



November 16, 2018

The Honorable Heather L. McDougall
Chairman
U.S. Occupational Safety and Health Review Commission
One Lafayette Centre
1120 20th Street NW, Ninth Floor
Washington, DC 20036-3457

VIA ELECTRONIC SUBMISSION: rbailey@oshrc.gov

**Re: Comments on Advance Notice of Proposed Rulemaking,
29 CFR part 2200, 83 Fed. Reg. 45366, (September 7, 2018)**

Dear Ms. McDougall:

The Coalition for Workplace Safety (“CWS”) is comprised of a group of associations and employers who believe in improving workplace safety through cooperation, assistance, transparency, clarity, and accountability. The CWS believes that workplace safety is everyone’s concern. Improving safety can only happen when all parties - employers, employees, and OSHA - have a strong working relationship. The U.S. Occupational Safety and Health Review Commission’s (“OSHRC” or “Review Commission”) rules and procedures apply to CWS members and their membership when they elect to contest a Notification of Citation and Penalty issued by the Occupational Safety and Health Administration (“OSHA”).

On behalf of its members, CWS submits the following recommendations to the Occupational Safety and Health Review Commission’s Advance Notice of Proposed Rulemaking, (“ANPR”) 29 CFR part 2200, 83 Fed. Reg. 45366, (September 7, 2018). OSHRC is currently reexamining the agency’s rules of procedure as set forth in 29 CFR part 2200. As part of this process, OSHRC has requested recommendations from the public as to which rules would benefit from revision. One specific aspect of the current rules and procedures on which the agency requested recommendations was the definition of “affected employee” pursuant to 29 C.F.R § 2200.1(e) and whether that definition should be broadened. 83 Fed. Reg. at 45367. For the reasons outlined below, CWS recommends that the definition of “affected employee” does not need to be revised.

I. The current definition of affected employee is well defined and easily applied by judges.

Section 2200.1(e) currently defines “affected employee” as an employee of a cited employer who is exposed to or has access to the hazard arising out of the allegedly violative circumstances, conditions, practices or operations. 29 C.F.R. § 2200.1(e).

The CWS is comprised of associations and employers who believe in improving workplace safety through cooperation, assistance, transparency, clarity, and accountability.

In August 1971, the Review Commission published its first set of rules and procedures as interim rules pursuant to section 12(g) of the Occupational Safety and Health Act of 1970. 36 Fed. Reg. 17409 (August 31, 1971). Those interim rules did not provide a definition for affected employee but provided that “affected employees or authorized employee representatives shall be deemed parties.” *Id.* Section 2200.5 addressed the individuals and entities that were considered to be parties to proceedings. At the time of the issuance of those interim rules, the Review Commission sought comments to the proposed interim rules. In August 1972, the Review Commission issued a Notice of Proposed Rulemaking (“NPRM”) revising the interim rules based on the public comments the agency received.

As part of that NPRM, the Review Commission defined “affected employee” as “an employee of a cited employer who is exposed to the alleged hazard described in the citation, as a result of his assigned duties.” 37 Fed. Reg. 15470 (August 2, 1972). Affected employees were permitted to elect party status at any time before the beginning of the hearing. *Id.* at 15471. The final Rules of Procedure kept the definition of “affected employee” as proposed. 37 Fed. Reg. 20238 (September 28, 1972).

In 1986 the definition of affected employee was revised to mean “an employee of a cited employer who is exposed to or has access to the hazard arising out of the allegedly violative circumstances, conditions, practices or operations.” 51 Fed. Reg. 23184, 23195 (June 25, 1986).

Thus, the definition of affected employee has held essentially the same meaning since 1972. In fact, a review of Administrative Law Judge (“ALJ”) and Review Commission case law establishes only a few cases that even mention Section 2200.1(e). CWS does not believe there is evidence to support a basis or need for revising this definition, which has been in place and applied consistently over the last forty-five years.

In a January 23, 2015, letter to Thomasina Rogers, then Chair of the Review Commission, the Occupational Safety & Health Law Project, on behalf of several labor organizations and union alliances, urged OSHRC to broaden the definition of “affected employee.” Specifically, the letter requested that OSHRC “amend the definition of ‘affected employee’ ...to eliminate the requirement that only employees of the cited employer may be ‘affected employees.’” Instead, they proposed to define an affected employee as “any employee who performs work at the site and who is exposed to or has access to the hazard arising out of the allegedly violative circumstances, conditions, practices or operations.”

Assuming the Review Commission would propose the definition recommended by the Occupational Safety & Health Law Project, the definition and its application to Commission proceedings would become unmanageable for judges and would invite any employee on a multi-employer site to claim party status as an affected employee. By implication, this change in the definition of “affected employee” would allow a labor organization with a collective bargaining relationship that represents “affected employees” to claim party status. Section 2200.20(a).

Moreover, by broadening the definition it would require judges to analyze whether employees of non-cited employers had access to the hazard. Currently there is a bright line rule

for who can be an “affected employee” - an individual either is or is not an employee of the cited employer. If the definition is broadened, where would the line be drawn as to which employees have access to the hazard? Would it be appropriate for a labor organization to have party status merely because one of its members walked past equipment with a non-compliant ground-fault circuit interrupter? Would that be an example of an employee who has access to a hazard? Similarly, what about a laborer who is not exposed to excessive noise on an 8-hour time weighted average but walks near a high noise area at various points during his shift? Or, what about employees who walk through a construction site where a crane is being used? Would it be appropriate to consider employees of a subcontractor who regularly walk past a regulated silica area in a foundry to have access to the hazard? The examples of scenarios that could arguably give rise to party status by broadening the definition of affected employee to those who merely have access to the alleged hazard are endless.

