

# ARTICLES

## **Alternative Dispute Resolution and the Occupational Safety and Health Review Commission: Settlement Judges and Simplified Proceedings**

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## INTRODUCTION

"[W]e have only begun to identify the kinds of disputes likely to be amenable to the techniques of ADR."<sup>1</sup>

Although the impetus for "alternative dispute resolution" (ADR) originated largely from efforts to correct shortcomings in the judicial system,<sup>2</sup> the extension of ADR concepts to federal agencies has been both natural and inevitable. In some respects, federal agencies offer a more fertile field for ADR than do the courts. If nothing else, formal agency adjudications<sup>3</sup> far outnumber the caseload of the federal courts.<sup>4</sup> Moreover, numerous federal agency actions involve informal decisionmaking which is not preceded by any form of evidentiary hearing, but may often result in litigation before an administrative tribunal or judicial review by a federal court.<sup>5</sup> There is also constant and pervasive agency rulemaking, which produces volumes of regulations having the force and effect of law. As recognized by the Administrative Conference of the United States (Administrative Conference), there are "a myriad of government activities [and] the best [ADR] procedure for a program, or even an individual dispute, must grow out of its own needs."<sup>6</sup>

During the past ten years, a number of federal agencies have experimented with ADR techniques. One of the most promising areas has been the field of government contracting.<sup>7</sup> In addition, there have been significant steps toward extending ADR to rulemaking. Recent rulemaking proceedings for some eighteen federal rules reportedly have

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1. Lieberman & Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 438 (1986).

2. See, e.g., Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Ray, *Emerging Options in Dispute Resolution*, 75 A.B.A. J. 66 (June 1989); Riggs & Dorminey, *Federal Agencies' Use of Alternative Means of Dispute Resolution*, 1 ADMIN. L.J. 125, 126 (1987); Sander, *Varieties of Dispute Resolution*, 70 F.R.D. 111 (1976).

3. The word "formal" is used to signify adjudications involving the right to a full evidentiary hearing, such as those proceedings governed by the Administrative Procedure Act, 5 U.S.C. §§ 554, 556, 557 (1988).

4. See B. SCHWARTZ, *ADMINISTRATIVE LAW: A CASEBOOK* 43, 45-46 (3d. ed. 1988) (supporting conclusion that agency adjudications far outnumber traditional federal court cases).

5. See generally 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 1:4 (1978) (providing discussion of formal versus informal adjudication in administrative law).

6. AGENCIES' USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION, ACUS RECOMMENDATION No. 86-3, 1 C.F.R. § 305.86-3 (1991) [hereinafter ACUS RECOMMENDATION No. 86-3].

7. Crowell & Pou, *Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation*, Recommendation No. 87-11, 1988 ACUS 1139 [hereinafter Crowell & Pou Recommendation 87-11].

involved negotiation in one way or another.<sup>8</sup> Initiatives and the use of ADR in other areas have been described in the growing body of literature on the use of ADR by administrative agencies.<sup>9</sup> Perhaps most significantly, congressional interest in legislation encouraging the use of ADR by federal agencies culminated in 1990 with the Administrative Dispute Resolution Act.<sup>10</sup>

The subject of this Article is the use of settlement judges<sup>11</sup> and simplified proceedings<sup>12</sup> in adjudications by the Occupational Safety and Health Review Commission (OSHRC), which has been something of a pioneer among federal agencies in implementing ADR. After describing generally the settlement judge and simplified proceedings concepts, and their relation to other forms of ADR, this Article: (1) gives an overview of the statutory system and context in which these ADR devices operate, namely in the adjudicatory system created by the Occupational Safety and Health Act;<sup>13</sup> (2) discusses important differences and similarities between this adjudicatory system and the situations in other agencies using ADR techniques; (3) examines in detail how settlement judges and simplified proceedings have been operating in actual practice; and (4) offers conclusions and recommendations.

