a request for admissions, oftentimes OSHA will either outright deny the request for admission or object to it for a seemingly frivolous

reason. Therefore, I rarely use a request for admissions. The sole exception to this is to authenticate documents.

The rules also provide for the use of depositions. Although depositions can be quite expensive, I have found them to be invaluable in settling or winning contested OSHA cases. The investigator rarely has time to thoroughly review the investigation file prior to his or her deposition. Furthermore, the investigator rarely has time to really discuss the deposition and the prospective testimony with the attorney from the Office of the Solicitor. In preparing for a compliance officer's deposition, I consult with the safety representatives of my client and literally go page-by-page, line-by-line, over the investigation file looking for mistakes and erroneous conclusions. I also consult with any consulting or retained experts that we have retained for the case. I then prepare a deposition outline with exhibits I intend to use and confront the compliance officer with during the deposition. I have found that compliance officers will hedge or be evasive in responding to questions during the deposition. I therefore am prepared to object to the responses as being nonresponsive and move to strike. I have found that OSHA attorneys do not argue with my objections and that when the question is re-asked, the compliance officer having given up hope guesses or speculates about the response and often answers wrong. I can then use the documentary evidence from the file to impeach the compliance officer and show that his answer is unsupported by the evidence and has no merit. By doing so, I have been able to settle contested cases during the course of a deposition or shortly thereafter because the attorney recognizes the frivolity of pursuing a full-blown hearing without sufficient evidence to sustain OSHA's burden of proof.

For example, I once represented a company involved in installing traffic lights on streets intersecting an interstate highway. An OSHA investigator observed my client installing lights at a busy intersection. He hustled across the street and conducted a quick investigation, citing my client for several alleged violations of the Act. The foremost citation involved my client's failure to wear lime green vests while performing their installation duties. Apparently, the speed of traffic one is working in controls the color of the vest one must wear. My client's employees were wearing orange vests. During the deposition, I asked the compliance officer about the speed of the vehicles driving around my client's employees. He estimated their speed and I asked if he had actually bothered to clock any of the cars. He stated he had not. When I asked if his estimate of speed was simply a best guess, he admitted that it was, despite the fact that his narrative statement unequivocally stated that the drivers were going 55 miles an hour and above in the work area. I also asked him if there was a stop sign at the intersection where my client's employees were working and he stated there was. I asked him if any drivers ran that stop sign and he told me he had not observed anyone running the stop sign. I then asked him how fast the drivers were going when they slowed at the stop sign and he did not know. He admitted he saw drivers come to a full stop. Furthermore, he admitted that they were going very slowly when they left the stop sign. Finally, I asked him what color safety vest he was wearing and he said orange. When the attorney for OSHA heard that we were being cited for wearing orange vests while his own compliance officer was in the alleged zone of danger wearing the same color vest, the citation was quickly withdrawn. The investigator's lack of credibility enabled us to resolve the case at deposition with the dismissal of 80% of the citations issued during this unfortunate investigation and the resulting dramatic reduction in the proposed penalties. The important thing

about the dismissal of the vest citation is the fact that my client operates on city streets all the time and would have been subjected to repeated citations and perhaps a willful citation for failure to wear the appropriate color vest if the erroneous citation had been affirmed by the Commission and it was cited again. Therefore, by taking an aggressive defensive posture, my client was able to avoid future more serious (repeated or willful with substantially increased penalties) citations and it has been inspected on several other occasions by OSHA. There is very important since a final citation at one workplace could be the basis for a repeated or possibly even a willful citation at another workplace.

In hand with the taking of the compliance officer's deposition, counsel should interview all employees interviewed by OSHA. Most importantly, counsel should view the work site where the citations were issued to determine the validity of the citations and exactly what happened in the event that the investigation occurred because of an accident or fatality.

