United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 93-1886
OSCAR RENDA CONTRACTING, INC.,	:	
Respondent.	:	

DECISION

BEFORE: WEISBERG, Chairman; MONTOYA and GUTTMAN, Commissioners.

BY THE COMMISSION:

This case arises out of an accident at the worksite of Oscar Renda Contracting, Inc. ("Oscar Renda"), which resulted in the death of an employee. Following the accident, the Secretary of Labor ("Secretary") conducted an inspection and issued a citation charging Oscar Renda with numerous serious violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, and proposing penalties totaling $26,400. Administrative Law Judge Stanley M. Schwartz vacated the citation in its entirety based on his finding that the Secretary failed to establish a *prima facie* violation of any of the cited standards. At issue on review is the question of whether the record should be reopened. For the following

reasons we find that the record should be reopened, and we vacate the judge's decision, remanding the case for further proceedings consistent with this decision.[1]

I. BACKGROUND

The hearing before the judge commenced on January 11, 1994, at which time the Secretary requested a postponement due to the inspecting compliance officer's failure to appear. The Secretary explained that the Department of Labor had terminated Compliance Officer ("CO") Debra McDavid's employment, she had been subpoenaed the previous evening, and her presence was necessary to adequately present evidence and formulate questions to witnesses. The judge denied the Secretary's request due to the fact that service

---

[1]Chairman Weisberg directed this case for review *sua sponte*, pursuant to § 12(j) of the Act, 29 U.S.C. § 661. The Chairman notes that although letters from family members of the deceased worker objecting to the judge's decision and urging review may have initially brought the case to his attention, these letters were not accepted as petitions for review.

In the Chairman's view *sua sponte* direction is not something that a Commissioner should do frequently, or even occasionally, but rather only rarely. Generally, when none of the parties in a case seek review, absent unusual circumstances, the judge's decision should become a final order, and the parties should not be required to litigate further.

Rule 92(b) of the Commission's rules states that:

> In the absence of a petition for discretionary review, a Commissioner will *normally* not direct review unless the case raises novel questions of law or policy or questions involving conflict in Administrative Law Judges' decisions. (Emphasis added.)

29 C.F.R. § 2200.92(b). Chairman Weisberg notes that his colleague, Commissioner Montoya, in citing and quoting from this rule in her dissenting opinion, neglected to include the word "normally." This rule was adopted by the Commission in 1976 in response to a particular Commissioner directing review in virtually every case to insure that the text of the administrative law judge's decision would be published. In addition, the Commission explained that this rule "does not limit in any manner a Commissioner's right to direct review, but merely establishes administrative guidelines for the exercise of that right." 41 Federal Register No. 234 (Dec. 3, 1976) at 53015. In any event, the Chairman is in accord with the view that *sua sponte* direction be exercised sparingly.

of the subpoena occurred only the evening before trial[2] and, "more importantly," because of his "complete confidence" that the Secretary had fact witnesses and another experienced compliance officer available at the hearing.[3]

During the hearing it became evident that two of the Secretary's three fact witnesses could not effectively testify without an interpreter. The first witness, Abel Espinoza, stated that he could not understand English well and asked that the questioning proceed more slowly. He was, nevertheless, questioned by both parties with no discussion of the need for an interpreter, and the record contains numerous lapses in his testimony where the designation "unintelligible" was inserted by the court reporter. The second witness, Rogelio Rojas, was unable to understand the oath when the judge attempted to swear him in and asked for an interpreter. Despite acknowledgment by both parties and the judge that an interpreter was needed, questioning of Mr. Rojas proceeded without translation and the record reflects numerous lapses in his testimony by the designation "unintelligible."

The Secretary's third employee testified effectively in English, but had limited knowledge of the circumstances and conditions underlying the alleged violations. Oscar Renda presented no evidence or testimony. At the close of the hearing, when it had become clear that CO McDavid's testimony was essential to establishing the violations, the Secretary stated his intent to compel her appearance. The judge ruled that any motion for subpoena enforcement must be preceded by a motion to reopen the record which would "stand or fall on the reasons occurring prior to the actual hearing in this matter . . . ."

