January 23, 2015

Thomasina Rogers, Chair
Occupational Safety & Health Review Commission
1120 20th Street NW, 9th Floor
Washington, DC 20036

Re: Petition to Amend OSHRC’s Procedural Rules

Dear Chair Rogers:

The Occupational Safety & Health Law Project, on behalf of the National Council for Occupational Safety and Health (National COSH), North America’s Building Trades Unions (Building Trades), Change to Win and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (Steelworkers) urge the Occupational Safety & Health Review Commission to amend its procedural regulations to permit increased employee participation in proceedings before the Commission. We believe that OSHRC’s procedural rules create obstacles to employee participation that deter many employees and their representatives from participating more often and more fully in Commission proceedings. We urge OSHRC to make several changes to its procedural regulations to eliminate these obstacles. Each of the suggested changes would enhance opportunities for employee participation in OSHRC proceedings.

National COSH is an umbrella organization for 20 local, non-profit Coalitions/Committees on Occupational Safety and Health, known as “COSH groups”, located around the country. The COSH network has a combined experience of hundreds of years promoting safe and healthy working conditions for all working people in the United States, through education, training, advocacy, and organizing.

The Building Trades is a labor organization composed of fourteen national and international labor unions in the construction industry, and 293 State and local building and construction trades councils (BCTCs) throughout the United States, which together represent 3 million working men and women. The Building Trades has long been actively engaged in promoting the safety and health of construction industry employees, through research, training and participation in proceedings at OSHA and OSHRC and in the federal courts.

Change to Win is a national alliance of four labor unions with 4.5 million members in the transportation, manufacturing, construction, health care and other sectors of the economy.

The Steelworkers represent 1.5 million active and retired workers in steel manufacturing, chemical manufacturing, petroleum refining, paper and pulp product industries as well as health care and
public sector workers. The Steelworkers appear as a representative of employees in OSHRC proceedings regularly.

The Occupational Safety & Health Act (OSH Act) grants employees the right to be active participants in enforcement proceedings under the Act. Section 8(f) of the Act, 29 U.S.C. §657(f), grants employees and a representative of employees the right to file a complaint of hazardous working conditions and the right to accompany OSHA during a work site inspection. Section 10(c), 29 U.S.C. §659(c), directs the Commission to adopt procedural rules that allow employees or a representative of employees to elect party status and participate in Commission proceedings.

Too often, employees do not exercise the rights they have been given under the OSH Act. This is particularly true at OSHRC where employee participation in Commission proceedings is the exception, rather than the rule. Increased participation by employees in enforcement proceedings would ensure that those most directly affected by conditions alleged to violate the OSH Act have a say in whether and how those violations will be remedied. One reason employees often do not exercise their right to participate in OSHRC proceedings is that the Commission’s procedural rules, at least the way they have been applied, create unreasonable obstacles to full employee participation. OSHRC can, and should, eliminate these barriers. We suggest several amendments to OSHRC procedural rules, which together would enable employees to more frequently and effectively participate in enforcement proceedings pending before OSHRC.

1. Amend the Definition of Affected Employee

OSHRC rules define an “affected employee” as “an employee of a cited employer who is exposed to or has access to the hazard arising out of the allegedly violative circumstances, conditions, practices or operations.” 29 C.F.R. §2200.1(e). This definition is too narrow.

Workers may be affected by exposures created or controlled by a cited employer, even if they are not directly employed by the cited employer. For example, under the multi-employer worksite doctrine, affirmed by OSHRC on numerous occasions, OSHA is authorized to cite an employer who creates or controls a hazard even if the only employees exposed work for another employer. This doctrine is usually applied in the construction industry, where multi-employer worksites are common. Employees exposed to a hazard on a construction site have an interest in proceedings to determine whether the hazard will be abated. And with their first-hand knowledge of the cited conditions, they can contribute significantly to the Commission’s proceedings. This is true whether the employees are employed by the cited employer or another employer at the worksite.

Multi-employer worksites are increasingly present in industries other than construction. Over the past several decades, there has been a precipitous rise in the use of temporary workers, employed by leasing or employment agencies, who work on the premises, and often under the control, of a host employer. In cases where contract or leased employees are working at a site, they often are not employees of the employer cited by OSHA, but are employed by an off-site temporary staffing agency that may claim no responsibility for health and safety conditions at the site. OSHA has recognized that these temporary or contract workers are often at increased risk of injury when faced with health and safety hazards at the worksite of host employers and asserts the right to cite the host employer for OSHA
violations to which temporary or contract workers are exposed. See generally,

Like exposed employees on construction sites, these contract workers both are directly affected
by and can actively assist in the Commission’s proceedings. Moreover, OSHRC will inevitably be
asked to decide whether OSH Act has the authority to cite a host employer for exposures of temporary, or
leased workers under a variety of circumstances. When such cases arise, the employees affected by
the citation should be allowed to participate in OSHRC’s proceedings. Under the current rules, they
would not be permitted to do so.

Accordingly, OSHRC should amend the definition of “affected employee” in 29 C.F.R. §
2200.1(e) to eliminate the requirement that only employees of the cited employer may be “affected
employees.” An “affected employee” should be any employee who performs work at the site and “who
is exposed to or has access to the hazard arising out of the allegedly violative circumstances, conditions,
practices or operations.” The proposed definition is consistent with the definition of “employee” in
§3(6) of the OSH Act and more accurately reflects the interests potentially at stake in OSHRC
proceedings.

