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December 20, 2024

The Honorable Cynthia L. Attwood
Chair
Occupational Safety and Health Review Commission
1120 20th Street NW, 9th Floor
Washington, DC 20036-3457

Dear Chair Attwood:

We write with concern about the risk to workers' lives and wellbeing caused by the growing backlog of cases awaiting discretionary review from the Occupational Safety and Health Review Commission (OSHRC).

The *Occupational Safety and Health Act of 1970* (OSH Act)¹ establishes an unusual split-enforcement scheme: whereas the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor (DOL) sets safety and health standards and undertakes their enforcement, administrative review of challenges to those cases goes before OSHRC, an independent commission with three members appointed by the president subject to the advice and consent of the Senate.² An employer's contest of a citation is heard by one of OSHRC's administrative law judges (ALJs).³ The ALJ decision becomes a final agency action within 30 days unless any one OSHRC Commissioner designates the case to be heard at the Commission level;⁴ otherwise, a party can seek further review in one of the federal courts of appeals.⁵

This scheme can work as designed when OSHRC has a full complement of three members. Theoretically, it can still work when OSHRC has only two confirmed members, the minimum to constitute a quorum⁶—but they can also deadlock and fail to reach a final decision. When OSHRC has only one member, as is currently the case, that member can still designate cases for review even though no review is practically possible at that time. The result is that a backlog of cases can develop during periods of deadlock or a lack of quorum.

¹ Pub. L. No. 91-596, 84 Stat. 1590, 91st Congress (1970).

² *Id.* § 12.

³ *Id.* § 12(j).

⁴ *Id.*

⁵ *Id.* § 11.

⁶ *Id.* § 12(f).

Each case that is allowed to languish represents one or more workplaces in which employees may be in real danger of harm. Employers are not required to fix the hazards identified in their workplaces until their case is final, so any challenge brought to OSHRC effectively stays the date of the abatement period.⁷ These delays can put workers at significant risk:

[A]n employer that challenges an OSHA citation can delay correction of cited violations for as many as five or more years. For example, Caterpillar was cited for violation of OSHA's 50 µg/m³ lead standard in 1979. Caterpillar contested the citation, arguing that lead really was not dangerous—a finding the U.S. Court of Appeals for the D.C. Circuit had already rejected. In 1986, OSHRC finally rendered a decision in the case remanding the matter to an ALJ for further fact-finding. During this seven-year period, employees continued to be overexposed to lead, and OSHA was powerless to take action to prevent that overexposure.⁸

Once created, backlogs are difficult to clear, even during intermittent periods of a full three-member OSHRC. A representative of the U.S. Chamber of Commerce explained why in a 2003 hearing:

MR. SAPPER. The problem is that [OSHRC] is so riddled with vacancies. It is — well, it's paralyzed. It can't do its job. Either it has one member or no members, or most of the time, only two members. If it has only two members, they're paralyzed. Very few cases will you see in which two members are going to agree on everything in the case. The cases are just too big, too complicated nowadays. And so the cases, as I said before, just sit.

MRS. BIGGERT. Well, if it's paralyzed, then they just don't act on it, or don't make a decision? Or how long does that take? Or can they bring back a third member to make a decision?

MR. SAPPER. Correct. They have to await the appointment of a third member. Unfortunately, if you look at the timeline, by the time a third member comes aboard, there's not too much time remaining before another one of the previous two members is about to leave. And then when that third member comes aboard, well, the experienced legal staff at [OSHRC] has to spend time, shall we say, helping that new member climb the learning curve. By the time he's ready to vote on all the pending cases, a goodly proportion of his term has expired, and then it's time, perhaps, for another member to get ready to leave.⁹

⁷ *Id.* § 10(b).

⁸ H. REP. NO. 103-825, at 71 (1994) (committee report accompanying the Comprehensive Occupational Safety and Health Reform Act, H.R. 1280, 103d Cong. (1994)).

⁹ *Hearing on H.R. 1583, "The Occupational Safety and Health Fairness Act of 2003": Small Business and Workplace Safety Before the Subcomm. on Wrkf. Prots. of the H. Comm. on Educ. & Wrkf.*, 108th Cong. 22 (2003) (colloquy between Rep. Judy Biggert (R-IL) and witness for U.S. Chamber of Commerce).

These periods of vacancies have not been rare occurrences. They were already a familiar hazard by the time of that 2003 hearing:

For over two thirds of its existence, [OSHRC] has been so paralyzed by frequent vacancies that it has been unable to do its job. For over half the time since 1982, [OSHRC] has had two or fewer members and, for over a third of that time, it has had only two members. For twenty percent of that time, it lacked even a quorum of two. Between 1996 and 1999, it had a full complement for only a third of that time. Recently, [OSHRC] had only one member for nine months during fiscal year 2002, from the end of December 2001 until late August 2002. . . .¹⁰

The spells of vacancies have continued since then. Even if we ignore the few days in January 2020 when two members had not yet been confirmed, OSHRC has had some period of vacancy every year but three since 2003.¹¹ Most recently, OSHRC had only two members—yourself and Amanda Wood Laihow—from late March 2021 until Ms. Laihow’s departure in late April 2023. That OSHRC has had only you as its sole member since April 28, 2023, is, unfortunately, not an exceptional circumstance.

