

**Guide to Review Commission Procedures**  
**Occupational Safety and Health Review Commission**

**June 2019**

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## **Section 1 – Introduction**

### **The Review Commission**

The Occupational Safety and Health Review Commission ("Commission") is an independent agency of the U.S. Government that was established by the Occupational Safety and Health Act of 1970 ("Act") to be like a court that resolves certain disputes under the Act. The Commission has three members who are appointed by the President of the United States and confirmed by the Senate for six-year terms. It employs Administrative Law Judges to hear and decide cases, which may include settlement proceedings.

The Act was passed by Congress to “assure safe and healthful working conditions for working men and women.” The Act also established another agency, the Occupational Safety and Health Administration (“OSHA”), which is part of the U.S. Department of Labor, to enforce the law. OSHA issues occupational safety and health standards that an employer must follow. As part of its enforcement responsibilities, OSHA may also conduct an inspection of a workplace. If OSHA’s inspectors find what they believe are unsafe or unhealthy conditions, they may issue a **citation** to an employer. A citation includes allegations of workplace safety or health violations, proposed penalties, and proposed dates by which the employer must correct the alleged hazardous conditions.

If the cited employer or any of its employees or an employee representative disagrees with the citation, they may then file a timely **notice of contest**. The Commission (which is **completely independent** of OSHA) then comes into the picture to resolve the dispute over the citation.

### **Purpose of This Guide**

This Guide is intended to inform employers, employees, and other interested persons about Commission proceedings. It provides an overview of the proceedings conducted before the Administrative Law Judges and the Commission Members and it is primarily intended as a guide to employers who have contested an OSHA citation. It will also be useful to other persons interested in a general overview of the Commission and its procedures.

The Commission also has a **Guide to Simplified Proceedings** and an **Employee Guide to Review Commission Procedures** that are both posted on the Commission website, located at <https://www.oshrc.gov>. Copies of any of these guides may also be obtained by writing or calling:

Executive Secretary  
U.S. Occupational Safety and Health Review Commission  
1120 20th Street, N.W., 9th Floor  
Washington, D.C. 20036-3457  
(202) 606-5400

### **Rules of Procedure**

The Commission’s Rules of Procedure are published in Part 2200 of Title 29, Code of Federal Regulations (“C.F.R.”). These Rules are posted on the Commission Website, <https://www.oshrc.gov>, or may be obtained by contacting the Commission’s Office of the Executive Secretary at the address or telephone number above. References to the Rules in this Guide state “see Rule” and the appropriate number. (For example, “see Rule 4” refers to 29 C.F.R. § 2200.4.)

This guide is intended to provide an overview of the Commission’s procedures and is not intended to be a substitute for the Rules of Procedure, which are followed in the Commission’s proceedings in deciding cases. Parties to cases should review the Rules and follow them in proceedings before judges and the Commission members.

### **Using This Guide**

This guide describes many of the documents and steps in proceedings before the Commission members and judges. Throughout this Guide, important terms are shown in **bold** and many are included in the **Glossary**.

### **Parties May Represent Themselves**

In proceedings before the Commission, an employer, union, or affected employee who is a **party** to a case may appear in person (self-represented), through an attorney, or through another representative who is not an attorney. However, proceedings before the Commission are legal in nature and certain

legal formalities must be followed. OSHA will be represented by lawyers from the **Office of the Solicitor** and the decision in the case may have consequences beyond the amount of the penalty. For example, a decision may require corrective actions at a worksite. Parties to cases should consider carefully whether to hire a lawyer to represent them in their case.

### **Time is of the Essence**

Many of the documents that parties are required to file, such as those needed to disagree with an OSHA citation or proposed penalty, must be filed within a specific time period. Failure to file documents as required could result in a citation issued to an employer by OSHA becoming a final order without an opportunity to have the case heard by a Commission judge. Therefore, parties to cases must respond promptly to communications received from the judge, the Commission, or any of the other parties to the dispute.

### **Electronic Filing**

If you are represented by an attorney or a non-attorney representative, that representative is responsible for making filings on your behalf and must file your documents electronically using the Commission's E-File System. Instructions for e-filing are available on the Commission website, located at <https://www.oshrc.gov>. If you are self-represented, you may choose to use the E-File System or to send your documents to the Commission's Executive Secretary or the judge assigned to your case via U.S. Mail. If you are self-represented and choose to e-file, you must continue to file all documents electronically for the duration of your case.

### **Sample Legal Documents**

The Appendixes contain forms and sample correspondence that may be used or referred to in preparing a case. These sample documents are mentioned throughout the Guide. The sample forms and correspondence are also available on the Commission website, <https://www.oshrc.gov>.

### **Questions About Commission Procedure**

Parties to cases with questions regarding the Commission's procedures in cases pending before a judge should contact the Legal Assistants in the Office of the Chief Administrative Law Judge at 202-606-5405. At other stages of the proceedings, inquiries should be directed to the Executive Secretary's Office at 202-606-5400. Commission employees cannot give legal advice or discuss the merits of a case, but they may be able to explain some Commission procedures.

## **Section 2 – Preserving Rights and Requesting Simplified or Conventional Proceedings**

### **OSHA Citation**

Cases that come before a Commission judge arise from inspections conducted by OSHA, an agency of the United States Department of Labor. When OSHA finds what it believes to be a **violation** at a worksite, it will notify the employer in writing of the alleged violation and the period of time OSHA thinks is reasonable for correction by issuing a written **citation** to the employer.

The period of time stated in the citation for an employer to correct the alleged violation is the **abatement period**. OSHA likely will also propose that the employer pay a monetary penalty.

The Act requires that the employer **immediately post a copy of the citation** in a place where **affected employees** will see it, to have legal notice of it. An affected employee is an employee who has been exposed to or could be exposed to any hazard arising from the cited violations.

### **Employer's Notice of Contest**

If an employer disagrees with any part of the OSHA citation—the alleged violation, the abatement period, or the proposed penalty—it **must notify OSHA in writing of that disagreement within 15 working days** (Mondays through Fridays, excluding Federal holidays) of receiving the citation. This written notification is referred to as a **notice of contest**, and if it is filed after the deadline, the employer is not usually entitled to have the dispute resolved by the Commission.