Another reason for vigorously opposing OSHA citations involves defending a civil suit for negligence involving either a serious injury or death. Although most states require workers' compensation, many states provide that a fatality could take the situation outside of workers' compensation and provide a cause of action for gross negligence to the employee's family. Texas does not require workers' compensation; therefore, many large employers in the state are nonsubscribers. They go naked which means they can be sued for accidents and fatalities for negligence. Often OSHA investigates and issues citations when there is serious bodily injury and always in the case of a fatality. Plaintiffs' attorneys like to use OSHA citations as prima facie evidence of negligence and tell juries that my client has been cited by the government for workplace safety violations. Therefore, more often than not, it is my job to rid the employer of the OSHA citations that the Plaintiff's attorney is attempting to rely on or limit their potential use in a negligence case. Under such circumstances, my client will take vigorous action to defend itself since there is much more at stake than a simple OSHA citation and proposed penalty. Negligence cases may involve demands for millions of dollars and jury verdicts can be for millions of dollars. Therefore, it is imperative to defend to protect oneself from collateral damage.

The third reason many employers defend OSHA cases through hearing is because OSHA is just wrong. Many years ago I represented a national pizza chain who was cited for not having safety guards on its dough rollers. OSHA expressed concern that an employee taking the dough off the pizza roller could get his or her fingers caught in the rolling mechanism and the finger or fingers could be crushed or the wrist possibly broken. The first issue involved, if the company did not contest this citation, was that it might be responsible for having to put guards on every dough roller in the chain, which could amount to hundreds of thousands of dollars. The second issue involved the fact that the company had never recorded an injury involving an employee crushing a finger or breaking a wrist because of a lack of guards on the dough roller to prevent the employee from getting their fingers into the rolling mechanism. It was the pizza chain's opinion that the rolling mechanism was not injurious to its employees and it proved it by having a supervisor place his fingers in the machine and have them roll through the mechanism. The machine did not injure the employee and the employee felt no pain. Furthermore, when we placed a common wood pencil in the rolling mechanism, the machine was not even strong

enough to snap the wood pencil. As a result of the implications for the pizza industry, other pizza chains came to the defense of my client and I was able to put on expert testimony from other chains that these injuries did not occur in the industry. As a result, after hearing, the ALJ rejected OSHA's position and the citation was deleted. This was not only a clear victory for my client, but for the industry in general. To the best of my knowledge, even at this date, there are no guards on pizza dough rollers to prevent employees from catching their fingers or hands in the rolling mechanism.

After discovery is complete, the ALJ will conduct a hearing. The hearing is evidentiary in nature and both sides will have an opportunity to introduce evidence, including exhibits and cross-examine the other's witnesses. The ALJ will allow the parties to file a written brief based upon the record made at the hearing and I always take advantage of this opportunity. Although oral argument is fine, I have found that having an opportunity to review the hearing transcript and place my thoughts and defenses in writing helps me convince the ALJ of the righteousness of our position. I therefore recommend that companies, after an OSHA hearing, file a post-hearing brief. Assuming that the hearing has been tried properly, the brief will highlight the deficiencies in OSHA's position and the employer should win.

In summary, we have found it efficacious to vigorously defend against OSHA citations and demand hearings before the Commission for the following reasons. The first reason is when the acceptance of a citation could adversely impact our operations in other facilities and could subject us to repeated or even willful citations with heightened proposed penalties. The second reason to vigorously defend against OSHA citations is when there is civil litigation involving injury or death that could involve potentially millions of dollars in adverse jury verdicts against the employer. At that point it is the attorney's job to mitigate the citations and the impact on the civil side of the litigation. Remember, juries will tend to believe an employer did something wrong if the plaintiff's attorney can show that a governmental unit said the employer did something wrong. Finally, the third reason for vigorously defending against an OSHA citation is when OSHA is just dead wrong in its assumption that the employer violated the Act. In such situations, an employer might want to assess the cost of defending against the erroneous citation against the cost of paying a penalty and accepting the citation. However, the cost benefit analysis might not be the best method available to analyze whether the citation should be contested since there is always the possibility that a final citation with a subsequent injury could lead to civil liability.