In his motion to reopen, the Secretary argued that the CO's testimony was necessary to complete the record, and explained that the CO had been fired for insubordination, was informed of the hearing, indicated she would be available for trial, and was subpoenaed

---

[2]The Commission's rules provide that a motion to postpone a hearing must be received at least seven days prior to the hearing unless good cause is shown for late filing. Rule 62(c), 29 C.F.R. § 2200.62(c).

[3]Ronald Sarnacki, the compliance officer present at the hearing, informed the judge that he had taken no part in the inspection of Oscar Renda's worksite.

because the Secretary was uncertain she would keep her commitment. The judge denied the motion on April 29, 1994, for failure to show good cause justifying the late postponement request. In a series of letters the Secretary subsequently requested reconsideration of the judge's ruling arguing that failure of a witness under subpoena to appear constitutes exigent circumstances justifying a hearing postponement despite an otherwise untimely request. In addition, the Secretary explained that although CO McDavid had agreed to testify two weeks prior to the hearing, he served a subpoena on her attorney to ensure her appearance. When the attorney complained of improper service the day before the hearing, the Secretary attempted to serve McDavid by a private process server.[4] By the time of the Secretary's reconsideration request, McDavid had been reinstated, mooting any subpoena enforcement issue.

The judge issued a decision on June 28, 1994 vacating the citation in its entirety. Reaffirming his earlier rulings, the judge concluded that "where there was a well-founded fear the CO would not appear because she had been terminated, leaving a subpoena with a roommate the night before the hearing was insufficient and provides no basis for postponing the hearing or reopening the record." In addition, the judge's decision accurately states that "Espinoza indicated he could not understand English very well, while Rojas specifically stated he needed an interpreter." Despite acknowledgement by both parties that an interpreter was needed, and notwithstanding his own finding that a significant portion of the testimony given by witnesses Espinoza and Rojas was "unintelligible", the judge found that "none of the testimony of either of these witnesses addressed any of the allegations set forth in the citation items."

[4]A copy of the subpoena submitted by the Secretary in response to the judge's order indicates that the process server left a copy of the subpoena at Ms. McDavid's residence with her roommate on January 10, 1994, at 6:45 p.m.

II. DISCUSSION

A. The Appropriate Standard

It is well settled that a request for postponement must be supported by a showing of good cause for the need to postpone, and for any failure to request a postponement later than seven days prior to trial. *Baytown Constr. Co.*, 15 BNA OSHC 1705, 1708, 1991-93 CCH OSHD ¶ 29,741, p. 40,412 (No. 88-2912-S, 1992), *aff'd without published opinion*, 983 F.2d 232 (5th Cir. 1993); *Hern Iron Works, Inc.*, 13 BNA OSHC 2186, 2186-2187, 1987-90 CCH OSHD ¶ 28,502, p. 37,773 (No. 88-1962, 1989). When the Secretary requested a postponement at the outset of the hearing, he failed to fully explain to the judge the background of the subpoena of CO McDavid and her failure to appear, nor did he explain why McDavid's testimony was essential to establishing the violations. In denying the request the judge explained that he had "complete confidence" that the Secretary had adequate witnesses available, and would not be prejudiced by the absence of Compliance Officer McDavid. At that time, therefore, as the judge reasonably concluded, the Secretary had not shown good cause either for the need to postpone or for his untimely request.