The written notice of contest must be **delivered to the Area Director of the OSHA office that mailed the citation within the 15 working day contest period**. But if the notice of contest is sent by U.S. Mail, the notice of contest will be timely if the mailing is postmarked within the 15 working day contest period. The Area Director's name and address will be listed on the citation. **A notice of contest must not be sent to the Commission or filed using the Commission's E-File System.**

### **Informal Conference with OSHA**

If a citation is issued, an employer may schedule an informal conference or engage in settlement discussions with the OSHA Area Director, **but this does not delay the 15 working day deadline for filing a notice of contest**. This means that if an informal conference is conducted that does not result in a written settlement agreement, and if a notice of contest is not filed within the 15 working day deadline, all citation items must be abated and all penalties must be paid.

### **Content and Effect of Notice of Contest**

The notice of contest is a written statement that an employer intends to contest (1) the alleged violations, (2) the specific abatement periods, and/or (3) the penalties proposed by OSHA. The notice should state in detail those matters being contested. (See Appendixes 1A, 1B.)

For example, if there are two citations and the employer wishes to contest only one of them, the citation being contested should be identified. If there are six different items alleged as violations in a single citation and the employer wishes to contest items 3, 4, and 6, those items should be specified.

If the employer wishes to contest the entire penalty, or only the amount for one citation or specific items of one citation, or only the abatement period for some or all of the violations alleged, this should also be specified.

For any item (violation) not contested, the abatement requirements must be fully satisfied and any related penalty must be paid to the Department of Labor. If the employer contests whether a violation occurred, the abatement period and the proposed penalty for that item is suspended until the Commission issues a final decision.

### **Notice of Docketing**

The OSHA Area Director sends the notice of contest, together with the citation and notification of proposed penalty, to the Commission. The Executive Secretary's Office then notifies the employer that the case has been received and assigns a docket number. This docket number must be included on all documents sent to the Commission.

### **Employee Notification**

At the time the employer receives the notice of docketing that the case has been filed and assigned a docket number, the Commission will send the employer a copy of a notice to be used to inform affected employees of the case. A pre-printed post card is sent to the employer with this notice; the employer returns the post card to the Commission to inform it that affected employees have been notified.

### **Assignment to a Judge**

After the case is docketed with the Commission, the parties will receive a notification from the Chief Administrative Law Judge (“Chief Judge”) that identifies the Commission judge assigned to the case.

### **Employees May Contest Abatement Period**

Even if the employer does not contest the citation, **unions** or **affected employees** can object to the abatement period provided in a citation. (See Appendix 1C.) **This must be done within 15 working days of the employer’s receipt of the citation.** The written notice of contest should state that the signer is an affected employee or a union that represents affected employees and that the signer wishes to contest the reasonableness of the abatement period.

The employee or the union **must deliver the written notice of contest to the Area Director of the OSHA office that mailed the citation, not the Commission.** But if the notice of contest is sent by U.S. Mail, the notice of contest will be timely if the mailing is postmarked within the 15 working day contest period. The Area Director’s name and address will be listed on the citation. (See Section 10 of the Act and Rules 20, 22 and 33.)

When affected employees or their unions contest the time allowed for abatement, and the employer does not contest the citation, the employer may in turn elect to participate. Once the abatement date has been contested, other employees or unions may likewise elect to participate.

### **Employees May Elect Party Status**

Employees may also elect party status in a case by filing a written notice of election at least 14 days before the hearing. A notice of election filed less than 14 days prior to the hearing is ineffective unless good cause is shown for not timely filing the notice. It must be served on (i.e., sent to) all other parties consistent with the requirements of Rule 7. (See Rule 20.)

### **Intervention by Other Employees**

An employee who is not employed by the cited employer but who performed work at the cited worksite and was exposed to or has access to the alleged violative condition may intervene in the case. Such an employee may file a petition to intervene at least 14 days before the hearing. A petition to intervene filed less than 14 days prior to the hearing is ineffective unless good cause is shown for not timely filing the petition. The petition must be served on all other parties consistent with the requirements of Rule 7. (See Rule 21.)

### **Party Requests for Simplified Proceedings**

A case heard by a Commission judge may proceed in one of two ways: conventional proceedings or Simplified Proceedings. Each method is described in detail in Sections 3 and 4 of this Guide. The Chief Judge may designate a case for Simplified Proceedings soon after the notice of contest is received at the Commission. Parties may also request Simplified Proceedings within 21 days of the date on the notice of docketing. If a case is not designated for Simplified Proceedings, conventional proceedings are in effect.

### **Simplified Proceedings or Conventional Proceedings**

Simplified Proceedings are appropriate for cases that involve less complex issues of law or fact and for which more formal procedures used in conventional proceedings are considered unnecessary to assure the parties a fair and complete contest. Simplified Proceedings are covered briefly in Section 4 of this Guide and in a separate guide that should be consulted by those persons interested in that method of hearing cases.

## **Section 3 – An Overview of Conventional Proceedings**

This section describes the major features of the Commission's hearings conducted under the conventional proceedings method as opposed to hearings conducted under Simplified Proceedings. Simplified Proceedings are explained briefly in Section 4 and in a separate guide that should be consulted by those persons interested in that method of hearing cases.

### **The Complaint**

Within 21 days of receipt of the employer's notice of contest, the Secretary of Labor must file a written **complaint** with the Commission. To meet the requirements of Rule 7, a copy must be served on the employer and any other parties. The complaint sets forth the alleged violation(s), the abatement period and the amount of the proposed penalty. (See Rule 34.) See Appendix 2A for an example of a complaint.

### **The Answer**

The employer must file a written **answer** to the complaint **with the Commission within 21 days** after the Secretary of Labor serves the complaint on all parties. The answer must contain a short, plain statement denying allegations of the complaint that the employer wishes to contest. **Any allegation not denied by the employer is considered to be admitted.** In addition, if the employer has a specific defense it wishes to raise, such as (1) the violation was due to employee error or failure to follow instructions, or (2) compliance with a standard was infeasible, or (3) compliance with a standard posed an even greater hazard, the answer must describe that defense. **If the employer fails to file an answer to the complaint on time, its notice of contest may be dismissed, and the citation and penalties may become final.** The answer must be filed with the Commission. If the employer is represented, the answer must be filed through the E-File System. If the employer is self-represented and has not elected to use the E-File System, it must be sent to:

Executive Secretary  
U.S. Occupational Safety and Health Review Commission  
1120 20th Street N.W., 9th Floor  
Washington, D.C. 20036-3457

or to the judge, once the case has been assigned to one. A copy of the answer must also be served on all parties, including the Secretary of Labor. (See Rule 34.) See Appendix 3 for an example of an answer.