Further, OSHA itself defines an affected employee as an employee who is exposed to the hazards identified as violations in a citation. CPL-02-00-160, Field Operations Manual, August 2, 2016. So in a multi-employer scenario, if an employee is exposed to a hazard, irrespective of who created, controlled or corrects the hazard, the employee’s employer will be cited as an exposing employer and therefore would have an opportunity to participate in proceedings before the Review Commission as an affected employee.

CWS’s comments are not intended to imply that employees or entities who have legitimate legal interests should be denied the ability to participate in proceedings before the Review Commission. To the contrary, CWS does believe that employees or entities with legitimate legal interests should have an opportunity to participate and that the current definition, in conjunction with intervention rights, adequately protects all interested parties and provides sufficient opportunity to participate in Review Commission proceedings. Broadening the current definition is judicially inefficient, particularly in light of other legally available avenues of obtaining party status, such as intervention.

II. There are other legal avenues available to participate in proceedings before OSHRC without having to broaden the definition of affected employee.

Section 2200.21 of the Commission’s Rules grants non-parties the ability to participate in contested citation proceedings by filing a petition for leave to intervene. A non-party can obtain status as an intervener by showing their interest in the proceeding and that their participation will assist in the determination of issues and such participation will not delay the proceeding. 29 C.F.R. 2200.21(b).

There is no reason to believe that the current process of party status and intervention in any way denies employees who are not employed by the cited employer a fair opportunity to participate in such proceedings. See, *Georgia-Pacific Corp.*, 15 BNA OSHC 1127 (No. 89-2713, 1991)(noting that if a former employee’s interests were not adequately protected by the authorized employee representative the employee could seek intervention.); *Brown & Root, Inc.*, 7 BNA OSHC 1526(No. 78-127, 1979) (holding that a union which represents employees of a subcontractor but does not represent employees of the cited employer cannot be granted party status, but can move for leave to enter the proceeding as an intervener.)

In *Brown & Root, Inc.*, for example, a labor organization represented three employees of a subcontractor at the worksite who was not the cited employer. These employees were allegedly exposed to the hazardous condition for which Brown & Root was cited. While the labor organization was denied party status under 2200.1(e) because it did not represent affected employees as the term is defined, it was granted intervention because

[a]s the authorized representative of employees allegedly exposed to a hazard that was cited as a serious violation of the Act, petitioner has shown sufficient interest in the proceeding. Respondent does not contest that the union has expertise in the steel erection industry that would assist in determining whether respondent failed to brace adequately the structural steel framing of the boiler structure that collapsed. The union's knowledge of structural steel construction techniques and procedures may lend significant assistance to a complete determination of the facts and issues in question. Finally, there has been no showing that granting the petitioner leave to intervene will unnecessarily delay the proceeding. Certainly some delay may be occasioned by the introduction of another party to a proceeding, but we emphasize the word "unnecessarily" in rule 21(b). In view of the union's interest in protecting its members and its potential contribution as outlined herein, we conclude that intervention will not "unnecessarily" delay the proceedings.

Brown & Root, Inc., 7 BNA OSHC at 1526.

Moreover, the Commission stressed that "intervention should be freely granted to petitioners unless their participation in the proceeding unduly hinders efficient resolution of the case." *Id.*

In urging the Review Commission to broaden the definition of affected employees, the Occupational Safety & Health Law Project's 2015 letter suggests that employees on multi-employer construction sites, as well as temporary or contract workers "can actively assist in the Commission's proceedings...and the employees affected by the citation should be allowed to participate in OSHRC's proceedings. Under the current rules, they would not be permitted to do so."

While it is true such employees would not be affected employees under the current definition, there is no basis to believe that such employees would be denied intervener status upon adequately showing their interest in such a proceeding. See, *Southern Scrap Materials Co., Inc.* 23 BNA OSHC 1596, 2012 OSHD (CCH) P33,177 (No. 94-3393, 2011) (holding a former employee was entitled to party status as an affected employee and that the employee "would have otherwise satisfied the requirements for intervention under Commission Rule 21, 29 C.F.R. § 2200.21.")

For the reasons stated above, CWS asserts that the definition of affected employee at 29 C.F.R. § 2200.1(e) does not need to be revised since the current Review Commission rules afford employees and other interested parties mechanisms for meaningful participation in Review Commission proceedings.

For the Coalition for Workplace Safety,

Air Conditioning Contractors of America
American Bakers Association
American Road & Transportation Builders Association
American Trucking Associations
Associated Builders and Contractors
Associated General Contractors
Building Service Contractors Association International
California Chamber of Commerce
Flexible Packaging Association
Global Cold Chain Alliance
Industrial Fasteners Institute
Industrial Minerals Association - North America
Institute of Makers of Explosives
Mason Contractors Association of America
Mechanical Contractors Association of America
Motor & Equipment Manufacturers Association
National Automobile Dealers Association
National Cotton Ginners' Association
National Electrical Contractors Association
National Lumber & Building Material Dealers Association
National Tooling and Machining Association
National Utility Contractors Association
National Association of Home Builders
North American Meat Institute
Precision Machined Products Association
Retail Industry Leaders Association
Sheet Metal and Air Conditioning Contractors' National Association (SMACNA)
Southeastern Cotton Ginners Association
Texas Cotton Ginners' Association
U.S. Chamber of Commerce

Of Counsel

Tressi Cordaro, Esq.
Attorney at Law
JACKSON LEWIS P.C.
10701 Parkridge Blvd
Suite 300
Reston, VA 20191