CONN
MACIEL
CAREY

Eric J. Conn
econn@connmaciel.com
202-909-2737

November 16, 2018

By E-Mail (rbailey@oshrc.gov)
Mr. Ron Bailey
Attorney-Advisor
Occupational Safety and Health Review Commission
One Lafayette Centre
1120 20th Street, NW, 9th Floor
Washington, DC 20036-3419

Re: Advance Notice of Proposed Rulemaking, 29 CFR 2200, Docket # OSHRC-2018-0007

Dear Mr. Bailey:

We provide these comments on behalf of the OSHA defense attorneys and paralegals in the national OSHA Practice Group at the law firm Conn Maciel Carey LLP. The attorneys and professionals at the firm who focus their practice on OSHA law have a combined 125+ years of experience practicing before the Occupational Safety and Health Review Commission ("Commission" or "OSHRC").

We thank you for the opportunity to respond to the Commission's request for comments regarding various rules of procedure, as set forth at 83 Fed. Reg. 45336 (Sept. 7, 2018). Our comments below address the specific areas about which the Commission seeks comments, and also discuss a number of other procedural rules that we believe the Commission also should consider amending.

1. Should the threshold amount for cases referred for mandatory settlement proceedings be increased (from the current threshold of $100,000)?

No. If anything, the rules for triggering mandatory settlement proceedings should be amended to sweep in more, not fewer cases.

As an initial point, the attorneys at Conn Maciel Carey believe OSHRC's Mandatory Settlement Proceedings program is extremely effective. So often a case that feels virtually

impossible to settle is either settled at the in-person mediation with the OSHRC ALJ or following the mediation as a result of the ALJ's effective mediation. As a general rule, alternative dispute resolution is worthwhile, but the Mandatory Settlement Proceedings Program in particular, is effective because the "mediator," in these cases an experienced OSHRC ALJ, has a unique perspective to offer to the Parties. The ALJ's are uniquely knowledgeable about the underlying legal issues in dispute, can project for the Parties the litigation that will follow if the case is not settled, and have earned the respect and credibility of the OSHA Bar (both the defense bar and the Department of Labor's Solicitor's office), so they are especially well-positioned to move tough cases to settlement. We rarely have a case that starts in Mandatory Settlement Proceedings and is then referred back out. We have not seen the statistics in a few years, but we know our experience is not unique – the Program has an extremely high success rate. In short, the Program works. It saves employers, OSHA and OSHRC valuable resources.

Second, in our experience, cases with penalties greater than $100,000 but less than $400,000 are the real sweet spot for successful Mandatory Settlement Proceedings. Note, it is possible, in fact quite likely, that cases with lower initial penalties also would fare particularly well in the Mandatory Settlement Proceedings, but those cases are not included in the Program today. On the flip side, in our experience, large cases (e.g., half million dollar-plus cases) are less likely to be resolved in the Mandatory Settlement Proceedings, often requiring at least some discovery and sometimes a full hearing to achieve resolution. So it seems to us that shifting the threshold upwards from $100,000 would be a move in the wrong direction, excluding the very cases that are most likely to benefit from an OSHRC ALJ mediator.

Third, we understand the origin of this possible rule change is the 2016 civil penalties inflation adjustment that has significantly increased OSHA's maximum civil penalty authority. However, regardless of OSHA's penalty authority, or how OSHA may choose to define for itself what is a "significant case," the impact of a $100,000 fine on an employer has not changed. Likewise, the fact that the penalty authority increase has resulted in an increase in $100,000-plus enforcement actions, that also does not change what a $100,000 fine feels like to an employer, particularly the average employer impacted by OSHA enforcement (the majority of which are small and medium sized employers).

If a motivating factor for this potential rule change is the increased burden on OSHRC ALJs because of the increasing number of $100,000-plus cases, we reiterate that the Mandatory Settlement Proceedings, on balance, save OSHRC resources because mandated mediation for those low $100,000 cases will continue to drive settlements earlier in the process.

In sum, we believe $100,000 remains an appropriate threshold to trigger Mandatory Settlement Proceedings. If anything, we would encourage OSHRC to lower the threshold to $75,000, or, alternatively, for the Program to provide a better mechanism to facilitate the Parties mutually agreeing to move an otherwise ineligible case into Mandatory Settlement Proceedings.