2. Clarify That Employees May Select Any Person as Their Representative

Where no union has been certified as the exclusive representative of employees, the OSH Act
nevertheless gives workers the right to select a representative to participate on their behalf in OSHRC
proceedings. The Commission should ensure the right of employees to select whomever they choose as
their representative, and the right of that representative to participate fully, without restriction, in its
proceedings. OSHRC rules recognize that any party may appear “in person, through an attorney, or
through another representative who is not an attorney.” 29 C.F.R. §2200.22. This procedural rule is
consistent with the OSH Act which imposes no limits on who may serve as that representative.

Too often, however, OSHRC judges have expressed skepticism, if not downright hostility, to the
individuals who have sought to represent workers before OSHRC or have imposed unreasonable limits
on a representative’s participation in Commission proceedings.

The OSH Act grants to employees the right to select the individual or organization who will
represent their interests in all phases of Commission proceedings. OSHRC rules should ensure that
employees who do not have a union representative are free to select an attorney, pastor, community
organization or union to act on their behalf. As the First Circuit recognized In re: Perry, employees
(more than one, but less than a majority) have a right to select whomever they want to represent their
interests before OSHRC. 859 F.2d 1043, 1049 (1st Cir. 1989). So long as the representative’s demeanor
before OSHRC is appropriate, the representative’s outside activities are “absolutely irrelevant.” Id. at
1049.

OSHA recognizes that a wide range of organizations can represent workers for the purposes of
filing a complaint seeking an inspection. See https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-
148.pdf at 9-3. OSHA also instructs its inspectors, where the employees are not represented by a
union, to determine whether the employees have designated another person as their walk-around
related context, the Mine Safety & Health Administration defines a “miner’s representative” to include “any person or organization which represents two or more miners for the purposes of the Act.” 30 C.F.R. §40(b)(1). And, the Federal Mine Safety & Health Review Commission recognizes that any “affected miners or their representatives,” 29 C.F.R. §2700.4(b)(1), shall be permitted to intervene in Commission proceedings.

Unfortunately, OSHRC judges do not consistently follow these principles. Even when they do, some judges have imposed restrictions on employee representatives that are not imposed on employer representatives, treating the employee representatives as less than full participants in Commission proceedings. In such cases, few unions or non-union workers have the resources or experience to fight limits on their participation imposed by administrative law judges. These limits also deter other employees from participation.

For example, in Secretary of Labor v. Cooper Tire & Rubber Co., No. 11-0079, an OSHRC ALJ refused to allow a union, which had elected party status, to designate who would represent it during a discovery inspection of the employer’s facility. The union filed an interlocutory appeal with the Commission. Although the Commission lacked a quorum at the time, Chairman Rogers responded to the appeal, suggesting the ALJ “erred.” In response, the ALJ reversed his position and allowed the union to select its representative for an entry on land. In this case, the Steelworkers had the resources to appeal the limits placed on their participation by the ALJ. Few unions, and even fewer non-union workers, have the experience or resources to do so. Because Chairman Roger’s opinion in Cooper Tire is neither binding nor readily accessible, the ALJ’s reported decision in Cooper Tire will likely deter others from fully exercising their right to participate in OSHRC proceedings.

We urge OSHRC to clarify that employees may designate any person to represent their interests before OSHRC, so long as that individual’s demeanor during the proceedings is reasonable. OSHRC ALJs should not impose limits on who those representatives should be or limit their full participation in the proceedings.

3. Narrow the Scope of Confidentiality During Settlement Proceedings

Under Commission Rule 2200.120(d)(3), “all statements made and information presented” during settlement are treated as confidential. Confidentiality applies to both statements of fact made during settlement and to offers of compromise. Confidentiality applies even if one of the parties had an independent basis for knowing the information. The Commission’s rule is too broad, particularly as applied to employees and their representatives. Employees are present in the workplace. They learn about everyday working conditions, hazards employees face, and violations during their daily work activities. They, and their representatives, have a right to demand improvements in working conditions and to bargain with employers to gain safer workplaces. They also have a right to communicate with the public in their efforts to improve their working conditions.

The process of employees acting in their joint interest to improve working conditions should not be held in abeyance because of ongoing settlement discussions before the Commission. Unfortunately, this is what sometimes happens under Commission Rule 120. Where hazardous working conditions and options for abatement are discussed in settlement, the factual information disclosed is treated as
confidential. This is true even if the employees or their representatives have an independent basis for learning of or knowing about such information.

The Commission's rule on confidentiality is broader than Rule 408 of the Federal Rules of Evidence. The Federal Rules recognize that statements of fact made during the course of settlement negotiations are not rendered inadmissible if the facts could have been obtained from an independent source, including through discovery. The Commission should narrow the scope of its rule so that it parallels the Federal Rules of Evidence. A revised OSHRC rule should make confidential only offers of compromise and factual information that a party could not learn of through discovery or other means. This clarification will permit employees and their representatives to continue to work towards improving health and safety in their workplaces, even during Commission proceedings.

We appreciate your thoughtful consideration of the issues raised in this petition. We look forward to working with the Commission on ways in which it can ensure that employees may effectively exercise their right to participate in Commission proceedings.

Respectfully submitted,

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Occupational Safety & Health Law Project