### **Discovery**

Discovery is a procedure that allows one party to obtain information from another party or person before a hearing. Types of discovery in Commission cases include (1) written questions, called interrogatories; (2) oral statements taken under oath, which are depositions; (3) asking a party to admit the truth of certain facts, called requests for admissions; and (4) requests that another party produce certain documents or objects for inspection or copying. In conventional proceedings, any party can use these types of discovery without the judge's permission, except for depositions, which require that the parties agree to take depositions or that the judge order the taking of depositions after a party files a motion requesting permission to do so. (See Rules 51-56.)

### **Scheduling Order or Conference**

In conventional cases, discovery takes place after the answer is filed and before the hearing date. After the answer to the complaint is filed, the judge will issue an order setting a schedule for the case and may also hold a conference with the parties to clarify the issues, consider settlement, or discuss other ways to expedite the hearing. (See Rule 51.)

### **Withdrawal of Notice of Contest**

When a party decides to withdraw its notice of contest in connection with a settlement reached with the Secretary of Labor, the party should not send a notice of withdrawal to the Commission or judge. Communication from the parties that the notice of contest has been withdrawn will be included in the joint notification of settlement they send to the Commission or judge to end the case before the Commission.

A party may decide at any time to withdraw its contest of the citation and notification of penalty without having reached a settlement with the Secretary of Labor. When that decision is made, the party must send a **notice of withdrawal** to the Commission or judge and serve a copy on all parties in the case. See example at Appendix 8. Unless another party in the case (such as an employee or union) has objected to the abatement period stated in the citation, the Commission or judge will issue an order terminating the proceedings before the Commission. (See Rule 102.)

## **Settlement**

**The Commission encourages the settlement of cases.** Cases can be settled at any stage. The Secretary of Labor and the employer must agree to the settlement terms, and the affected employees or their union who have elected party status must be given an opportunity to provide input on all matters pertaining to the settlement before the agreement is finalized. (See Rule 100.)

Any party can also request that a Settlement Judge be appointed to help facilitate a settlement. (See Rule 120.)

Some cases will be referred to mandatory settlement before a Settlement Judge. Mandatory settlement applies only to cases with a total proposed penalty amount of \$185,000 or greater. This total penalty amount may be adjusted proportionately to match the penalty amounts that are set by law and that increase periodically with inflation. Any adjustments to this threshold penalty amount that occur after the publication of this Guide will be posted on the Commission's website, <https://www.oshrc.gov>. (See Rule 120.)

## **Hearings**

Hearings are governed by Rules 60-74. The parties will be notified of the time and place of the hearing at least 30 days in advance. The employer must post the hearing notice if there are any employees who do not have a representative and serve the hearing notice on all unions representing affected employees. The hearing is usually conducted as near the workplace as possible.

At the hearing, a Commission judge presides. The hearing enables the parties to present evidence on the issues raised in the complaint and answer. Each party to the proceedings may call witnesses, introduce documentary or physical evidence, and cross-examine opposing witnesses. In conventional proceedings, the Commission follows the Federal Rules of Evidence. Under these rules, evidence is only admitted into the record if it meets certain criteria that are designed to ensure that the evidence is reliable and relevant.

## **Hearing Transcripts**

A transcript of the hearing will be made by a court reporter. A copy may be purchased from the reporter.

## **Post-hearing Briefs**

After the hearing is completed and before the judge reaches a decision, each party is given an opportunity to submit to the judge proposed findings of fact and conclusions of law with reasons why the judge should decide in its favor. Proposed findings of fact are what a party believes actually happened in the circumstances of a case based upon the evidence introduced at the hearing. Proposed conclusions of law are how a party believes the judge should apply the law to the facts of a case. The statement of reasons is known as a **brief**. (See Rule 74.)



## **Judge's Decision and Petition for Discretionary Review**

After hearing the evidence and considering all arguments, the judge will prepare a decision based upon the evidence that was admitted (i.e., accepted into evidence by the judge) during the hearing and mail copies of that decision to all parties. The parties then can object to the judge's decision by filing a **Petition for Discretionary Review with the Commission's Office of the Executive Secretary** (see Appendix 6 for an example). **Instructions for submitting such a petition will be stated in the judge's letter transmitting the decision and in a Notice of Docketing of Administrative Law Judge's Decision issued by the Executive Secretary's Office.** See Rule 91 for further information on filing **Petitions for Discretionary Review.**

## **Decisions Final in 30 Days**

If a Commissioner does not direct review of a judge's decision, it becomes a final order of the Commission 30 days after the decision has been docketed. If a Commissioner does direct review, the Commission will issue its own written decision and that decision becomes the final order of the Commission.

Any party who is adversely affected by a final order of the Commission can appeal to a United States Court of Appeals. However, the courts usually will not hear appeals from parties that have not taken advantage of all possible appeal rights earlier in the case. **This means that a party who failed to file a petition for review of the judge's decision with the Commission likely will not be able to later appeal that decision to a court of appeals.**

## **Section 4 – An Overview of Simplified Proceedings**

### **What are Simplified Proceedings?**

Simplified Proceedings are designed to resolve small and relatively simple cases in a less formal, less costly, and less time-consuming manner. **The Commission's Chief Judge or the judge assigned to the case notifies the parties that the case will be heard under Simplified Proceedings.** Even though the legal process is streamlined, the proceedings still involve a hearing before a Commission judge with sworn testimony and witness cross-examination.

### **Major Features of Simplified Proceedings**

Under Simplified Proceedings:

1. Early discussions among the parties and the judge are required to narrow and define the disputes between the parties.
2. Limited, if any, motion practice is contemplated.
3. The Secretary of Labor is required to provide the employer with inspection details early in the process. In some cases, the employer may also be required to provide certain documents necessary to establish an affirmative defense, such as evidence of the employer's safety program, to the Secretary.
4. Discovery, which is the written exchange of information, documents and questionnaires between the parties before a hearing, is discouraged and permitted only when ordered by the judge.
5. Appeals of actions taken by the judge before the hearing and decision, such as asking the Commission to rule on the judge's refusal to allow the introduction of a piece of evidence, called interlocutory appeals, are not permitted.

- Hearings are less formal. The Federal Rules of Evidence, which govern other trials, do not apply unless the parties agree in writing that the Federal Rules of Evidence will apply in whole or in part. Each party may present oral argument at the close of the hearing. The judge may allow or require post-hearing briefs (written arguments explaining your position in the case) or statements of position upon request of either party or on the judge's own motion. (See Rule 209(e).) In some instances, the judge may render a decision "from the bench," which means the judge will state at the end of the hearing whether the evidence proved the alleged violations and will state the amount of the penalty the employer must pay, if a violation is found.