Different circumstances prevailed and different criteria applied, however, at the close of the hearing when the Secretary requested that the record be reopened. While neither the Commission's rules nor the Federal Rules of Civil Procedure contain specific procedures governing motions to reopen a hearing or record, the Commission has considered such motions in a number of cases on review, adopting the federal courts' criteria of "fairness and substantial justice" in light of "all the surrounding circumstances" in deciding whether to grant or deny the motion. *See e.g., Article II Gun Shop, Inc.*, 16 BNA OSHC 2035, 2036, 1994 CCH OSHD ¶ 30,563, p. 42,229 (No. 91-2146, 1994) (consolidated); *Chesapeake Operating Co.*, 10 BNA OSHC 1790, 1792-93, 1982 CCH OSHD ¶ 26,142, p. 32,915 (No. 78-1353, 1982) (quoting 6A *Moore's Federal Practice*, ¶59.04[13], p. 59-39(1994)). Accordingly, we find that fairness and substantial justice is the standard under which the Secretary's motion to reopen should have been considered. *See Equitable Shipyards, Inc.*, 12 BNA OSHC 1288, 1290, 1984-85 CCH OSHD ¶ 27,237, p. 35,161 (No. 81-1685, 1985) (consolidated) (finding fundamental fairness required that respondent be given opportunity

to obtain crucial testimony, Commission ordered remand where witness declined to appear at hearing and judge denied subpoena enforcement motion).[5]

While the grant or denial of a motion to reopen is an exercise of discretion on the part of the trial judge which we are normally reluctant to disturb, that discretion must be exercised within the context of the proper standard. The applicable standard is a matter of law, and is not discretionary. The record here shows that in considering the Secretary's post-hearing motion to reopen the record the judge applied the good cause standard and limited his consideration to "reasons occurring prior to the actual hearing," without consideration of further intervening and surrounding circumstances which might be relevant. Accordingly, we conclude that the judge erred as a matter of law by failing to apply the "fairness and substantial justice" test in light of all the surrounding circumstances when ruling on the motion to reopen the record.[6]

B. Application of the Standard

In applying the fairness and substantial justice test to motions requesting a reopening of the record, the Commission has considered the timing of the motion, the character of additional testimony, and the effect of granting the motion. Applying these factors here, we find that the Secretary's efforts to ensure CO McDavid's appearance at the hearing, were not a model of diligence but evidenced a continued effort to obtain vital testimony in the face of unusual and changing circumstances. McDavid had been fired for insubordination but had agreed to testify just two weeks prior to the hearing. In order to ensure her presence, the Secretary served a subpoena on her attorney who complained of improper service only the day before the hearing. In these circumstances, the Secretary had little basis upon which to timely request a postponement the requisite seven days prior to trial, nor did he have much

---

[5]In its brief on Review, Oscar Renda also cites the "fairness and substantial justice" standard as applicable to the question whether to reopen the record.

[6]We note here that our dissenting colleague's concern with our failure to find abuse of discretion is misplaced in view of our conclusion that the judge erred by applying the wrong legal standard. Accordingly, we had no occasion to decide whether the judge abused his discretion.

time to effect personal service.[7] At the hearing, the Secretary immediately requested a postponement although admittedly he could have provided more detailed information at that time concerning the circumstances of McDavid's failure to appear. After completion of the proceedings, the Secretary indicated his intent to compel the CO's appearance. The Secretary filed a formal motion to reopen the record just over a month after the hearing date, within the time specified by the judge. Following the judge's denial of the motion, the Secretary requested reconsideration of the ruling supported by further details of his efforts to obtain McDavid's appearance. Finally, although he did not petition for review, the Secretary's position before the Commission is that reopening the record remains necessary and justifiable. *Cf. Genesee Brewing Co.*, 11 BNA OSHC 1516, 1518, 1983-84 CCH OSHD ¶ 26,519, p. 33,763 (No. 78-5178, 1983) (remand warranted where Secretary's efforts in seeking discovery inspection prior to hearing, though not model of diligence, not excessively dilatory).