2. Should electronic filing be mandatory?

Yes, the use of the OSHRC E-File System should be mandatory. The electronic filing system is much more efficient and reliable than filing by other methods because all parties obtain an immediate confirmation that a pleading has been submitted, and, assuming the filing is in order, a confirmation that the pleading has been accepted is received soon after the

submission. The instructions for using the E-File System are also clear and easy to follow. And the OSHRC E-File System is user-friendly; it does not pose a challenge for even the least technologically savvy among us.

We do not believe express exceptions are necessary, but of course, the Commission can always retain discretion to grant an exception upon request in the rare circumstance that an employer has no access to the internet, even at a public library.

3. Computation of Time, 29 C.F.R. 1910.2200.4

Paragraph (a) of 1910.2200.4 is clear and unambiguous, but we believe paragraph (b) is convoluted. The paragraph begins by stating that you should not apply paragraph (a) if serving by mail, and then goes on to state in the last sentence that you should comply with paragraph (a) by not counting Saturday, Sunday or Federal Holidays if the prescribed period is less than 11 days. We understand the meaning of the section, but newcomers generally find it confusing. It would be easier to follow if the rule were amended to simply state:

> (b) Service by mail. Where service of a document, including documents issued by the Commission or Judge, is made by mail pursuant to §2200.7, a separate period of 3 days shall be allowed, in addition to the prescribed period, for the filing of a response. This additional 3-day period shall commence on the first calendar day following the day on which service has been made. Where the period is 11 days or more, begin counting on the first day following the expiration of the 3-day period. If the prescribed period is less than 11 days, begin counting on the first day after service that is not a Saturday, Sunday or Federal Holiday.

4. Definition of affected employee—should it be broadened?

No. To remain in accord with the OSH Act, the OSHRC Rules should continue to limit litigation rights to employees of the employer who have a potential to be exposed to the subject hazard. The current rule is reasonably tailored to the nature of litigation before the

Review Commission and to the interests of employees and employers affected by that litigation. Expanding the parties to an OSHRC litigation beyond the employees of the employer, or beyond employees who may be exposed to the subject hazard, would complicate, lengthen, and likely confuse the process–in sum, this expansion would simply muck up the process. Non-employees and those not working in areas affected by the citations could not reasonably provide better value to the litigation process than those employees actually exposed to the hazard. Furthermore, expanding the definition may create a slippery slope to opening up participation in OSHRC proceedings to a host of other interests; e.g., interest groups, trade associations, the general public, other agencies or governmental entities, like the Chemical Safety Board or local building inspectors, etc. This could create a circus environment around a system that currently effectively serves the interests of all employees, and such expansion would most certainly increase the cost of the litigation for all parties and strain the resources of the Commission.

5. Should the Commission allow Parties to cite to cases contained in OSHRC's website under "Decisions"?

Yes. Although these cases may not carry the precedential weight of published cases, they are still instructive as to the Commission's reasoning. Simply because a decision has not been published should not preclude it from being cited in pleadings in cases before an ALJ or the Commission.

Federal Rule of Appellate Procedure 32.1, which became effective in 2007, allows attorneys to cite unpublished opinions that were decided on or after January 1, 2007 in the federal circuit courts. The new federal rule does not dictate the precedential value that federal circuit courts shall assign to unpublished opinions, but attorneys may cite them to the courts. As the Commission follows many of the Federal Rules already, it makes sense

for the Commission to adopt this rule as well. It will be clear to the ALJs or the Commission that a case is unpublished, and they can determine the appropriate weight to give the referenced case.

6. Other OSHRC Rule Changes to Consider

Although the request for comment did not address the rules we comment on below, our OSHA Practice would like to ask the Commission to consider our comments and feedback, and consider our suggested amendments to these rules.

a. §2200.57 Issuance of subpoenas - Choice to issue *ex parte*.

We have puzzled for years why, pursuant to OSHRC Rule §2200.57(a), third party subpoenas may issue upon applications made either with notice to the other party or *ex parte*. The rule establishes no standard or circumstances for the issuance of an *ex parte* subpoena, so it is hard to imagine a scenario when the Secretary would opt to give notice to the employer when seeking a third-party subpoena. Employers ought to have an opportunity to bring valid objections and motions to quash such subpoenas in all instances.

As an anecdote, in a recent case, the Secretary subpoenaed records from one of our client's insurers. Due to what seemed to be some intimidation by the Solicitors office, the insurer did not separately notify our client about the subpoena or its response to the subpoena. Had our client known about the subpoena, it could have raised several legitimate bases to quash the subpoena.

b. Automatic disclosure of OSHA inspection file.