### **Cases Eligible for Simplified Proceedings**

It is possible that not every relatively small case eligible for Simplified Proceedings will be selected. (See Rules 202 and 203(a).) **The Chief Judge will assign cases for Simplified Proceedings or, if your case is not selected, you may request that it be assigned.** Cases appropriate for Simplified Proceedings are those with one or more of the following characteristics:

- relatively simple issues of law or fact with relatively few citation items,
- total proposed penalty of not more than \$30,000,
- a hearing that is expected to take less than two days, or
- a small employer whether appearing with or without an attorney.

Cases with willful or repeated violations or that involve a fatality are not deemed appropriate for Simplified Proceedings.

### **Employee or Union Contests to an Abatement Period**

Affected employees or their unions who file a notice of contest to an abatement period may also request Simplified Proceedings. (See Section 2, "Employees May Contest Abatement Period"). Simplified Proceedings may be appropriate to avoid the time and expense of a conventional hearing.

### **Requesting Simplified Proceedings**

If the total proposed penalties in a contested citation are between \$20,000 and \$30,000, the Chief Judge may designate your case for Simplified Proceedings. If the penalties are \$20,000 or less and your case has not already been designated for Simplified Proceedings, you may file a request for Simplified Proceedings if there is no allegation of willfulness or a repeat violation, and the case does not involve a fatality.

**You must file your request within 21 days of the docketing of your case by the Executive Secretary's Office.** The request must be in writing. You need not give any reason for requesting Simplified Proceedings. A letter saying simply "I request Simplified Proceedings," and indicating the Docket Number assigned to your case, is sufficient. (See Appendix 4.) The letter must be filed electronically through the Commission's E-File System or sent to:

Executive Secretary  
U.S. Occupational Safety and Health Review Commission  
1120 20th Street, N.W., 9th Floor  
Washington, D.C. 20036-3457

The Chief Judge or the assigned judge will then rule on your request.

Even though your case may be appropriate for Simplified Proceedings, that does not necessarily mean that your particular interests will be best served by requesting Simplified Proceedings. In addition to considering time and expense, you should base your decision on the facts of your case, the nature of your objections to the citation, what you will try to show the judge at the hearing, the amount of paperwork

involved if your case proceeds under conventional proceedings as compared to Simplified Proceedings, and whether you have legal representation.

Either way, Simplified Proceedings or conventional, the proceedings are legal in nature and the Secretary of Labor will be represented by an attorney. You have the right to represent yourself or to be represented by an attorney or by anyone of your choosing.

### **Complaint and Answer**

Once your case is selected for Simplified Proceedings, the complaint and answer are not required. However, until a case has been designated for Simplified Proceedings, conventional procedures will apply, so if a complaint has been served an answer must be timely filed. (See Rule 205(a).)

### **Notifying Other Parties**

**A copy of your request for Simplified Proceedings must be sent to the Regional Solicitor of the Department of Labor office for your region.** The address is on your notice of docketing. All employee representatives, including an employee union, that have elected party status must also be sent a copy of your request for Simplified Proceedings. **A brief statement indicating to whom, when, and how your request was served on the parties in the case must be received with the request for Simplified Proceedings.** An example of such a "Certificate of Service" follows (see Rule 203(b)):

**Example:** I certify that on June 1, 2019, a copy of my request for Simplified Proceedings was sent by first class mail to Jane Doe, Office of the Solicitor, U.S. Department of Labor, 123 Street, City, State Zip Code and to John Doe, President, Local 111, GHI International Union, 456 Street, City, State Zip Code. (See Appendix 2B.)

### **Objections to and Discontinuing Simplified Proceedings**

If you decide to object to the Chief Judge's assignment of your case to Simplified Proceedings or another party's request for Simplified Proceedings, you have 14 days to file a brief written statement with the judge assigned to your case or, if the case has not been assigned to a judge, with the Chief Judge, explaining why your case is not appropriate for Simplified Proceedings. (See Rule 204(b).)

If it appears that a case is not appropriate for Simplified Proceedings, the use of this method may be discontinued by the judge at the judge's discretion. At any time during the proceedings any party may also request that Simplified Proceedings be discontinued and that the matter continue under conventional proceedings.

**If you agree with another party's request to discontinue Simplified Proceedings, you should submit a letter saying so.** When all parties agree that a case is not appropriate for Simplified Proceedings, the judge is required to grant the request unless the request is filed less than 30 days before a scheduled hearing date. If the judge orders that a case be taken out of Simplified Proceedings, the case will proceed under the Commission's conventional procedures.

### **Pre-hearing Conference**

The judge may hold a pre-hearing conference to address possible settlement of the case and also to find out which factual and legal issues the parties agree on. This discussion may be conducted in person but is usually conducted by a telephone conference call. The judge may direct the parties to speak with one another to determine what facts and issues they agree on. The discussion may include the following topics (see Rule 207):

1. **Narrowing of Issues.** The parties should be prepared to discuss all areas in dispute and to resolve as many as possible by agreement. Where matters remain unresolved, the judge may issue an order that specifies the issues to be resolved at the hearing.
2. **A Statement of Facts.** The parties are expected to agree on as many of the facts as possible. Examples of facts about which the parties may agree include: the size and nature of the business, its safety history, details of the inspection, and the physical nature of the worksite.
3. **A Statement of Defenses.** An employer will be required to identify any specific defenses the employer may have to the citation. The burden is on the Secretary of Labor to establish that each violation occurred. However, an employer should be prepared to tell the judge all reasons why the employer believes that the citation is wrong.

An employer may also have “affirmative defenses.” An affirmative defense is a recognized set of circumstances in which an employer will be found not in violation even though the employer did not comply with the cited OSHA standard. For example, an employer may believe that the alleged violation was the result of an employee acting contrary to a work rule that has been effectively communicated and enforced. Or, an employer may think that compliance with the standard was impossible or infeasible, or would have resulted in a danger to employees that was greater than the danger that the standard was designed to prevent.

You should be aware that **the burden of proving an affirmative defense is on the employer.** Therefore, if an employer argues that a violation was the result of employee misconduct, at the hearing the employer will have to prove to the judge that it had an effectively communicated and enforced work rule. If an employer raises an affirmative defense, the judge may require it to provide the Secretary of Labor with certain documents before the hearing regarding the defense. For example, if an employer claims that an employee violated a written work rule, the employer will probably be required to provide the Secretary with a copy of its safety rules.

**It is critical that an employer set forth any affirmative defenses at the pre-hearing conference.** An employer may be prohibited from later asserting any defenses not raised at the pre-hearing conference.