While the Secretary's efforts to timely present the CO's testimony were less than exemplary, any sanction for his lack of diligence in dealing with McDavid's appearance must be assessed in the context of the hearing itself. The purpose of this hearing was to adjudicate allegations of numerous serious violations of the Act arising from an accident in which employee Rodolpho Fierra died from injuries suffered when a 3500-pound plate fell while being lowered into a trench. In denying the Secretary's postponement request the judge relied on his "complete confidence" that the Secretary had fact witnesses whose testimony would be available. At the hearing (which lasted less than two hours) two witnesses made

---

[7]Although service of the subpoena on Ms. McDavid's roommate raised a question as to enforceability of the subpoena, McDavid never challenged it. *See Lee Way Motor Freight*, 3 BNA OSHC 1843, 1846, 1975-76 CCH OSHD ¶ 20,250, p. 24,144 (No. 7674, 1975) (Commission affirmed judge's denial of motion to revoke subpoena, in part, because "[p]arties to whom subpoenas are not directed lack standing to attack them"). Moreover, adjudication of such questions is appropriately left to a subpoena enforcement proceeding. *See Equitable Shipyards, Inc.*, 12 BNA OSHC at 1293, 1984-85 CCH OSHD at p. 35,163. Accordingly, our disposition of this case does not include consideration of the now moot question of the sufficiency of service.

clear their inability to communicate adequately in English and need for interpretive assistance and, in the absence of such assistance, presented testimony that was admittedly unintelligible to the judge and counsel. The third, who was able to testify in English, had limited knowledge of the conditions relating to the alleged violations.

If we were to examine each element and each episode in this process without reference to the others, we might reach a different conclusion than we do today. Looking at the totality of the circumstances, however, and applying the test of fairness and substantial justice, we conclude that we must remand this proceeding and direct that the record be reopened.

In particular, we note the circularity of the judge's reasoning. Initially, he found that postponement was not warranted based on the failure of the CO to appear, in part, because other witnesses were available. Later, however, when it became apparent that the only two witnesses with direct knowledge of the allegations were "unintelligible" because of their lack of facility with the English language, he neither provided an interpreter nor permitted the record to be reopened for inclusion of CO McDavid's testimony despite the Secretary's further elucidation of the circumstances under which she initially failed to appear. Finally, the judge issued a decision which both characterized the testimony of these two witnesses as unintelligible *and* stated that it did not address the allegations.

The judge, perforce, evaluated each element in the process at the time it occurred. However, as noted above, he applied the incorrect test when considering the Secretary's motion to reopen. We have reviewed the process as a whole as outlined above and conclude that it simply does not satisfy the proper test of "fairness and substantial justice," nor does it meet the standards which Commission procedures must maintain.

In this regard, we note in particular our dismay at the absence of an interpreter for the two non-English speaking witnesses, particularly in light of the judge's subsequent conclusion that their admittedly unintelligible testimony was not probative.[8] Following Mr.

---

[8]While the Secretary did not move to reopen the record to allow witnesses Espinoza and (continued...)

Rojas' request for translation and obvious difficulty understanding the proceedings, the judge pointed out that a certified interpreter may assist in Commission proceedings but noted that "[w]e usually do it ahead of time, if either party lets [the judge] know." The Secretary had not requested an interpreter for these witnesses, and the parties questioned Mr. Espinoza and Mr. Rojas without translation. As the judge noted in his decision, "[b]oth were native Spanish speakers and it was apparent from their testimony that their command of English was very limited, a fact that rendered a significant portion of their testimony unintelligible."

The Commission's rules provide no express guidance on the use or appointment of interpreters. In such circumstances, the Commission might proceed under the Federal Rules of Evidence. Federal Rule of Evidence 604 ("Interpreters"), however, is silent to the issue here, providing merely that "[a]n interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation." The Federal Rules of Civil Procedure, by which the Commission is also governed in the absence of an applicable Commission rule, are somewhat, but not decisively, more helpful, providing that a "court may appoint an interpreter of its own selection and may fix his reasonable compensation." Fed. R. Civ. P. 43(f). This rule empowers the court in a civil proceeding to appoint an interpreter, but does not by its terms require a court to do so.[9]

---

[8](...continued)
Rojas to testify with appropriate translation, the lack of such translation and the inferences drawn by the judge as to the testimony's probity despite its unintelligibility constitute a part of the surrounding circumstances we must examine in order to properly apply the fairness and substantial justice test. We also note that the Commission's *sua sponte* direction authority permits disposition of an issue even in the absence of a party's request.