One legacy of your current tenure as OSHRC chair is a new backlog of 29 cases to date, 15 of which were directed for review during the time that you have served as the sole member.¹² At stake are OSHA citations that are on average more than 3.5 years old. One case is actually *eight years old*, dating back to an OSHA citation in December 2016.¹³

Because of OSHRC’s intervention, employers in these cases are not currently required to fix hazards that include unguarded machinery exposing workers to amputation and crushing injuries;¹⁴ toxic lead exposures;¹⁵ workplace violence;¹⁶ electrical shocks causing burns so severe they require amputation;¹⁷ and deadly releases of toxic and explosive chemical vapors.¹⁸ The relief from abating hazards even extends to a case involving a seafood processing vessel with a litany of unsanitary and deadly conditions—such as brown water in the drinking water system, expired food, missing fire suppression systems, exposed wiring, and broken outlets near water—in what is, moreover, a repeat violation by an employer with three separate violations in the past.¹⁹

¹⁰ *Id.* at 65-66.

¹¹ *Agency Chairmen and Commissioners*, OCC. SAFETY & HEALTH REV. COMM’N, <https://www.oshrc.gov/about/agency-chairmen-and-commissioners/> (last visited Dec. 6, 2024).

¹² *ALJ Decisions Pending Commission Review*, OCC. SAFETY & HEALTH REV. COMM’N, <https://www.oshrc.gov/alj-decisions-pending-commission-review/> (last visited Dec. 6, 2024).

¹³ *Joon, LLC d/b/a Ajin USA*, Doc. No. 17-0053 (reviewing OSHA citation from Dec. 12, 2016). The ALJ decision for this case and others cited in this letter is available via the webpage cited in note 12 *supra*.

¹⁴ *Id.*

¹⁵ *Jacobs Tech., Inc.*, Doc. No. 21-0267 (reviewing OSHA citation from Jan. 25, 2021); *U.S. Ceiling Corp.*, Doc. No. 20-0232 (reviewing OSHA citation from Jan. 17, 2020).

¹⁶ *UHS of Fuller, Inc., UHS of Delaware, Inc.*, Doc. No. 20-0032 (reviewing OSHA citation from Dec. 11, 2019).

¹⁷ *MasTec Svcs., Inc.*, Doc. No. 20-1212 (reviewing OSHA citation from Mar. 30, 2020).

¹⁸ *LyondellBasell & Its Successors*, Doc. No. 22-0153 (reviewing OSHA citation from Jan. 1, 2022).

¹⁹ *EastWest Seafoods LLC*, Doc. No. 23-0236 (reviewing OSHA citation from Jan. 12, 2023).

There is no need for this backlog or the risk it poses to workers' lives. But for OSHRC's decision to designate a case for review, any employer wishing to challenge an ALJ citation could continue to pursue that case by filing an appeal in the courts. The courts can undoubtedly apply the underlying law with reasonable competence; that is, after all, their function. Now that you are the sole confirmed member of OSHRC, you can help employers enjoy finality and workers have a safe workplace by no longer designating any cases for review until OSHRC once again has a full roster of members.

We have a series of related requests for information and documents:

1. Please provide a list of the cases currently designated for review and, for each case, note which OSHRC member designated the case for review.
2. In the case of *EastWest Seafoods LLC* (Doc. No. 22-0236), the ALJ vacated the notice of contest and affirmed OSHA's citation after the employer failed to file a response, failed to appear for the ordered conference call, and failed to communicate any further after that.
 - a. Under OSHRC's regulations, an employer defaulted for failure to appear may file a request for reinstatement within seven days after the scheduled hearing date.²⁰ Did the employer in this case file such a request? If so, please provide a copy of that request.
 - b. Under OSHRC's regulations, failure to appear may be excused at either the ALJ or Commission level for good cause shown.²¹ Was any material submitted by the employer showing good cause for failure to appear? If so, please provide a copy of such material.

We request your response by no later than January 10, 2025. Please send all official correspondence and information related to these requests to Eleazar Padilla with the Committee's Democratic staff at Eleazar.Padilla@mail.house.gov. If you have any questions about how to comply with a request, please contact Bob Shull at Robert.Shull@mail.house.gov.

Sincerely,



ROBERT C. "BOBBY" SCOTT
Ranking Member



ALMA S. ADAMS, Ph.D.
Ranking Member
Subcommittee on Workforce Protections

²⁰ 29 C.F.R. § 2200.64(b).

²¹ *Id.* § 2200.64(c).