4. **Witnesses and Exhibits.** The parties will be expected to identify the witnesses they intend to call at a hearing, and to identify and provide to the other parties copies of documentary exhibits (e.g., correspondence, photographs, safety policies) they intend to introduce to support their positions.

### **Review of the Judge’s Decision**

Any party adversely affected or aggrieved by the judge’s decision may petition the Commission for review of that decision.

No particular form is required for the petition (see Appendix 6). However, it should clearly explain why you believe that the judge’s decision is in error on either the facts or the law or both. **Review of a judge’s decision is at the discretion of the Commission. It is not a right.** (See Rules 91 and 210.)

Your petition should be filed no later than 20 days after the judge’s written decision is docketed. Under the Act, the Commission cannot grant any petition for review more than 30 days after the judge’s decision is docketed. Therefore, **your petition should be filed as soon as possible to obtain maximum consideration.**

The Commission will notify you whether your petition has been granted (see Appendix 7). If it is granted, your case will then proceed under the Commission’s conventional rules.

### **Section 5 – Other Important Things to Know**

## Appearances in Commission Proceedings

Any employer, employee, or union that initially files a notice of contest is automatically a party to the proceedings. Affected employees or their union may also choose to participate as a party where the employer has filed a notice of contest. Any party may be self-represented in a Commission proceeding (e.g., for an organization, through an employee of the organization). Alternatively, any party may appear through an attorney or through a non-attorney representative. (See Rule 22.) However, any individual that represents a party in a particular case before the Commission must either enter an appearance by signing the first document filed on behalf of the party or **intervenor**, or thereafter by filing an entry of appearance. (See Rule 23.)

Every party to the case must serve every other party or its representative with copies of every document it files with the Commission or judge. Service is made by email, first class mail, personal delivery, or facsimile transmission. Documents that are electronically filed must be simultaneously emailed to the other parties and intervenors to ensure that service of the document is accomplished on the same date that the document is e-filed with the Commission. (See Rules 7(c)(1), 8(c)(9).)

All notices the Commission sends to the parties will list the name, address, and email address of any self-represented party or a represented party's attorney or non-attorney representative. (See Rule 22.) Parties must do the same.

## Penalties

OSHA only **proposes** amounts which it believes are appropriate as penalties. These proposals automatically become penalties assessed against the cited employer when the enforcement action (the citation and proposed penalty) is not contested. Once a **citation or proposed penalty** is contested, the amount of the penalty for that citation, if any, will be decided by the Commission or a judge.

When a case goes to hearing before a Commission judge, the employer's evidence and argument on what penalty, if any, should be assessed, receives the same consideration as the evidence and argument of the Secretary of Labor.

The four factors that the Act requires the Commission to consider in determining the appropriateness of civil penalties are:

- The size of the business of the employer being charged,
- The gravity of the violation,
- The good faith of the employer, and
- The employer's history of previous violations.

The maximum amounts that may be assessed as civil penalties by the Commission under Section 17 of the Act are set by law and increase periodically as inflation increases.

## Private (Ex Parte) Discussions

Parties to cases before the Commission may not communicate ex parte (without the knowledge or consent of the other parties) with respect to the merits of a case with the judge (except a Settlement Judge), a Commissioner, or any employee of the Commission. In other words, no participant, directly or indirectly, may discuss the case or make any argument about a matter in a case to any Commission personnel unless done in the presence of the other participants who are given an equal opportunity to present their side, or unless it is done in writing and copies are sent to all other parties. Violation of this rule may result in dismissal of the offending party's case before the Commission. This prohibition does not, however, preclude asking questions about the scheduling of a hearing or other matters that deal only with Commission procedures. (See Rule 105.)

## **Petition for Modification of Abatement**

An employer who does not contest a **citation** is required to correct all of the violations within the **abatement period** specified in the **citation**. If the Commission upholds a contested citation, the employer must then correct the violation, with the **abatement period** starting on the date of the Commission's final order. If the employer has made a good faith effort to correct a violation within the **abatement period** but has not been able to do so because of reasons beyond the employer's control, the employer may file a **Petition for Modification of Abatement (PMA)**. This petition is filed with the **OSHA** area director and should be filed no later than the end of the next working day following the day on which abatement was to have been completed. It must state why the abatement cannot be completed within the given time. The PMA must be posted in a visible place where all affected employees can see it or near the location where the violation occurred. The PMA must remain posted for 10 working days. The Secretary of Labor may not approve a PMA until the expiration of 15 working days from its receipt.

At the end of the 15-day period, if the Secretary of Labor, affected employees, or their union object to the petition, the Secretary of Labor is required to forward the PMA to the Commission. After notice by the Commission to the employer and the objecting parties of its receipt of the PMA, each objecting party has 10 working days in which to file a response to the PMA setting out the reasons for opposing it. Modification of abatement proceedings before the Commission are conducted in the same way as notice-of-contest cases, except that they are expedited. The employer must establish that abatement cannot be completed for reasons beyond the employer's control and has the burden of proving the petition should be granted. In cases of this kind, the employer is called the Petitioner, the Secretary of Labor is called the Respondent. (See Rules 37 and 103.)

## **Expedited Proceedings**

In certain situations, time periods allowed for certain procedures are shortened. The Commission's Rules of Procedure provide that an **Expedited Proceeding** may be ordered by the Commission. If an order is made to speed up proceedings, all parties in the case will be specifically notified. All **Petitions for Modification of Abatement and all employee contests** are automatically expedited. Expedited proceedings are different from Simplified Proceedings. (See Rule 103.)

## **Maintaining Copies of Pleadings**

In order that affected employees may have the opportunity to be kept informed of the status of the case, the employer must keep available at some convenient place copies of all pleadings filed in the case so they can be inspected and copied at reasonable times by affected employees. (See Rule 7(g).)

## **Section 6 – Descriptive Table of Conventional Proceedings for Contesting an OSHA Citation**

### **Events Common to All Proceedings**

- Employer files notice of contest with OSHA office that mailed the citation within 15 working days of receiving the citation.
- Employer receives notification (notice of docketing) from Commission of case, docket number and forms to notify employees.
- Employer posts notification to employees of case in progress.
- Union and/or affected employees may contest reasonableness of abatement period; notice of contest is sent to citing OSHA office within 15 working days of the employer's receipt of the citation.

- If the Chief Judge has not assigned the case for Simplified Proceedings, and if a party has not requested Simplified Proceedings within 21 days of the notice of docketing or if the request is not granted, conventional proceedings will be used. (See Rule 203.)