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8. Cameron, Harter, Bingham, & Eisner, *Alternative Dispute Resolution with Emphasis on Rulemaking Negotiations*, 4 ADMIN. L.J. 83, 96-97 (1990) (Colloquium, Proceedings of the First Annual Review of the Administrative Process) (discussing negotiations in rulemaking involving hazardous waste management, asbestos-containing materials in schools, financial assistance to local education agencies, flight-time limitations, and rest requirements for airline personnel).

9. See, e.g., Edelman, Carr, & Simon, *ADR at the U.S. Army Corps of Engineers*; Pou, *Federal Agency Use of ADR: The Experience to Date*; Robinson, *ADR in Enforcement Actions at the U.S. Environmental Protection Agency*, in CONTAINING LEGAL COSTS: ADR STRATEGIES FOR CORPORATIONS, LAW FIRMS, AND GOVERNMENT (Fine ed. 1987); *A Colloquium on Improving Dispute Resolution: Options for the Federal Government*, 1 ADMIN. L.J. 399 (1987) (entire issue devoted to colloquium); Harter, *Dispute Resolution and Administrative Law: The History, Needs, and Future of a Complex Relationship*, 29 VILL. L. REV. 1393 (1983) [hereinafter Harter, *Dispute Resolution*]; Harter, *Points on a Continuum: Dispute Resolution Procedures and the Administrative Process*, 1 ADMIN. L.J. 141 (1987) [hereinafter Harter, *Points on a Continuum*]; Riggs & Dorminey, *Federal Agencies' Use of Alternative Means of Dispute Resolution*, 1 ADMIN. L.J. 125 (1987).

10. Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990) (codified mainly at 5 U.S.C. § 581, with codification of miscellaneous provisions in scattered sections of titles 9, 28, 29, and 41) See also Lavelle & Samborn, *Congress Now Considering Dispute Resolution Measure*, NAT'L L. J., Feb. 5, 1990, at 1, col. 1 (supporting premise of increased interest in "Alternative Dispute Resolution" (ADR) by Congress).

11. Rules of Procedure, 29 C.F.R. §§ 2200.100-.102 (1991) [hereinafter 29 C.F.R. § 2200.xxx.].

12. 29 C.F.R. §§ 2200.200-.212 (1991).

13. 29 U.S.C. §§ 651-678 (1988).

## I. DEFINING SETTLEMENT JUDGE AND SIMPLIFIED PROCEEDINGS

## A. The Settlement Judge

Judicially encouraged settlements are nothing new.<sup>14</sup> However, the judge who becomes too active in settlement negotiations incurs the risks of departing from neutrality, appearing biased in favor of one party, and losing effectiveness not only as a settlement facilitator<sup>15</sup> but also as an adjudicator.<sup>16</sup> If negotiations fail, and the judge proceeds to try the case, prior judicial activism in encouraging settlement may lead to motions to recuse on grounds of bias, or furnish ammunition for appeals.<sup>17</sup> In the administrative law setting, these problems are even more acute. The adjudicative hearing officer, usually an administrative law judge (ALJ), is, despite a large degree of independence, not a member of the judicial branch of government. The ALJ or other administrative hearing officer must be particularly scrupulous and sensitive in order to avoid the appearance of favoritism. Statutory constraints on the ALJ's conduct, such as prohibitions on ex parte contacts,<sup>18</sup> impose further limitations on an ALJ's flexibility in the settlement context.

The settlement judge is a recently developed, but relatively well defined, concept both recognized and recommended by the Administrative Conference.<sup>19</sup> The settlement judge has been called "an ingenious device"<sup>20</sup> because it preserves the real advantages of having a judge actively involved in the settlement process, while avoiding the serious problems which can arise if the trial judge becomes an overactive participant in settlement negotiations.

A settlement judge is simply an ALJ who: (1) is specially appointed

14. Brazil, *Hosting Settlement Conferences: Effectiveness in the Judicial Role*, 3 OHIO ST. J. ON DISP. RESOL. 1 (1987); Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257 (1986).