[9]Although it is not applicable to administrative proceedings, we note that the Court Interpreters Act, which was enacted by Congress in 1978 (28 U.S.C. §1827) to provide for interpreters in Federal Courts, applies to the testimony of witnesses in civil matters. The Act provides in relevant part:

> The presiding judicial officers... shall utilize [an interpreter]... in judicial proceedings instituted by the United States, if the presiding judicial officer determines on such officer's own motion or on the motion of a party that such party (including the (continued...)

We simply do not know why the Secretary failed to request an interpreter at the hearing, at least when it became self-evident that the witnesses could not be understood and were in need of assistance. It is clear, nonetheless, that the failure to provide those invited to appear before us with the basic means to be effectively understood, particularly on their explicit request, demeans both the witness and the forum and undermines the credibility, much less the civility, of the adjudicative process. [10] We need not decide here, however, whether and under what circumstances Commission judges are obliged to provide interpreters even absent a party's request. Rather, under all the circumstances here, including the judge's denial of the motion to postpone based, in part, on the presence of witnesses Espinoza and Rojas, his later denial of the request to reopen, and his decision simultaneously citing the unintelligibility and irrelevance of the testimony, we find that the

---

[9](...continued)

> defendant in a criminal case), or a witness who may present testimony in such judicial proceedings --
>
> > (A) speaks only or primarily a language other than English; or
> >
> > (B) suffers from a hearing impairment...
>
> so as to inhibit such party's comprehension of the proceedings or communication with counsel or the presiding officer, or so as to inhibit such witnesses comprehension of questions and the presentation of such testimony.

Id. at §1827(d)(1).

[10]While we are reluctant to impose on the respondent the consequences of the Secretary's failure to request an interpreter at the hearing, the judge compounded the effect of this failure by his later treatment of the evidence in his decision. We emphasize that the principles relevant to the use of interpreters in Commission proceedings that we articulate here are equally applicable to the witnesses of any party appearing before us. Finally, we note that our consideration of the use of interpreters here is fully consistent with other efforts by the Commission such as "E-Z Trial," a simplified procedure utilized in certain types of cases, to make Commission procedures more "user friendly" and the outcome of Commission cases less likely to be distorted by legal technicalities or an imbalance in the legal resources of the parties.

absence of an interpreter constituted one of the critical flaws in this proceeding warranting that the hearing be reopened.

Finally, we consider the effect of reopening the record in this case. In considering whether it is fair to Oscar Renda to reopen the record here, our inquiry is whether it would suffer legal prejudice, *i.e.*, be prejudiced in the preparation of its defense. Oscar Renda makes no specific claim of prejudice to it from reopening the record. It simply cites the unfairness of offering the Secretary a second chance to obtain testimony that Oscar Renda argues should have been more timely sought. Although we recognize that Oscar Renda's complaint does not amount to legal prejudice, *see Genesee Brewing Co.*, 11 BNA OSHC at 1518, 1983-84 CCH OSHD at p. 33,763 (extra case preparation and similar inconveniences do not amount to legal prejudice), we do not consider the costs associated with preparing a case to be a trivial matter. However, even if we were to take these factors into consideration, when they are measured against the employee fatality and the numerous serious violations alleged by the Secretary here, they do not affect the conclusion that the principles of fundamental fairness and substantial justice require that the record be reopened. *Equitable Shipyards, Inc.*, 12 BNA OSHC at 1290, 1984-85 CCH OSHD at p. 35,161. We find that the opportunity Oscar Renda will now have to cross-examine the Secretary's witnesses and present a defense is sufficient to prevent it from being prejudiced by reopening the record.

