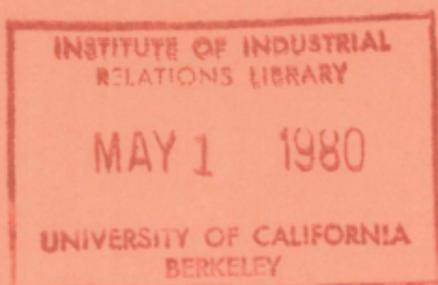


Occupational Safety and Health[✓]
Act, 1970

RULES OF PROCEDURE,



U.S. OCCUPATIONAL SAFETY AND
HEALTH REVIEW COMMISSION

Revised
May 1978

[Washington] 1978. ✓

NOTE: This is a complete print of the Review Commission's Rules of Procedure which are now in effect. They are codified in volume 29 of the Code of Federal Regulations §2200.1 through §2200.110. In this document the codification prefix "2200." which precedes each Rule number as it is published in the Federal Register and Code of Federal Regulations has been omitted.

No rule has been omitted from this document. For consistency in numbering the first Rule in each sub-part, the following numbers were not used: 12, 13, 14, 15, 16, 17, 18, 19, 23, 24, 25, 26, 27, 28, 29, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 56, 57, 58, 59, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 94, 95, 96, 97, 98 and 99.

only in exceptional circumstances where it finds (1) that the appeal satisfies the criteria for certification of an appeal set forth in paragraph (b) of this section; and (2) that there is a substantial probability of reversal.

(d) *Denial without prejudice.* The Commission's action in declining to accept a certification or denying a petition for interlocutory appeal shall not preclude a party from raising an objection to the Judge's interlocutory ruling in a petition for discretionary review. A party whose request for certification of an interlocutory appeal is denied by a Judge and who elects not to file a petition for interlocutory appeal with the Commission shall not be precluded from raising in a petition for discretionary review an objection to the ruling from which interlocutory appeal was sought.

(e) *Stay.* (1) *Trade secret matters.* The filing with a Judge of a request to certify an interlocutory appeal of a ruling concerning an alleged trade secret shall stay the effect of the ruling: (i) until the Judge denies the request; or (ii) if the request is granted, until the Commission rules on the appeal or declines to accept the certification. In the event such a request is denied, the Judge, upon motion of the requesting party, shall stay for a period of 5 days the effect of the ruling from which appeal was sought in order to allow the party to petition the Commission for interlocutory appeal of the ruling. The filing with the Commission of a petition for interlocutory appeal of a ruling concerning an alleged trade secret shall stay the effect of the ruling until the Commission denies the petition or rules on the appeal.

(2) *Other cases.* In all other cases, the filing or granting of a request to certify an interlocutory appeal, or the filing or granting of a petition for interlocutory appeal, shall not stay a proceeding or the effect of a ruling unless otherwise ordered.

(f) *Briefs.* Should the Commission desire briefs on the issues raised by an interlocutory appeal, it shall give notice to the parties. See § 2200.93 Briefs before the Commission.

§§ 2200.91a, 2200.91b, 2200.92, and 2200.93 (Redesignated)

6. Sections 2200.91a, 91b, 92, and 93 are redesignated sections 2200.92.93, 94 and 95, respectively.

7. Subpart F is amended by adding a new § 2200.93, that reads as follows:

§ 2200.93 Briefs before the Commission.

(a) *Requests for briefs.* The Commission ordinarily will request the parties to file briefs on issues before the

Commission. When briefs are requested, a party may file a letter setting forth its arguments instead of filing a brief. The provisions of this rule shall apply to such letters.

(b) *Time for filing briefs.* When briefs are requested under paragraph (a), a briefing notice shall be issued to the parties at a time reasonably in advance of the date when the case is scheduled for disposition at a Commission meeting. Unless the briefing notice provides otherwise, the time for filing of briefs shall be as follows:

(1) *Appeal by one party.* A party whose petition for review or for interlocutory appeal is granted or whose interlocutory appeal is certified shall file a brief within 40 days after the date of the briefing notice. All other parties shall file briefs within 30 days after the brief of the petitioning or appealing party is served.

(2) *Appeals by two or more parties.* When petitions of two or more parties are directed for review, each such party shall file an initial brief addressing the issues on which it appeals within 40 days after the date of the briefing notice and may file a brief responding to the initial brief of the other party within 30 days after the initial brief of the other party or parties is served. This sequence of briefing shall be followed in the event that two or more parties' petitions for interlocutory appeal are granted or two or more parties' interlocutory appeals are certified.

(3) *Motion for review on the motion of a Commission member.* When no petition for discretionary review is granted and a member directs review of a Judge's decision on his own motion, all briefs shall be filed within 40 days after the date of the briefing notice.

(4) *Additional briefs.* Additional briefs shall not be allowed except by leave of the Commission.

(c) *Motion for extension of time for filing brief.* Any extension of time to file a brief shall not be granted except in extraordinary circumstances. A motion for extension of time to file a brief shall be filed within the time limit prescribed in paragraph (b) of this section and shall include the following information: When the brief is due; the number and duration of extensions of time that have been granted to each party; the length of extension being requested; the specific reasons for the extension being requested; and an assurance that the brief will be filed within the time extension requested.

(d) *Consequences of late filing of brief.* The Commission may decline to accept a brief that is not timely filed.

(e) *Length of brief.* Except by

permission of the Commission, a brief shall contain no more than 35 pages of text.

(f) *Table of contents.* A brief in excess of 15 pages shall include a table of contents.

(g) *Failure to meet requirements.* The Commission may return briefs that do not meet the requirements of paragraphs (e) and (f) of this section.

(h) *Number of copies.* Five copies of a brief shall be filed. See § 2200.7(a).

8. Section 2200.100 is revised to read as follows:

§ 2200.100 Settlement.

(a) *Policy.* Settlement is permitted at any stage of the proceedings. Settlements submitted for consideration after the Judge's decision has been directed for review shall be filed with the Executive Secretary. A settlement proposal shall be approved when it is consistent with the provisions and objectives of the Act.