We recommend the Commission consider a new rule to require the Secretary to provide the employer with certain automatic disclosures shortly after receipt of a Notice of Contest or after the employer files an Answer and Affirmative Defenses. Rule 2200.200 covering Simplified Proceedings already requires such disclosures of basic records from

the inspection file, and that disclosure, in our experience, has often facilitated much more productive early settlement discussions. Likewise, litigation before the Cal/OSHA Appeals Board requires a very simple, early disclosure to employers of the entire inspection file. Our experience is that these disclosures also lead to productive, early settlement discussions in Cal/OSHA cases.

We have found that Informal Conferences and post-Conference formal settlement discussions are often hampered because the parties are not operating from the same basic set of facts. This problem would be much improved with early, automatic disclosure of the OSHA inspection file.

c. Reply briefs should be allowed without a motion for leave.

Under current Commission procedure, Parties are not permitted an automatic Reply to Opposition motions. We have seen motions for leave to Reply denied more often than they are granted. That process creates perverse incentives to engage in bad faith litigation. For example, we had a Solicitor refuse to make various OSHA representatives available for depositions, without providing an explanation of the basis for the refusal. We were forced to move for leave to depose the OSHA representatives. For the first time in the Opposition to our motion, the Solicitor introduced arguments about a senior executive exception to the general rule in favor of liberal discovery. Without foreknowledge of that exception being raised, the employer could not dispute the application of the exception in its motion. Yet, the ALJ denied the employer's motion for leave to Reply, denying our client the opportunity, for the first time, to argue against the discovery limitation. Likewise, in a recent motion for summary judgment, we relied heavily on admissions made by OSHA's 30(b)(6) witness. Inexplicably, in the government's Opposition to the motion, OSHA "ran

away" from the admissions and entirely changed its rationale for the decision to issue the citation. Our motion for leave to Reply to address the new theory of the government's case was denied.

In short, by not allowing Reply briefs as an automatic right, the Rules incentivize hiding the ball in litigation, rewarding those parties who do so because new positions and theories can be presented without challenge. A rule allowing for an automatic Reply could include reasonable limitations (e.g., page limits and/or restrictions on scope to new arguments or positions introduced in an Opposition motion). The appropriate place for such a rule would be at §2200.40, between current subparts (c) and (d).

d. Automatic stay of discovery for cases involving a fatality and an alleged willful violation pending notice regarding the Secretary's intent to make a criminal referral.

Our experience informs us that OSHA's solicitors are waiting longer and longer to declare the government's intentions around potential criminal investigations. Indeed, we have seen multiple cases where the decision to refer the file to the U.S. Attorney's Office was made on the eve of a scheduled mediation under the Mandatory Settlement Proceedings. In those instances, the Solicitors are able to take advantage of agreements with the employer and the ALJ about limited discovery; i.e., the Solicitor has taken some limited discovery under the civil discovery standard, and provided the information obtained to a criminal prosecutor. The current unchecked discretion available to solicitors in this area provides an opportunity for abuse of the civil litigation process, with potentially dire consequences to employers.

Establishing deadlines for solicitors to provide notice of their intention regarding a criminal referral, or setting an automatic stay of discovery until those intentions are

communicated to the ALJ and the employer are ways this potential for abuse can be remedied.

e. Include Case Name in the E-File System Auto-generated Emails.

Because many attorneys and legal assistants are involved in multiple cases before the Commission simultaneously, it would be helpful to have the auto-generated E-File system emails include the case name, not just the docket number, in the subject line of the emails issued without an attachment. It is time consuming to look up the docket number identified in the email, then log into the system only to find out that someone filed a notice of appearance or other non-pressing filing.

f. Consider amending the discovery rules regarding Interrogatories and Requests for Admission to allow Parties to propound the greater of either twenty-five or five times the number of citation items.

The limit of twenty-five interrogatories and requests for admission is often insufficient in cases involving numerous citation items. A case with dozens of citation items should not involve the same discovery limit as a case involving only a single citation item. This is especially true of cases with citations for willful or repeat violations. Expanding the number of discovery requests based on the size of the enforcement action will assist the parties in understanding the issues in dispute, without wasting the ALJ's time dealing with discovery motions and disputes. We recommend the limit be set at the greater of twenty-five, or some multiplier (we propose five) of the number of citation items in dispute.

* * * * * * *

We hope our comments are useful to the Commission in its review of the OSHRC Rules of Procedure.

Respectfully,

Eric J. Conn
On behalf of the OSHA Practice Group at Conn Maciel Carey LLP