Turning to the dissent, we note that our colleague simply rejects our application of the "fairness and substantial justice" test. She relies, in part, on the Supreme Court's conclusion in *Martin v. OSHRC and CF&I Steel Corp.*, 499 U.S. 144, 155 (1991) that "Congress intended to delegate to the Commission the type of nonpolicymaking adjudicatory powers typically exercised by a *court* in the agency-review context." (Emphasis in original.) Our colleague further concludes that our application of this test in an effort to insure the integrity of our proceedings somehow is inconsistent with the Commission's role of "neutral arbiter" as set forth in *Cuyahoga Valley Ry. v. United Transportation Union*, 474 U.S. 3 (1985), and constitutes a dismissal of the standards of practice to which litigants are normally held. In

our view, she mischaracterizes and undervalues the roles of both the courts and the Commission in presiding over litigation.

We are mindful that, as Commissioner Montoya points out, under *CF&I Steel* the Commission's role under the Occupational Safety and Health Act is essentially that of a court. Chief among the obligations of this role must be the function, inherent in our courts, of promoting justice and assuring fundamental fairness in proceedings before us. The principles on which we decide this case expressly inhere in the role of judicial bodies. They are not, as Commissioner Montoya suggests, creations of "administrative" or "policy" bodies. Thus, as noted above, the concept of "fairness and substantial justice" is part of and derived from our court system. See, e.g. *Moore Federal Practice*, ¶ 59.04[13].

Our dissenting colleague does not question the wisdom with which we apply these principles to the facts here, but rather appears to be of the view that the principles themselves have no part in the deliberation of a judicial body. This view is assumed by the dissent without evident reflection on either the longstanding principles of the judicial process or the manner in which these principles undergird, and provide a touchstone for, "administrative" agencies when they act in a "quasi-judicial" capacity.

Similarly, our application of the "fairness and substantial justice" test does not represent an abrogation of "any recognizable standards" as suggested by our colleague. While concededly an inquiry into "fairness" is not susceptible to mathematical precision, this is so because it must include examination of elements which may be both intricate and variable. Yet as the Third Circuit has so aptly described the quest for due process in *Rogal v. American Broadcasting Companies, Inc.*, 74 F.3d 40, 44 (3d Cir. 1966):

> We have repeatedly emphasized that the requirements of due process are not reducible to a static formula, but rather are sensitive to the facts and circumstances of a given case. While "the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner[,] the concept is flexible, calling for procedural protection as dictated by the particular circumstance." *Kahn v. United States*, 753 F.2d 1208, 1218 (3d Cir. 1985) (citing *Morrissey v. Brewer*,

> 408 U.S. 471, 481 (1972)). The determination of the appropriate form of procedural protection requires "an evaluation of all the circumstances and an accommodation of competing interests. The individual's right to fairness must be respected as must the court's need to act quickly and decisively." *Eash*, 757 F.2d at 570 (citations omitted).

Or, as the Supreme Court stated in *Michell v. W.T. Grant Company*, 416 U.S. 600, 610 (1974):

> The requirements of due process of law "are not technical, nor is any particular form of procedure necessary." *Inland Empire Council v. Millis*, 325 U.S. 697, 710 (1945). Due process of law guarantees "no particular form of procedure; it protects substantial rights." *NLRB v. Mackay Co.*, 304 U.S. 333, 351(1938). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895(1961); *Stanley v. Illinois*, 405 U.S. 645, 650 (1972).

Thus, while the inquiry may be less neat and predictable than our colleague fancies, it is not one we can simplify or avoid if we are to maintain the integrity of our procedures. Indeed, rather than being an abrogation of standards, application of the test is essential to uphold them and to foster the respect that the adjudicatory process must harbor in order to fulfill its role in our system of government.[11]

In short, the dissent does not recognize that the concepts on which we rely are derived from the judicial process itself to address circumstances, such as those here, where issues are raised that bear on the integrity and neutrality of that process. As we proceed under these rules and concepts, it is certainly possible that others may differ with the particulars of our analysis or the conclusions we draw. The dissent, however, declines even to recognize the

[11]As evidenced by the application of these principles in favor of the respondent rather that the Secretary in *Equitable Shipyards*, the pursuit of "fundamental fairness and substantial justice" is in the interest of all litigants, and does not favor any one party in Commission proceedings.

existence of such rules or to engage in the analysis required by the adjudicatory role of the Commission.