(b) *Requirements.* Every settlement proposal submitted to the Judge or Commission shall include, where applicable, the following:

(1) A motion to amend or withdraw a citation, notification of proposed penalty, notice of contest, or petition for modification of abatement;

(2) A statement that payment of the penalty has been tendered or a statement of a promise to pay; and

(3) A statement that the cited condition has been abated or a statement of the date by which abatement will be accomplished.

(c) *Filing; service and notice.* When a settlement proposal is filed with the Judge or Commission, it shall also be served upon represented and unrepresented affected employees in the manner prescribed for notices of contest in § 2200.7. Proof of service shall accompany the settlement proposal. A settlement proposal shall not be approved until at least 10 days following service of the settlement proposal on affected employees.

Notice of Changes to Rules of Procedure

The following changes to the Commission's Rules of Procedure are effective January 1, 1980:

Rule 11	Revised
Rule 30	Revised
Former Rule 50	Revised and Redesignated as Rule 100(a)
Rule 51(a)	Revised
Rule 75	Revised
Former Rule 91(a)	Redesignated as Rule 92
Rule 93	New
Former Rule 92	Redesignated as Rule 94
Former Rule 93	Redesignated as Rule 95
Rule 100	Revised.

1. Section 2200.11 is amended by deleting paragraph (b) and by deleting the designation (A) in front of remaining paragraph (a). As revised, § 2200.11 reads as follows:

§ 2200.11 Protection of trade secrets and other confidential information.

Upon application by any person, in a proceeding where trade secrets or other matters may be divulged the confidentiality of which is protected by 18 U.S.C. 1905, the Judge shall issue such orders as may be appropriate to protect the confidentiality of such matters.

2. Section 2200.30 is revised to add a new paragraph (d). The entire rule with the amendment reads as follows:

§ 2200.30 Form.

(a) Except as provided herein, there are no specific requirements as to the form of any pleading. A pleading is simply required to contain a caption sufficient to identify the parties in accordance with rule 31 of this subpart, which shall include the Commission's docket number, if assigned, and a clear and plain statement of the relief that is sought, together with the grounds therefor.

(b) Pleadings and other documents (other than exhibits) shall be typewritten, double spaced, on letter size opaque paper (approximately 8½ inches by 11 inches). The left margin shall be 1½ inches and the right margin 1 inch. Pleadings and other documents shall be fastened at the upper left corner.

(c) Pleadings shall be signed by the party filing or by his representative. Such signing constitutes a representation by the signer that he has read the document or pleading, that to the best of his knowledge, information and belief the statements made therein are true, and that it is not interposed for delay.

(d) When a court decision is cited in which the first-listed parties on each side are the Secretary of Labor (or the name of a particular Secretary of Labor) and the Commission, the citation shall include in parenthesis the name of the respondent in the Commission proceeding. For example: *Brennan v. OSHRC (Vy Lactos Laboratories, Inc.)*, 494 F.2d 460 (8th Cir. 1974).

(e) The Commission may refuse for filing any pleading or document which does not comply with the requirements of paragraphs (a), (b), (c) and (d) of this section.

3. Section 2200.50 is redesignated § 2200.100a and is revised to read as follows:

§ 2200.100a Withdrawal of notice of contest.

At any stage of the proceedings, a party may move to withdraw its notice

of contest or any portion of its notice of contest. The motion shall include a statement that a promise of another party has not led to the motion to withdraw the notice of contest. The rule on settlements, § 2200.100, shall apply whenever a promise of another party has led to the party's motion to withdraw.

4. Section 2200.51(a) is revised to read as follows:

§ 2200.51 Prehearing conference.

(a) At any time before a hearing, the Commission or the Judge, on their own motion or on the motion of a party, may direct the parties or their representatives to exchange information or to participate in a prehearing conference to consider settlement or matters which will tend to simplify issues or expedite the hearing.

5. Section 2200.75 is revised to read as follows:

§ 2200.75 Interlocutory appeals.

(a) *Generally.* A Judge's interlocutory ruling may be appealed to the Commission only in the manner prescribed by this rule.

(b) *Certification.* A party desiring to appeal from an interlocutory ruling shall file with the Judge a written request for certification of the appeal. The request and supporting documents shall be filed within 5 days after receipt of the Judge's ruling from which appeal is sought. Responses to the request, if any, shall be filed within 5 days after service of the request. The Judge shall certify an interlocutory appeal when the ruling involves an important question of law or policy about which there is substantial ground for difference of opinion and an immediate appeal of the ruling may materially expedite the proceedings.

(1) *Procedure after certification.* Following certification, the Judge shall forward to the Executive Secretary the request for certification and supporting documents, responses filed by the other parties, the ruling from which appeal is taken, a copy of relevant portions of the record, and the Judge's order certifying the appeal.

(2) *Acceptance of certification—discretionary.* The Commission at any time may decline to accept a certification.

(c) *Petition for interlocutory appeal.* Within 5 days following the receipt of a Judge's order denying certification, a party may file with the Commission a petition for interlocutory appeal. Responses to the petition, if any, shall be filed within 5 days following service of the petition. The Commission shall grant a petition for interlocutory appeal

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Subpart A - General Provisions

Rule 1 Definitions.

As used herein:

(a) "Act" means the Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C.A. 651, et seq.

(b) "Commission," "person," "employer," and "employee" have the meanings set forth in §3 of the Act.

(c) "Secretary" means the Secretary of Labor or his duly authorized representative.

(d) "Executive Secretary" means the Executive Secretary of the Commission.

(e) "Affected employee" means an employee of a cited employer who is exposed to the alleged hazard described in the citation, as a result of his assigned duties.

(f) "Judge" means a Hearing Examiner appointed by the Chairman of the Commission pursuant to §12(j) of the Act.

(g) "Authorized employee representative" means a labor organization which has a collective bargaining relationship with the cited employer and which represents affected employees.