### **Events Pertaining to Conventional Proceedings**

#### **The Employer:**

- Receives a complaint from OSHA's attorneys.
- Files an answer to the complaint within 21 days of receiving the complaint.
- Discusses types of discovery with the judge when applicable.
- Participates in a conference call to discuss issues and a possible settlement.
- Engages in discovery; exchanges interrogatories and conducts depositions.
- If the case does not settle, then:
  - Prepares for and participates in the hearing.
  - May purchase a copy of the hearing transcript and may choose to submit a brief to the judge.

#### **Judge issues a decision.**

- If adversely affected or aggrieved by the decision, any party may ask for Commission review of the decision.

### **Section 7 – Descriptive Table of Contesting an OSHA Citation and Requesting Simplified Proceedings**

#### **Events Common to All Proceedings**

- Employer files notice of contest with OSHA office that mailed citation within 15 working days of receiving the citation.
- Employer receives notification (notice of docketing) from Commission of case, docket number and forms to notify employees.
- Employer posts notification to employees of case in progress.
- Union and/or affected employees may contest reasonableness of abatement period; notice of contest is sent to citing OSHA office within 15 working days of the employer's receipt of the citation.
- If the Chief Judge has assigned the case for Simplified Proceedings, or if a party has requested Simplified Proceedings and the request is granted, Simplified Proceedings will be in effect. (See Rule 203.)

#### **Events Pertaining to Simplified Proceedings**

**If all disputed issues not resolved at the prehearing conference, then parties:**

- List witnesses and exhibits.
- Prepare for and participate in the hearing.
- Present oral arguments at the close of the hearing.
- May purchase a copy of the hearing transcript.
- Decide whether to request permission to file a brief.

**Judge issues decision.**

- If adversely affected or aggrieved by the decision, any party may ask for Commission review of the decision.

**Section 8 – Descriptive Table of Events Pertaining to  
Review of an Administrative Law Judge’s Decision**

**If a party is adversely affected or aggrieved by a Commission judge’s decision and wishes to seek review by the Commission members, the party:**

- Files petition for discretionary review of the judge’s decision.
- Receives notification from Commission that case is or is not directed for review.

**If the case is not directed for review, the judge’s decision is a final order of the Commission and the party may file a petition for review in a U.S. Court of Appeals.**

**If the case is directed for review, all parties:**

- Receive a request from Commission for briefs on review.
- File briefs on review before Commission.
- Receive Commission decision that may affirm, modify, or reverse the judge’s decision. In some cases, the case may be sent back to the judge for further proceedings.
- May file petition for review in U.S. Court of Appeals if adversely affected or aggrieved by the Commission decision.

**See also Rules 90-96.**

**Glossary**

**Abatement Period** – Period of time specified in citation for correcting alleged workplace safety or health violation.

**Affected Employee** – An employee of a cited employer who has been exposed to or could be exposed to any hazard arising from the cited violations—that is the circumstances, conditions, practices, or operations creating the hazard.

**Answer** – Written document filed in response to a complaint, consisting of short plain statements responding to each of the allegations in the complaint.



**Authorized Employee Representative** – A labor organization, such as a union, that has a collective bargaining relationship with the employer and represents affected employees who are members of the collective bargaining unit.

**Brief** – Written document in which a party states what the party believes are the facts of the case and argues how the law should be applied.

**Certificate of Service** – Written document stating the date and manner in which the parties were served (given) a document. See Appendix 2B for sample certificate. (Also see definition of “service.”)

**Citation** – Written notification from OSHA of alleged workplace violation(s), proposed penalty(ies), and abatement period.

**Complaint** – Written document filed by the Secretary of Labor detailing the alleged violations contained in a citation.

**Conventional Proceedings** – Typical Commission proceedings, which are similar to court proceedings.

**Discovery** – The process by which one party obtains information from another party prior to a hearing.

**Exhibit** – A document, photo, video, object, etc., that is formally offered as evidence at a hearing.

**File** – To submit documents to the Commission electronically through the Commission’s E-File System or to send documents by some other means to the Commission’s Executive Secretary or the judge assigned to a case. (See “Service” below regarding providing a filed document to the other parties.)

**Interlocutory Appeal** – An appeal of a judge’s ruling on a preliminary issue in a case that is made before the judge issues a final decision on the full case. These types of appeals are infrequently made and are infrequently allowed. One example of an issue often raised in an interlocutory appeal is whether certain material that a party wants kept confidential, such as an employer’s trade secrets or employee medical records, should become part of the public record in a case.

**Intervenor** – Any person or entity other than a party who is permitted to participate in the case under Rule 21.

**Motion** – Oral or written request asking that the judge direct some act to be done in favor of the party making the request or motion.

**Notice of Appearance** – Written letter informing the Commission of the name and address of the person or persons who will represent a party or an intervenor in a case.

**Notice of Contest** – Written document disagreeing with any part of an OSHA citation.

**Notice of Docketing** – Written document from the Commission’s Executive Secretary telling an employer, the Secretary of Labor, and any other parties in a case that the case has been received by the Commission and given an OSHRC docket number.

**Notice of Withdrawal** – Written document from a party withdrawing its notice of contest or the citation and thus terminating the proceedings before the Commission (see Appendix 8).

**Party** – The Secretary of Labor, anyone who files a notice of contest, or a union or affected employee(s) with party status.

**Petition for Discretionary Review** – Written request from a party in a case asking the Commission to review the judge’s decision. The grounds on which a party may request discretionary review are: (1) it

believes the judge made findings of material facts which are not supported by the evidence; (2) it believes that the judge's decision is contrary to law; (3) it believes that a substantial question of law, policy, or abuse of discretion is involved; or (4) it believes that a prejudicial error was committed.

**Secretary of Labor** – The head of the U.S. Department of Labor. OSHA is part of that Department.

**Service** – Sending by email, first class mail, personal delivery, or facsimile transmission a copy of documents filed in a case to all parties in the case. See Definitions of "Certificate of Service" and "File." (See Rule 7.)

**Settlement** – An agreement reached by the parties resolving the disputed issues in a case.

**Simplified Proceedings** – Commission proceedings that are less formal than conventional proceedings and designed for smaller and relatively simple cases.

**Solicitor of Labor** – The U.S. Department of Labor's chief lawyer who has offices throughout the country. Lawyers from these offices represent the Secretary of Labor and OSHA in Commission cases.

### **Appendixes/Sample Legal Documents**

This section is not intended to be a manual of forms, and the sample legal documents here are limited in number. The sample legal documents are intended for illustration to familiarize the reader with the general nature of some of the documents received and issued. Many of the documents received by the Commission, such as those in Appendixes 2, 3, and 6 (Complaint, Answer, and Petition for Discretionary Review), vary significantly from case to case. These and other sample legal documents are also available on the Commission's website, <https://www.oshrc.gov>.