Finally, and as a corollary to the above, contrary to our dissenting colleague, reopening of the record here would not thrust the Commission into the policymaking role proscribed by the Supreme Court. We would not assume that by merely remanding this proceeding for further hearing we are thereby fixing the outcome or ensuring the "success" of one party or the other. Nor do we consider such a remand as somehow usurping the Secretary's prosecutorial discretion. Indeed, under the Supreme Court's *Cuyahoga* decision, the Secretary may withdraw a citation at anytime. That is the express holding in *Cuyahoga.* We do not know why the Secretary has not chosen to do so thus far in this case any more than we know why he elected not to seek review of the judge's decision. However, nothing in this decision forecloses the Secretary's right to decline to pursue this case further by withdrawing the citation.[12]

Accordingly, we vacate the judge's decision and remand the case for reopening the record to permit, at the request of the Secretary, the testimony of Compliance Officer McDavid and witnesses Espinoza and Rojas, with appropriate interpretation, and further to permit the Respondent to cross-examine these witnesses and present such rebuttal evidence as is deemed appropriate.

/s/
Stuart E. Weisberg
Chairman

[12]We note that our dissenting colleague speculates on the status of claims that family members of the deceased worker may have raised elsewhere, and appears to conclude that the resolution of these claims moots the matter here. The record does not contain specific information on the nature of any collateral claims or their disposition. In any event, we simply note that the public interest in our proceedings is not satisfied by the availability of any private remedies.

/s/
Daniel Guttman
Commissioner

Dated: January 29, 1997

MONTOYA, Commissioner, dissenting:

I strongly disagree with the majority's decision that this case be remanded for further proceedings on a reopened record. Not only did the Secretary seek no such relief from the Commission, but the majority has made no finding that Judge Stanley M. Schwartz abused his discretion in dismissing these citations. Under these circumstances, I can only assume that my colleagues are seeking to arrogate to themselves a share of the enforcement role that Congress intended to lie exclusively with the Secretary.

The Secretary's failure to prepare this case for trial was, of course, inexcusable. This more than explains why the Secretary did not seek review of Judge Schwartz' decision. Despite at least two weeks of advance notice that the compliance officer had been terminated, the Secretary did not even attempt service of a subpoena to secure her appearance until the night before the hearing. As for the Spanish-speaking witnesses, the failure of the Secretary to arrange for an interpreter tells me that these witnesses were not even interviewed by the Secretary in preparation for this trial. These failures are all the more disturbing when one considers the severity of the accident that led to the inspection, and the allegations that are made in the complaint. The majority apparently concurs in this view, as they have not found that the judge abused his discretion by dismissing the Secretary's citations. *See Philadelphia Constr. Equip., Inc.*, 16 BNA OSHC 1128, 1131, 1993 CCH OSHD ¶ 30,051, p. 41,295 (No. 92-899, 1993)("A judge has very broad discretion in imposing sanctions for non-compliance with Commission Rules of Procedure or the judge's orders . . . In determining whether a sanction imposed by a judge is too harsh, the test is whether the judge abused his discretion."). *See also Sealtite Corp.*, 15 BNA OSHC 1130,1134, 1991-93 CCH OSHD ¶ 29,398 , pp. 39,582-3 (No. 88-1431, 1991).

Instead, the majority has said that "fairness and substantial justice" require that the record be reopened, thereby allowing the Secretary a second opportunity to try this case. Certainly no one would deny that the family of the deceased employee has suffered a great personal tragedy. However, since the OSH Act itself provides no relief for the families of affected employees, *cf. Georgia-Pacific Corp.*, 15 BNA OSHC 1127, 1129 n.3, 1991-93 CCH OSHD ¶ 29,395, p. 39,576 n.3 (No. 89-2713, 1991) (no basis for intervention found

when former employee sought to represent interests of family members she alleged to be suffering from exposure to plant emissions), and since all collateral claims brought by the families of the employees affected here have apparently been resolved, it is entirely unclear to me to whom the majority believes the duty of fairness and substantial justice is owed. Is the majority announcing that fairness and substantial justice so favor regulatory action as to compel the Commission and its judges to insure the successful prosecution of an employer whenever a case involves employee fatalities and allegations of serious violations? Does the majority intend for the Commission and its judges to excuse, on their own motion as here, all failures on the part of the Secretary's prosecutors in such cases in the interest of fairness and substantial justice?[13] Should the Secretary's proof fail again upon the rehearing contemplated by the remand order, will the majority conclude that fairness and substantial justice require the continued *sua sponte* reopening of this record?