(h) "Representative" means any person, including an authorized employee representative, authorized by a party or intervenor to represent him in a proceeding.

(i) "Citation" means a written communication issued by the Secretary to an employer pursuant to §9(a) of the Act.

(j) "Notification of proposed penalty" means a written communication issued by the Secretary to an employer pursuant to §10(a) or (b) of the Act.

(k) "Day" means a calendar day.

(l) "Working day" means all days except Saturdays, Sundays, or Federal Holidays.

(m) "Proceeding" means any proceeding before the Commission or before a Judge.

Rule 2 Scope of Rules; applicability of Federal Rules of Civil Procedure.

(a) These rules shall govern all proceedings before the Commission and its Judges.

(b) In the absence of a specific provision, procedure shall be in accordance with the Federal Rules of Civil Procedure.

Rule 3 Use of gender and number.

(a) Words importing the singular number may extend and be applied to the plural and *vice versa*.

(b) Words importing the masculine gender may be applied to the feminine gender.

Rule 4 Computation of time.

(a) In computing any period of time prescribed or allowed in these rules, the day from which the designated period begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday, or Federal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or Federal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and Federal holidays shall be excluded in the computation.

(b) Where service of a pleading or document is by mail pursuant to Rule 7 of this subpart, 3 days shall be added to the time allowed by these rules for the filing of a responsive pleading.

Rule 5 Extensions of time.

Requests for extensions of time for the filing of any pleading or document must be received in advance of the date on which the pleading or document is due to be filed.

Rule 6 Record address.

The initial pleading filed by any person shall contain his name, address, and telephone number. Any change in such information must be communicated promptly in writing to the Judge or the Commission, as the case may be, and to all other parties and intervenors. A party or intervenor who fails to furnish such information shall be deemed to have waived his right to notice and service under these rules.

Rule 7 Service and notice.

(a) At the time of filing pleadings or other documents a copy thereof shall be served by the filing party or intervenor on every other party or intervenor.

(b) Service upon a party or intervenor who has appeared through a representative shall be made only upon such representative.

(c) Unless otherwise ordered, service may be accomplished by postage pre-paid first class mail or by personal delivery. Service is deemed effected at the time of mailing (if by mail) or at the time of personal delivery (if by personal delivery).

(d) Proof of service shall be accomplished by a written statement of the same which sets forth the date and manner of service. Such statement shall be filed with the pleading or document.

(e) Where service is accomplished by posting, proof of such posting shall be filed not later than the first working day following the posting.

(f) Service and notice to employees represented by an authorized employee representative shall be deemed accomplished by serving the representative in the manner prescribed in paragraph (c) of this section.

(g) In the event that there are any affected employees who are not represented by an authorized employee representative, the employer shall, immediately upon receipt of notice of the docketing of the notice of contest or petition for modification of the abatement period, post, where the citation is required to be posted, a copy of the notice of contest and a notice informing such affected employees of their right to party status and of the availability of all pleadings for inspection and copying at reasonable times. A notice in the following form shall be deemed to comply with this paragraph:

[Name of employer]

Your employer has been cited by the Secretary of Labor for violation of the Occupational Safety and Health Act of 1970. The citation has been contested and will be the subject of a hearing before the OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION. Affected employees are entitled to participate in this hearing as parties under

terms and conditions established by the OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION in its Rules of Procedure. Notice of intent to participate should be sent to:

Occupational Safety and Health
Review Commission
1825 K Street, N.W.
Washington, D.C. 20006

All papers relevant to this matter may be inspected at:

[Place reasonably convenient to employees, preferably at or near workplace].

Where appropriate, the second sentence of the above notice will be deleted and the following sentence will be substituted:

The reasonableness of the period prescribed by the Secretary of Labor for abatement of the violation has been contested and will be the subject of a hearing before the OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION.

(h) The authorized employee representative, if any shall be served with the notice set forth in paragraph (g) of this rule and with a copy of the notice of contest.

(i) A copy of the notice of the hearing to be held before the Judge shall be served by the employer on affected employees who are not represented by an authorized employee representative by posting a copy of the notice of such hearing at or near the place where the citation is required to be posted.

(j) A copy of the notice of the hearing to be held before the Judge shall be served by the employer on the authorized employee representative of affected employees in the manner prescribed in paragraph (c) of this rule, if the employer has not been informed that the authorized employee representative has entered an appearance as of the date such notice is received by the employer.

(k) Where a notice of contest is filed by an affected employee who is not represented by an authorized employee representative and there are other affected employees who are represented by an

authorized employee representative, the unrepresented employee shall, upon receipt of the statement filed in conformance with rule 35 hereof, serve a copy thereof on such authorized employee representative in the manner prescribed in paragraph (c) of this rule and shall file proof of such service.

(l) Where a notice of contest is filed by an affected employee or an authorized employee representative, a copy of the notice of contest and response filed in support thereof shall be provided to the employer for posting in the manner prescribed in paragraph (g) of this rule.

(m) An authorized employee representative who files a notice of contest shall be responsible for serving any other authorized employee representative whose members are affected employees.

(n) Where posting is required by this section, such posting shall be maintained until the commencement of the hearing or until earlier disposition.

Rule 8 Filing.

(a) Prior to the assignment of a case to a Judge, all papers shall be filed with the Executive Secretary at 1825 K Street, N.W., Washington, D.C. 20006. Subsequent to the assignment of the case to a Judge, and before the issuance of his decision, all papers shall be filed with the Judge at the address given in the notice informing of such assignment. Subsequent to the issuance of the decision of the Judge, all papers shall be filed with the Executive Secretary.

(b) Unless otherwise ordered, all filing may be accomplished by first class mail.

(c) Filing is deemed effected at the time of mailing.

Rule 9 Consolidation.

Cases may be consolidated on the motion of any party, on the Judge's own motion, or on the Commission's own motion, where there exist common parties, common questions of law or fact, or both, or in such other circumstances as justice and the administration of the Act require.

Rule 10 Severance.