### **Appendix 1 – Notices of Contest**

#### **Appendix 1A. Notice of Contest to Citation and Proposed Penalties**

XYZ Corp.  
123 Street  
City, State Zip Code

February 26, 2019

Jane Doe, Area Director  
Occupational Safety and Health Administration  
U.S. Department of Labor, Federal Building  
456 Road  
City, State Zip Code

Dear Ms. Doe:

This is to notify you that XYZ Corp. intends to contest all of the items and penalties alleged in the Citation and Proposed Penalty, received February 20, 2019, and dated February 19, 2019 (a copy is attached).

Very truly yours,

[Company official's name]

#### **Appendix 1B. Notice of Contest to Proposed Penalties Only**

XYZ Corp.  
123 Street  
City, State Zip Code

March 14, 2019

Jane Doe, Area Director  
Occupational Safety and Health Administration  
U.S. Department of Labor, Federal Building  
456 Road  
City, State Zip Code

Dear Ms. Doe:

I wish to contest the amount of the Proposed Penalties of \$1,200 issued March 8, 2019, based on the violations cited by you during your recent inspection.

Sincerely,

[Company official's name]

**Appendix 1C. Notice of Contest by Authorized Employee Representative**

GHI International Union  
456 Street  
City, State Zip Code

June 7, 2019

Jane Doe, Area Director  
Occupational Safety and Health Administration  
U.S. Department of Labor, Federal Building  
456 Road  
City, State Zip Code

Dear Ms. Doe:

We have been authorized by the employee representative, GHI International Union, to file this notice of contest to the OSHA citations issued on June 3, 2019, against the employer, XYZ Co. The abatement dates of June 27, 2019, for Items No. 1 and No. 3 of the non-serious citation, and January 6, 2020, for Item No. 1 of the serious citation, are unreasonable and will continue to expose workers to safety hazards.

Sincerely,

Director  
Safety Department  
GHI International Union

**Appendix 2 – Complaint and Certificate of Service**

**Appendix 2A. Complaint**

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

SECRETARY OF LABOR, Complainant, v. XYZ CORP., Respondent.	OSHRC DOCKET NO.
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**COMPLAINT**

This action is brought to affirm the Citations and Notifications of penalty issued under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, et seq., (the Act), of violations of § 5(a) of the Act and the Safety and Health Regulations promulgated thereunder.

**I**

Jurisdiction of this action is conferred upon the Commission by § 10(a) of the Act.

**II**

Respondent, XYZ Corp., is an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Act.

**III**

The principal place of business of respondent is at 123 Street, City, State, Zip Code, where it was engaged in retail sales as of the date of the alleged violations.

**IV**

The violations occurred on or about January 8, 2019, at 123 Street, City, State, Zip Code (hereinafter “workplace”).

**V**

As a result of an inspection at the workplace by an authorized representative of the complainant, respondent was issued three Citations and Notifications of Penalty pursuant to § 9(a) of the Act.

**VI**

The Citations and Notifications of Penalty, copies of which are attached hereto and made a part hereof as Exhibits “A”, “B”, and “C” (consisting of one page each) identify and describe the specific violations alleged, the corresponding abatement dates fixed, and the penalties proposed.

**VII**

On or about February 28, 2019, by a document dated February 25, 2019, the complainant received notification, pursuant to § 10(a) of the Act, of respondent’s intention to contest the Citations and Notifications of Penalty.

**VIII**

The penalties proposed, as set forth in Exhibits “A”, “B”, and “C” are appropriate within the meaning of § 17(j) of the Act. The abatement dates fixed were and are reasonable.

WHEREFORE, cause having been show, complainant prays for an Order affirming the Citations and Notifications of Penalty.

[Attorney's name]  
Office of the Solicitor  
U.S. Department of Labor, Federal Building  
City, State Zip Code

**Appendix 2B. Certificate of Service\***

**CERTIFICATE OF SERVICE**

**[Represented parties – mandatory electronic filing].**

This is to certify that service of the Joint Notification of Settlement filed in the Commission's E-File System was also simultaneous served by email attachment to the parties listed below on \_\_\_\_\_.

**[Self-Represented party – non-electronic filing].**

This is to certify that a copy of the Joint Notification of Settlement was served by first class, postage prepaid, U.S. Mail to the parties listed below on \_\_\_\_\_.

\_\_\_\_\_/s/\_\_\_\_\_

Name Title  
Company / Firm Name / Office of the Solicitor  
Street Address  
City, State, Zip Code  
Email Address

\* A similar document must accompany all other documents requiring a certificate of service.

**Appendix 3 – Answer**

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

\_\_\_\_\_  
SECRETARY OF LABOR,  
Complainant,  
v.  
XYZ CORP.,

OSHRC DOCKET NO.

Respondent.

**ANSWER**

**I, II, III**

Respondent admits Paragraphs I, II and III.

**IV**

Respondent denies Paragraph IV.

**V**

Respondent has insufficient information to either admit or deny the allegations at Paragraph V, and therefore denies the same.

**VI**

Respondent denies Paragraph VI.

**VII**

Respondent has insufficient information to either admit or deny the allegations at Paragraph VII, and therefore denies the same.

**VIII**

Respondent denies the allegations at Paragraph VIII. The penalties are excessive under § 17(j) of the Act based upon the small size of the employer, which has only twelve employees, and the low gravity of the alleged violations.

**IX**

Respondent pleads the affirmative defense of “greater hazard” as to Citation 1, Item 3a. Abatement of the violation alleged in Citation 1, Item 2 will increase the safety risk to employees. Respondent also pleads the affirmative defense of “unpreventable employee misconduct” as to Citation 2, Item 2. The alleged conditions were the result of unauthorized actions by certain employees which resulted in the conditions referred to in the alleged violations.

RESPONDENT

By \_\_\_\_\_

Attorney

XYZ Corp.

123 Street

City, State Zip Code

**Appendix 4 – Request for Simplified Proceedings**

XYZ Corp.

123 Street

City, State Zip Code

March 26, 2019

Executive Secretary  
U.S. Occupational Safety and Health Review Commission  
1120 20th Street, N.W., 9th Floor  
Washington, D.C. 20036-3457

Dear Executive Secretary;

I request Simplified Proceedings. The Review Commission Docket Number assigned to my case is 99-9999.