Congress has expressly charged the Commission with "carrying out adjudicatory functions under" the Occupational Safety and Health Act of 1970 (the OSH Act). 29 U.S.C. § 651(b)(3). In recent years, the Supreme Court has twice examined the Commission's authority under this section. In *Cuyahoga Valley Ry. v. United Transportation Union*, 474 U.S. 3 (1985) the court characterized the OSH Act itself as "a detailed statutory scheme which contemplates that the rights created by the Act are to be protected by the Secretary." *Id*. at 6. Recognizing that "[i]t is clear that enforcement of the Act is the sole responsibility of the Secretary," the Court went on to state that "[t]he Commission's function is to act as a neutral arbiter." *Id*. at 7. In *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144, 155 (1991) the Court repeated the "neutral arbiter" language of *Cuyahoga* while adding this further perspective:

> Insofar as Congress did not invest the Commission with the power to make law or policy by other means, we cannot infer that Congress expected the

[13]The majority's willingness to ignore civil procedure becomes even more untenable when one considers that OSH Act section 12(g), 29 U.S.C. § 661(g), makes the Federal Rules of Civil Procedure applicable to Commission proceedings.

> Commission to exercise *its* adjudicatory power to play a policymaking role . . . Consequently . . . we think . . . that Congress intended to delegate to the Commission the type of nonpolicymaking adjudicatory powers typically exercised by a *court* . . . .

(emphasis in original). *Id*. at 154.

These current Supreme Court definitions of the Commission's role have corrected the mistaken belief, common to earlier court cases under the OSH Act, that the Commission is a conventional regulatory agency with a public policy role to fulfill. In *Brennan v. OSHRC (John J. Gordon Co.)*, 492 F.2d 1027, 1032 (2d Cir. 1974), for instance, the Second Circuit stated that "the right of the public must receive active and affirmative protection at the hands of the Commission," a quotation that court borrowed from *Scenic Hudson Preservation Conf. v. F.P.C.*, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).[14] In *CF&I Steel Corp.*, 499 U.S. at 151, however, the Supreme Court made it clear that "[u]nder the OSH Act . . . Congress separated enforcement and rulemaking powers from adjudicative powers, assigning these respective functions to two *independent* administrative authorities. The purpose of this "split enforcement" structure was to achieve greater separation of functions than exists within the traditional 'unitary' agency" (emphasis in original).

Rule 92(b) of the Commission's rules, 29 C.F.R. § 2200.92(b), states that a Commissioner should not direct review of a judge's decision on his own motion unless the "case raises novel questions of law or policy or questions involving conflict in Administrative Law Judges' decisions." However, since the majority has not identified an interested party to whom their announced duty of fairness and substantial justice is owed, they have failed to establish any recognizable standard by which the law of this case can be applied to future practice. In the end, the fairness and substantial justice rubric on which this decision rests cannot disguise the fact that the majority is simply determined that the

---

[14]*Brennan v. OSHRC (John J. Gordon Co.)*, 492 F.2d 1027, 1032 (2d Cir. 1974) remains relevant here, however, since the Second Circuit decided that the Commission had abused its discretion by substituting its judgment for that of an administrative law judge with respect to the reopening of a hearing record.

violations alleged in this citation should be fully prosecuted. As a result, I fear that this decision will merely serve to raise uncertainty as to the Commission's willingness to abide by its statutory role as the neutral arbiter of contested cases.

/s/
Velma Montoya
Commissioner

Dated: January 29, 1997