Upon its own motion, or upon motion of any party or intervenor, the Commission or the Judge

may, for good cause, order any proceeding severed with respect to some or all issues or parties.

Rule 11 Protection of trade secrets and other confidential information.

(a) Upon application by any person, in a proceeding where trade secrets or other matters may be divulged, the confidentiality of which is protected by 18 U.S.C. 1905, the Judge shall issue such orders as may be appropriate to protect the confidentiality of such matters.

(b) Interlocutory appeal from an adverse ruling under this section shall be granted as of right.

Subpart B - Parties and Representatives

Rule 20 Party status.

(a) Affected employees may elect to participate as parties at any time before the commencement of the hearing before the Judge, unless, for good cause shown, the Commission or the Judge allows such election at a later time. See also Rule 21 of this subpart.

(b) Where a notice of contest is filed by an employee or by an authorized employee representative with respect to the reasonableness of the period for abatement of a violation, the employer charged with the responsibility of abating the violation may elect party status at any time before the commencement of the hearing before the Judge. See also rule 21 of this subpart.

Rule 21 Intervention; appearance by non-parties.

(a) A petition for leave to intervene may be filed at any stage of a proceeding before commencement of the hearing before the Judge.

(b) The petition shall set forth the interest of the petitioner in the proceeding and show that the participation of the petitioner will assist in the determination of the issues in question, and that the intervention will not unnecessarily delay the proceeding.

(c) The Commission or the Judge may grant a petition for intervention to such an extent and upon such terms as the Commission or the Judge shall determine.

Rule 22 Representatives of parties and intervenors.

(a) Any party or intervenor may appear in person or through a representative.

(b) A representative of a party or intervenor shall be deemed to control all matters respecting the interest of such party or intervenor in the proceeding.

(c) Affected employees who are represented by an authorized employee representative may appear only through such authorized employee representative.

(d) Nothing contained herein shall be construed to require any representative to be an attorney at law.

(e) Withdrawal of appearance of any representative may be affected by filing a written notice of withdrawal and by serving a copy thereof on all parties and intervenors.

Subpart C - Pleadings and Motions

Rule 30 Form.

(a) Except as provided herein, there are no specific requirements as to the form of any pleading. A pleading is simply required to contain a caption sufficient to identify the parties in accordance with rule 31 of this subpart, which shall include the Commission's docket number, if assigned, and a clear and plain statement of the relief that is sought, together with the grounds therefor.

(b) Pleadings and other documents (other than exhibits) shall be typewritten, double spaced, on letter size opaque paper (approximately 8-1/2 inches by 11 inches). The left margin shall be 1-1/2 inches and the right margin 1 inch. Pleadings and other documents shall be fastened at the upper left corner.

(c) Pleadings shall be signed by the party filing or by his representative. Such signing constitutes a representation by the signer that he has read the document or pleading, that to the best of his knowledge, information and belief the statements made therein are true, and that it is not interposed for delay.

(d) The Commission may refuse for filing any pleading or document which does not comply with the requirements of paragraphs (a), (b), and (c) of this rule.

Rule 31 Caption; titles of cases.

(a) Cases initiated by a notice of contest shall be titled:

Secretary of Labor,
Complainant
v.
(Name of Contestant),
Respondent.

(b) Cases initiated by a petition for modification of the abatement period shall be titled:

(Name of employer),
Petitioner
v.

Secretary of Labor,
Respondent.

(c) The titles listed in paragraphs (a) and (b) of this rule shall appear at the left upper portion of the initial page of any pleading or document (other than exhibits) filed.

(d) The initial page of any pleading or document (other than exhibits) shall show, at the upper right of the page, opposite the title, the docket number, if known, assigned by the Commission.

Rule 32 Notices of contest.

The Secretary shall, within 7 days of receipt of a notice of contest, transmit the original to the Commission, together with copies of all relevant documents.

Rule 33 Employer contests.**(a) Complaint**

(1) The Secretary shall file a complaint with the Commission no later than 20 days after his receipt of the notice of contest.

(2) The complaint shall set forth all alleged violations and proposed penalties which are contested, stating with particularity:

(i) The basis for jurisdiction;

(ii) The time, location, place, and circumstances of each such alleged violation; and

(iii) The considerations upon which the period for abatement and the proposed penalty on each such alleged violation is based.

(3) Where the Secretary seeks in his complaint to amend his citation or proposed penalty, he shall set forth the reasons for amendment and shall state with particularity the change sought.

(b) Answer

(1) Within 15 days after service of the complaint, the party against whom the complaint was issued shall file an answer with the Commission.

(2) The answer shall contain a short and plain statement denying those allegations in the complaint which the party intends to contest. Any allegation not denied shall be deemed admitted.

Rule 34 Petitions for modification of abatement period.

(a) An employer may file a petition for modification of abatement date when such employer has made a good faith effort to comply with the abatement requirements of a citation, but such abatement has not been completed because of factors beyond the employer's reasonable control.

(b) A petition for modification of abatement date shall be in writing and shall include the following information:

(1) All steps taken by the employer, and the dates of such action, in an effort to achieve compliance during the prescribed abatement period.

(2) The specific additional abatement time necessary in order to achieve compliance.

(3) The reasons such additional time is necessary including the unavailability of professional or technical personnel or of materials and equipment, or because necessary construction or alteration of facilities cannot be completed by the original abatement date.

(4) All available interim steps being taken to safeguard the employees against the cited hazard during the abatement period.

(c) A petition for modification of abatement date shall be filed with the Area Director of the United States Department of Labor who issued the citation no later than the close of the next working day following the date on which abatement was originally required. A later-filed petition shall be accompanied by the employer's statement of exceptional circumstances explaining the delay.

(1) A copy of such petition shall be posted in a conspicuous place where all affected employees will have notice thereof or near each location where the violation occurred. The petition shall remain posted for a period of ten (10) days.

(2) Affected employees or their representatives may file an objection in writing to such petition with the aforesaid Area Director. Failure to file such objection within ten (10) working days of the date of posting of such petition shall constitute a waiver of any further right to object to said petition.