Very truly yours,

[Company official's name]

### Appendix 5 – Notice of Decision



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20th Street, N.W., Ninth Floor  
Washington, DC 20036-3457

Phone: (202) 606-5405

Fax: (202) 606-5409

### Notice of Decision

#### In Reference To:

**Secretary of Labor v.**

**OSHRC Docket No.**

1. Enclosed is a copy of my decision. The entire record, including this decision, shall constitute the report of this Administrative Law Judge pursuant to section 12(j) of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. § 661(j). The Judge's report, which includes this decision, will be filed with the Commission's Executive Secretary on **[date]**. See Commission Rule 90(b), 29 C.F.R. § 2200.90(b).<sup>1</sup> The Executive Secretary will then issue a "Notice of Docketing of Administrative Law Judge's Decision" that notifies all parties of the date that the Executive Secretary docketed the Judge's report, and that will state the date by which a party must file a petition for discretionary review.
2. *Commission final order.* The decision shall become a final order of the Commission thirty (30) days from the date the Executive Secretary docketed the decision, unless a Commission member directs review of the Decision within that time. See Section 12(j) of the Act; Commission Rule 90(f), 29 C.F.R. § 2200.90(f).
3. *Party adversely affected or aggrieved by the decision.* A party adversely affected or aggrieved by

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<sup>1</sup> OSHRC's new Rules of Procedure were effective June 10, 2019 and all references contained herein refer to these revised Rules. Rules of Procedure, 84 Fed. Reg. 14554 (April 10, 2019) (to be codified at 29 C.F.R. pt. 2200). (<https://www.federalregister.gov/documents/2019/04/10/2019-06581/rules-of-procedure>).

the decision of the Judge may seek review by the Commission by filing a petition for discretionary review with the Executive Secretary at any time following the service of the Judge's decision on the parties but no later than 20 days after the date of docketing of the Judge's report. See Commission Rule 91(b), 29 C.F.R. § 2200.91(b). The Executive Secretary's address is as follows:

**Executive Secretary  
Occupational Safety and Health Review Commission  
One Lafayette Centre  
1120 20th Street NW, Suite 980  
Washington, D.C. 20036-3457**

The full text of the rule governing the filing of a petition for discretionary review is Commission Rule 91, 29 C.F.R. § 2200.91.

4. *Correction of errors in the Judge's report.* Up to the time that either the Commission directs review of the decision or the decision becomes a final order of the Commission, a request to correct clerical errors arising through oversight or inadvertence in the decision or in other parts of the Judge's report shall be filed with the undersigned Judge, by motion, pursuant to Commission Rule 90(b)(4)(i), 29 C.F.R. § 2200.90(b)(4)(i). Motions shall conform to Commission Rule 40, 29 C.F.R. § 2200.40.
5. *Relief from default.* Requests for relief from default or for reinstatement of the proceeding may be filed with the undersigned Judge, by motion, until the date the Executive Secretary docketed the Judge's report. See Commission Rule 90(c), 29 C.F.R. § 2200.90(c). Motions shall conform to Commission Rule 40, 29 C.F.R. § 2200.40.
6. *Filing with Executive Secretary.* Except for motions filed to correct errors in the Judge's report discussed in paragraph 4 above, on or after the date the Executive Secretary docketed the Judge's report, all documents shall be filed with the Executive Secretary. See Commission Rule 90(d), 29 C.F.R. § 2200.90(d).

\_\_\_\_\_  
Administrative Law Judge

Dated:

**Appendix 6 – Petition for Discretionary Review**

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

SECRETARY OF LABOR,  
Complainant,  
v.  
XYZ CORP.,  
Respondent.

OSHRC DOCKET NO.

**PETITION FOR DISCRETIONARY REVIEW**



Pursuant to Commission Rule 91, 29 C.F.R. 2200.91, Respondent, XYZ Corp. petitions the Occupational Safety and Health Review Commission for review of the Administrative Law Judge's decision in this case.

**Statement Of Portions Of The Decision And Order To Which Exception Is Taken**

1. XYZ Corp. takes exception to that portion of the Decision and Order wherein the Administrative Law Judge held XYZ Corp. in serious violation of the standard published at 29 CFR 1926.28(a) as alleged in Serious Citation 1, Item 1, in finding that XYZ's employee John Jones was exposed to the alleged violation. (Judge's Decision at pp. 8 - 12.)
2. XYZ Corp. takes exception to that portion of the Decision and Order pertaining to Serious Citation 1, Item 1, wherein the Administrative Law Judge held that action of employee John Jones was not unpreventable employee misconduct. (Judge's Decision at pp. 13 - 17.)

**Statement Of Reasons For Which Exceptions Are Taken**

1. In the Decision, the Administrative Law Judge failed to follow the test set forth for the Fifth Circuit's Decision in Secretary of Labor v. RPQ Corp. for determining the existence of employee exposure. The testimony at transcript pages 25-45 clearly shows that John Jones was not in the zone of danger because he was on a work break and outside of the definition of the zone.
2. The evidence of record supports XYZ's position that the actions taken by employee John Jones were unpreventable. The Commission has set forth the test for determining unpreventable employee misconduct at Secretary of Labor v. ROM Corp. The testimony of XYZ's employees at transcript pp. 46-59 met all of the requirements of ROM Corp. to prove John Jones's actions were unpreventable.

For the reasons stated herein, XYZ Corp. submits that the Occupational Safety and Health Review Commission should direct review of the Decision and Order of the Administrative Law Judge.

Respectfully submitted,

By \_\_\_\_\_  
Attorney for  
XYZ Corp.  
123 Street  
City, State Zip Code  
Tel. No. (999) 999-9999

**Appendix 7 – Direction for Review**



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20th Street, N.W., Ninth Floor  
Washington, DC 20036-3457

SECRETARY OF LABOR,  
Complainant,  
v.  
XYZ CORP.,

OSHRC DOCKET NO.

Respondent.

**DIRECTION FOR REVIEW**

Pursuant to 29 U.S.C. § 66(j) and 29 C.F.R. § 2200.92(a), the report of the Administration Law Judge is directed for review. A briefing order will follow.

COMMISSIONER

Dated:

**Appendix 8 – Notice of Withdrawal**

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

SECRETARY OF LABOR,  
Complainant,  
v.  
XYZ CORP.,  
Respondent.

OSHRC DOCKET NO.

**Respondent's Withdrawal of Notice of Contest**

Respondent, XYZ Corp., by the undersigned representative, withdraws its Notice of Contest in the case with the docket number above, pursuant to 29 CFR 2200.102 of the Rules of Procedure for the Commission.

[Company official's name]  
XYZ Corp.  
123 Street  
City, State Zip Code  
March 29, 2019