(3) The Secretary or his duly authorized agent shall have the authority to approve any petition for modification of abatement date filed pursuant to subparagraphs (b) and (c). Such uncontested petitions shall become final orders pursuant to sections 10(a) and (c) of the Act.

(4) The Secretary or his authorized representative shall not exercise his approval power until the expiration of fifteen (15) working days from the date the petition was posted pursuant to paragraphs (c)(1) and (2) by the employer.

(d) Where any petition is objected to by the Secretary or affected employees, such petition shall be processed as follows:

(1) The petition, citation and any objections shall be forwarded to the Commission within three (3) working days after the expiration of the fifteen (15) day period set out in paragraph (c)(4).

(2) The Commission shall docket and process such petitions as expedited proceedings as provided for in §2200.101 of this Part.

(3) An employer petitioning for a modification of abatement period shall have the burden of proving in accordance with the requirements of 29 U.S.C. §659(c), that such employer has made a good faith effort to comply with the abatement requirements of the citation and that abatement has not been completed because of factors beyond the employer's control.

(4) Within ten (10) working days after the receipt of notice of the docketing by the Commission of any petition for modification of abatement date, each objecting party shall file a response setting forth the reasons for opposing the granting of a modification date different from that requested in the petition.

Rule 35 Employee contests.

(a) Where an affected employee or authorized employee representative files a notice of contest with respect to the abatement period, the Secretary shall, within 10 days from his receipt of the notice of contest, file a clear and concise statement of the reasons the abatement period prescribed by him is not unreasonable.

(b) Not later than 10 days after receipt of the statement referred to in paragraph (a) of this rule, the contestant shall file a response.

(c) All contests under this section shall be handled as expedited proceedings as provided for in §2200.101 of this Part.

Rule 36 Statement of position.

At any time prior to the commencement of the hearing before the Judge, any person entitled to appear as a party, or any person who has been granted leave to intervene, may file a statement of position with respect to any or all issues to be heard.

Rule 37 Response to motions.

Any party or intervenor upon whom a motion is served shall have 10 days from service of the motion to file a response.

Rule 38 Failure to file.

Failure to file any pleading pursuant to these rules when due, may, in the discretion of the Commission or the Judge, constitute a waiver of the right to further participation in the proceedings.

**Subpart D - Pre-hearing Procedures
and Discovery**

Rule 50 Withdrawal of notice of contest.

At any stage of a proceeding, a party may withdraw his notice of contest, subject to the approval of the Commission.

Rule 51 Pre-hearing conference.

(a) At any time before a hearing, the Commission or the Judge, on their own motion or on motion of a party, may direct the parties or their representatives to exchange information or to participate in a

prehearing conference for the purpose of considering matters which will tend to simplify the issues or expedite the proceedings.

(b) The Commission or the Judge may issue a pre-hearing order which includes the agreements reached by the parties. Such order shall be served on all parties and shall be a part of the record.

Rule 52 Requests for admissions.

(a) At any time after the filing of responsive pleadings, any party may request of any other party admissions of facts to be made under oath. Each admission requested shall be set forth separately. The matter shall be deemed admitted unless, within 15 days after service of the request, or within such shorter or longer time as the Commission or the Judge may prescribe, the party to whom the request is directed serves upon the party requesting the admission a specific written response.

(b) Copies of all requests and responses shall be served on all parties in accordance with the provisions of rule 7(a) and filed with the Commission within the time allotted and shall be a part of the record.

Rule 53 Discovery depositions and interrogatories.

(a) Except by special order of the Commission or the Judge, discovery depositions of parties, intervenors, or witnesses, and interrogatories directed to parties, intervenors, or witnesses shall not be allowed.

(b) In the event the Commission or the Judge grants an application for the conduct of such discovery proceedings, the order granting the same shall set forth appropriate time limits governing the discovery.

Rule 54 Failure to comply with orders for discovery.

If any party or intervenor fails to comply with an order of the Commission or the Judge to permit discovery in accordance with the provisions of these rules, the Commission or the Judge may issue appropriate orders.

Rule 55 Issuance of subpoenas; petitions to revoke or modify subpoenas; right to inspect or copy data.

(a) Any member of the Commission shall, on the application of any party directed to the Commission,

forthwith issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including relevant books, records, correspondence, or documents, in his possession or under his control. Applications for subpoenas, if filed subsequent to the assignment of the case to a Judge, shall be filed with the Judge. A Judge shall grant the application on behalf of any member of the Commission. Applications for subpoenas may be made *ex parte*. The subpoena shall show on its face the name and address of the party at whose request the subpoena was issued.

(b) Any person served with a subpoena, whether *ad testificandum* or *duces tecum*, shall, within 5 days after the date of service of the subpoena upon him, move in writing to revoke or modify the subpoena if he does not intend to comply. All motions to revoke or modify shall be served on the party at whose request the subpoena was issued. The Judge or the Commission, as the case may be, shall revoke or modify the subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. The Judge or the Commission, as the case may be, shall make a simple statement of procedural or other grounds for the ruling on the motion to revoke or modify. The motion to revoke or modify, any answer filed thereto, and any ruling thereon shall become a part of the record.

(c) Persons compelled to submit data or evidence at a public proceeding are entitled to retain, or on payment of lawfully prescribed costs, to procure copies of transcripts of the data or evidence submitted by them.

(d) Upon the failure of any person to comply with a subpoena issued upon the request of a party, the Commission by its counsel shall initiate proceedings in the appropriate district court for the enforcement thereof, if in its judgment the enforcement of such subpoena would be consistent with law and with policies of the Act. Neither the Commission nor its counsel shall be deemed thereby to have assumed

responsibility for the effective prosecution of the same before the Court.

Subpart E - Hearings

Rule 60 Notice of hearing.

Notice of the time, place, and nature of a hearing shall be given to the parties and intervenors at least 10 days in advance of such hearing, except as otherwise provided in rule 101 hereof.

Rule 61 Postponement of hearing.

(a) Postponement of a hearing ordinarily will not be allowed.

(b) Except in the case of an extreme emergency or in unusual circumstances, no such request will be considered unless received in writing at least 3 days in advance of the time set for the hearing.

(c) No postponement in excess of 30 days shall be allowed without Commission approval.

Rule 62 Failure to appear.

(a) Subject to the provisions of paragraph (c) of this rule, the failure of a party to appear at a hearing shall be deemed to be a waiver of all rights except the rights to be served with a copy of the decision of the Judge and to request Commission review pursuant to Rule 91 hereof.

(b) Requests for reinstatement must be made, in the absence of extraordinary circumstances, within 5 days after the scheduled hearing date.

(c) The Commission or the Judge, upon a showing of good cause, may excuse such failure to appear. In such event, the hearing will be rescheduled.

Rule 63 Payment of witness fees and mileage; fees of persons taking depositions.

Witnesses summoned before the Commission or the Judge shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States. Witness fees and mileage shall be paid by the party at whose instance the witness

appears, and the person taking a deposition shall be paid by the party at whose instance the deposition is taken.

Rule 64 Reporter's fees.

Reporter's fees shall be borne by the Commission, except as provided in rule 63 of this subpart.

Rule 65 Transcript of testimony.

Hearings shall be transcribed verbatim. A copy of the transcript of testimony taken at the hearing, duly certified by the reporter, shall be filed with the Judge before whom the matter was heard. The Judge shall promptly serve notice upon each of the parties and intervenors of such filing.

Rule 66 Duties and powers of Judges.

It shall be the duty of the Judge to conduct a fair and impartial hearing, to assure that the facts are fully elicited, to adjudicate all issues and avoid delay. The Judge shall have authority with respect to cases assigned to him, between the time he is designated and the time he issues his decision, subject to the rules and regulations of the Commission, to:

- (a) Administer oaths and affirmations;
- (b) Issue authorized subpoenas;
- (c) Rule upon petitions to revoke subpoenas;
- (d) Rule upon offers of proof and receive relevant evidence;
- (e) Take or cause depositions to be taken whenever the needs of justice would be served;
- (f) Regulate the course of the hearing and, if appropriate or necessary, exclude persons or counsel from the hearing for contemptuous conduct and strike all related testimony of witnesses refusing to answer any proper questions;
- (g) Hold conferences for the settlement or simplification of the issues;
- (h) Dispose of procedural requests or similar matters, including motions referred to the Judge by the Commission and motions to amend pleadings; also to dismiss complaints or portions thereof, and to order hearings reopened or, upon motion, consolidated prior to issuance of his report;
- (i) Make decisions in conformity with §557 of title 5, United States Code;

(j) Call and examine witnesses and to introduce into the record documentary or other evidence;

(k) Request the parties at any time during the hearing to state their respective positions concerning any issue in the case or theory in support thereof;

(l) Adjourn the hearing as the needs of justice and good administration require;

(m) Take any other action necessary under the foregoing and authorized by the published rules and regulations of the Commission.

Rule 67 Disqualification of Judge.

(a) A Judge may withdraw from a proceeding whenever he deems himself disqualified.

(b) Any party may request the Judge, at any time following his designation and before the filing of his decision, to withdraw on ground of personal bias or disqualification, by filing with him promptly upon the discovery of the alleged facts an affidavit setting forth in detail the matters alleged to constitute grounds for disqualification.

(c) If, in the opinion of the Judge, the affidavit referred to in paragraph (b) of this rule is filed with due diligence and is sufficient on its face, the Judge shall forthwith disqualify himself and withdraw from the proceeding.

(d) If the Judge does not disqualify himself and withdraw from the proceeding, he shall so rule upon the record, stating the grounds for his ruling and shall proceed with the hearing, or, if the hearing has closed, he shall proceed with the issuance of his decision, and the provisions of rule 90 hereof shall thereupon apply.

Rule 68 Examination of witnesses.

Witnesses shall be examined orally under oath. Opposing parties shall have the right to cross-examine any witness whose testimony is introduced by an adverse party.

Rule 69 Affidavits.

An affidavit may be admitted as evidence in lieu of oral testimony if the matters therein contained are otherwise admissible and the parties agree to its admission.

Rule 70 Deposition in lieu of oral testimony; application; procedures, form; rulings.

(a) An application to take the deposition of a witness in lieu of oral testimony shall be in writing and shall set forth the reasons such deposition should be taken, the name and address of the witness, the matters concerning which it is expected he will testify and the time and place proposed for the taking of the deposition, together with the name and address of the person before whom it is desired that the deposition be taken (for purposes of this section, hereinafter referred to as "the officer"). Such application shall be filed with the Commission or the Judge, as the case may be, and shall be served on all other parties and intervenors not less than 7 days (when the deposition is to be taken within the continental United States) and not less than 15 days (if the deposition is to be taken elsewhere) prior to the time when it is desired that the deposition be taken. Where good cause has been shown, the Commission or the Judge shall make and serve on the parties and intervenors an order which specifies the name of the witness whose deposition is to be taken and the time, place, and designation of the officer before whom the witness is to testify. Such officer may or may not be the officer specified in the application.

(b) Such deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the examination is held. If the examination is held in a foreign country, it may be taken before any secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States.

(c) At the time and place specified in the order, the officer designated to take such deposition shall permit the witness to be examined and cross-examined under oath by all parties appearing, and the testimony of the witness shall be reduced to type-writing by the officer or under his direction. All objections to questions or evidence shall be deemed waived unless made at the examination. The officer shall not have power to rule upon any objection, but he shall note them upon the deposition. The testimony shall be subscribed by the witness in the presence of the officer who shall attach his certificate

stating that the witness was duly sworn by him, that the deposition is a true record of the testimony and exhibits given by the witness, and that the officer is not of counsel or attorney to any of the parties nor interested in the proceeding. If the deposition is not signed by the witness because he is ill, dead, cannot be found, or refuses to sign it, such fact shall be included in the certificate of the officer and the deposition may be used as fully as though signed. The officer shall immediately deliver an original and four copies of the transcript, together with his certificate, in person or by registered mail to the Executive Secretary at 1825 K Street, N.W., Washington, D.C. 20006.

(d) The Judge shall rule upon the admissibility of the deposition or any part thereof.

(e) All errors or irregularities in compliance with the provision of this section shall be deemed waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, discovered.

(f) If the parties so stipulate in writing, depositions may be taken before any person at any time or place, upon any notice and in any manner, and when so taken may be used as other depositions.

Rule 71 Exhibits.

(a) All exhibits offered in evidence shall be numbered and marked with a designation identifying the party or intervenor by whom the exhibit is offered.

(b) In the absence of objection by another party or intervenor, exhibits shall be admitted into evidence as a part of the record, unless excluded by the Judge pursuant to rule 72 of this subpart.

(c) Unless the Judge finds it impractical, a copy of each such exhibit shall be given to the other parties and intervenors.

(d) All exhibits offered, but denied admission into evidence, shall be identified as in paragraph (a) of this rule and shall be placed in a separate file designated for rejected exhibits.

Rule 72 Rules of evidence.

Hearings before the Commission and its Judges shall be in accordance with §554 of Title 5 U.S.C. and insofar as practicable shall be governed by the rules of evidence applicable in the United States District Courts.

Rule 73 Burden of proof.

(a) In all proceedings commenced by the filing of a notice of contest, the burden of proof shall rest with the Secretary.

(b) In proceedings commenced by a petition for modification of the abatement period, the burden of establishing the necessity for such modification shall rest with the petitioner.

Rule 74 Objections.

(a) Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence or a ruling by the Judge, may be stated orally or in writing, accompanied by a short statement of the grounds for the objection, and shall be included in the record. No such objection shall be deemed waived by further participation in the hearing.

(b) Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which shall be included in the record of the proceeding.

Rule 75 Interlocutory appeals; special; as of right.

(a) Unless expressly authorized by these rules, rulings by the Judge may not be appealed directly to the Commission except by its special permission. Unless otherwise provided by these rules, all such rulings shall become a part of the record.

(b) Request to the Commission for special permission to appeal from such ruling shall be filed in writing within 5 days following receipt of the ruling and shall state briefly the grounds relied on.

(c) Interlocutory appeal from a ruling of the Judge shall be allowed as of right where the Judge certifies that (1) the ruling involves an important question of law concerning which there is substantial ground for difference of opinion; and (2) an

immediate appeal from the ruling will materially expedite the proceedings. Such appeal shall also be allowed in the circumstances set forth in rule 11 hereof.

(d) Neither the filing of a petition for interlocutory appeal, nor the granting thereof as provided in paragraphs (b) and (c) of this rule, shall stay the proceedings before the Judge unless such stay is specifically ordered by the Commission.

Rule 76 Filing of briefs and proposed findings with the Judge; oral argument at the hearing.

Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. Any party shall be entitled, upon request made before the close of the hearing, to file a brief, proposed findings of fact and conclusions of law, or both, with the Judge. The Judge may fix a reasonable period of time for such filing, but such initial period may not exceed 20 days from the receipt by the party of the transcript of the hearing.

Subpart F - Post Hearing Procedures

Rule 90 Decisions and reports of Judges.

(a) Upon completion of any proceeding, the Judge shall prepare a decision. When a hearing is held the decision shall comply with 5 U.S.C. 557. Copies of the decision shall be mailed to all parties. Thereafter, the Judge shall file with the Executive Secretary a report consisting of his decision, the record in support thereof, and any petitions for discretionary review of his decision, or statements in opposition to such petitions, that may be filed in accordance with §2200.91. The Judge shall file his report on the day following the close of the period for filing petitions for discretionary review, or statements in opposition to such petitions, but no later than the twenty-first day following the date of the mailing of the decision to the parties.

(b) (1) Promptly upon receipt of the Judge's report, the Executive Secretary shall docket the case and notify all parties of that fact. The date of docketing shall be the date that the Judge's report is

made for purposes of section 12(j) of the Act (29 U.S.C. 661).

(2) On or after the date of docketing of the case, all pleadings or other documents that may be filed in the case shall be addressed to the Executive Secretary.

(3) In the event no Commission Member directs review of a decision on or before the thirtieth day following the date of docketing of the Judge's report, the decision of the Judge contained therein shall become a final order of the Commission.

Rule 91 Discretionary review; petitions for; statements in opposition.

(a) A party aggrieved by the decision of a judge may submit a petition for discretionary review. An aggrieved party that fails to file a petition for such review by the Commission may be foreclosed from court review of any objection to the judge's decision. **Keystone Roofing Co., Inc. v. Dunlop**, 539 F.2d 960 (3rd Cir. 1976).

(b) (1) Except as provided in paragraphs (b) (2) and (3) of this section, any petition must be received by the Judge at his office on or before the twentieth day following his mailing of a copy of the decision to the parties.

(2) When there is no objection by any party, when an expedited proceeding has been directed pursuant to §2200.101, or for other good cause, the Judge is empowered to prescribe a shorter time for filing petitions for discretionary review following the mailing of his decision.

(3) Petitions for review of a Judge's decision may be filed directly with the Executive Secretary subsequent to the filing of the Judge's report. Such petitions will be considered to the extent that time and resources permit. Parties filing such petitions should be aware that any action by a Commission Member directing review must be taken within thirty (30) days following the filing of the Judge's report.

(4) In the case of proposed settlements or other proposed dispositions by consent of all parties, petitions for discretionary review shall not be allowed, except for good cause shown.

(c) A petition should contain a concise statement of each portion of the decision and order to which

exception is taken and may be accompanied by a brief of points and authorities relied upon. The inclusion of precise citations to the record or legal authorities, as the case may be, will facilitate prompt review of the petition.

(d) Failure to act on such petition within the review period shall be deemed a denial thereof.

(e) Statements in opposition to petitions for discretionary review may be filed at the times and places specified in this section for the filing of petitions for discretionary review. Any Statement shall contain a concise statement on each portion of the petition to which it is addressed.

(f) An original and three copies of any petition or statement shall be filed with the Commission.

Rule 91a Review by the Commission.

(a) Review is a matter of sound discretion of a member of the Commission.

(b) In exercising discretion, a Commission member will consider assertions of the following:

(1) A finding of material fact is not supported by a preponderance of the evidence.

(2) The decision is contrary to law or to the duly promulgated rules or decisions of the Commission.

(3) A substantial question of law, abuse of discretion, or policy is involved.

(4) A prejudicial error of procedure was committed.

(c) When a petition for discretionary review is granted, review shall be limited to the issues specified in the petition, unless the order for review expressly provides differently.

(d) At any time within thirty days after the filing of a decision of a judge, a case may also be directed for review by a member upon his own motion upon any ground that could be raised by a party, but the issues would normally be limited to novel questions of law or policy or questions involving conflict in Administrative Law Judges' decisions. Any direction for review shall state the issues with particularity. Except in extraordinary circumstances, the Commission's power to review is limited to issues of law or fact raised by the parties in the proceedings below.

Rule 92 Stay of final order.

(a) Any party aggrieved by a final order of the Commission may, while the matter is within the jurisdiction of the Commission, file a motion for a stay.

(b) Such motion shall set forth the reasons a stay is sought and the length of the stay requested.

(c) The Commission may order such stay for the period requested or for such longer or shorter period as it deems appropriate.

Rule 93 Oral argument before the Commission.

(a) Oral argument before the Commission ordinarily will not be allowed.

(b) In the event the Commission desires to hear oral argument with respect to any matter it will advise all parties to the proceeding of the date, hour, place, time allotted, and scope of such argument at least 10 days prior to the date set.

Subpart G - Miscellaneous Provisions**Rule 100 Settlement.**

(a) Settlement is encouraged at any stage of the proceedings where such settlement is consistent with the provisions and objectives of the Act.

(b) Settlement agreements submitted by the parties shall be accompanied by an appropriate proposed order.

(c) Where parties to settlement agree upon a proposal, it shall be served upon represented and unrepresented affected employees in the manner set forth in rule 7 hereof. Proof of such service shall accompany the proposed settlement when submitted to the Commission or the Judge.

Rule 101 Expedited proceeding.

(a) Upon application of any party or intervenor or upon his own motion, any Commissioner may order an expedited proceeding. Contests arising under §§ 2200.34 and 2200.35 shall be placed on a special docket and treated as expedited proceedings before Administrative Law Judges. Cases arising under these sections which are directed for review before the Commission shall also be placed on a special docket

for review, and shall be treated as expedited proceedings under this section.

(b) When such proceeding is ordered, the Executive Secretary shall notify all parties and intervenors.

(c) The Judge assigned in an expedited proceeding shall make necessary rulings with respect to time for filing of pleadings and with respect to all other matters, without reference to times set forth in these rules, shall order daily transcripts of the hearing, and shall do all other things necessary to complete the proceeding in the minimum time consistent with fairness.

Rule 102 Standards of conduct.

All persons appearing in any proceeding shall conform to the standards of ethical conduct required in the courts of the United States.

Rule 103 Ex parte communication.

(a) There shall be no *ex parte* communication, with respect to the merits of any case not concluded, between the Commission, including any member, officer, employee, or agent of the Commission who is employed in the decisional process, and any of the parties or intervenors.

(b) In the event such *ex parte* communication occurs, the Commission or the Judge may make such orders or take such action as fairness requires. Upon notice and hearing, the Commission may take such disciplinary action as is appropriate in the circumstances against any person who knowingly and willfully makes or solicits the making of a prohibited *ex parte* communication.

Rule 104 Restrictions as to participation by investigative or prosecuting officers.

In any proceeding noticed pursuant to these rules, the Secretary shall not participate or advise with respect to the report of the Judge or the Commission decision.

Rule 105 Inspection and reproduction of documents.

(a) Subject to the provisions of law restricting public disclosure of information, any person may, at

the offices of the Commission, inspect and copy any document filed in any proceeding.

(b) Costs shall be borne by such person.

Rule 106 Restrictions with respect to former employees.

(a) No former employee of the Commission or the Secretary (including a member of the Commission or the Secretary) shall appear before the Commission as an attorney or other representative for any party in any proceeding or other matter, formal or informal, in which he participated personally and substantially during the period of his employment.

(b) No former employee of the Commission or the Secretary (including a member of the Commission or the Secretary) shall appear before the Commission as an attorney or other representative for any party in any proceeding or other matter, formal or informal, for which he was personally responsible during the period of his employment, unless 1 year has elapsed since the termination of such employment.

Rule 107 Amendments to rules.

The Commission may at any time upon its own motion or initiative, or upon written suggestion of any interested person setting forth reasonable grounds therefor, amend or revoke any of the rules contained herein. Such suggestions should be addressed to the Commission at 1825 K Street, N.W., Washington, D.C. 20006.

Rule 108 Special circumstances; waiver of rules.

In special circumstances not contemplated by the provisions of these rules, or for good cause shown, the Commission may, upon application by any party or intervenor, or on its own motion, after 3 days notice to all parties and intervenors, waive any rule or make such orders as justice or the administration of the Act requires.

Rule 109 Penalties.

(a) All penalties assessed by the Commission are Civil.

(b) The Commission has no jurisdiction under §17(e), (f), and (g) of the Act and will conduct no proceeding thereunder.

Rule 110 Official Seal Occupational Safety and Health Review Commission.

The seal of the Commission shall consist of: A gold eagle outspread, head facing dexter, a shield with 13 vertical stripes superimposed on its breast, holding an olive branch in its claws, the whole superimposed over a plain solid white Greek cross with a green background, encircled by a white band edged in black and inscribed "Occupational Safety and Health Review Commission" in black letters.