15. See Brazil, *supra* note 14, at 49-50 (discussing importance of maintaining neutrality in negotiation process).

16. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1980) (mandating disqualification in proceedings where judge's impartiality might reasonably be questioned).

17. Cf. *In re Corey*, 892 F.2d 829, 838 (9th Cir. 1989), *cert. denied*, \_\_\_ U.S. \_\_\_, 111 S. Ct. 56 (1990) (distinguishing between extrajudicial information and knowledge obtained during judicial proceedings).

18. Administrative Procedure Act, 5 U.S.C. §§ 554(d), 557(d) (1988). See 5 U.S.C. § 556(e) (1988) (limiting decision exclusively to matters on record).

19. AGENCY USE OF SETTLEMENT JUDGES, ACUS RECOMMENDATION No. 88-5, 1 C.F.R. § 305.88-5 (1991) [hereinafter ACUS RECOMMENDATION No. 88-5].

20. Joseph & Gilbert, *Breaking the Settlement Ice: The Use of Settlement Judges in Administrative Proceedings* (May 20, 1988) [hereinafter JOSEPH & GILBERT REPORT], reprinted in 1988 ACUS 281. The Joseph & Gilbert Report formed the basis for ACUS RECOMMENDATION 88-5, *supra* note 19.

for the sole purpose of facilitating settlement; (2) will not try the case or have any formal decisionmaking authority in the case, unless the parties so request; and (3) is drawn from the same agency as the trial judge and therefore generally hears the same kinds of cases.<sup>21</sup> A settlement judge is essentially a mediator with special status, expertise, and flexibility. As a sitting ALJ, the settlement judge has the prestige of position and the advantage of familiarity with the subject. Being specially appointed for the limited purpose of settlement negotiations, a settlement judge can be flexible, employing techniques and methods such as ex parte communications, off-the-record discussions, and assurances of confidentiality. The ALJ who is responsible for actually deciding the case could not use such tactics without running afoul of ethical and statutory prohibitions.<sup>22</sup> Insulated from the actual decisionmaking role, the settlement judge can facilitate settlements by evaluating the merits of each case and candidly informing the parties of the likelihood of their success. In this respect, the settlement judge can provide recalcitrant or stubborn parties with a sometimes needed preview of what might happen if the parties actually go to trial. Accordingly, the settlement judge also performs as an analogue to the settlement-enhancing functions of the "mini-trial,"<sup>23</sup> advisory or non-binding arbitration,<sup>24</sup> and the summary jury trial.<sup>25</sup>

It must be emphasized, however, that the appointment of a settlement judge should not be a routine matter. The settlement judge should be reserved for special problem situations, where there are reasonable prospects for settlement, but an impasse or barrier to settlement has arisen, and the parties could benefit from the flexibility and the more active intervention of a settlement judge.<sup>26</sup> The settlement judge procedure should be used sparingly. It is not a substitute for good-faith negotiations between the parties. If overused, it would not only tax the limited pool of agency ALJs, but also distort the negotiating process.

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21. *Id.*

22. See ACUS RECOMMENDATION NO. 88-5, *supra* note 19 and 5 U.S.C. § 557(d)(1) (1988) (addressing ex parte communications).

23. Harter, *Points on a Continuum*, *supra* note 9, at 150.

24. *Id.* at 151; Hensler, *What We Know and Don't Know About Court-Administered Arbitration*, 69 JUDICATURE 270 (1986).

25. See, e.g., Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 468 (1985); Lambros, *The Summary Jury Trial—An Alternative Method of Resolving Disputes*, 69 JUDICATURE 286 (1986); Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986).

26. JOSEPH & GILBERT REPORT, *supra* note 20, at 302-304.

### B. Simplified Proceedings

The OSHRC simplified proceedings, while generically serving a core purpose of ADR, are not readily identifiable with any particular ADR device or technique commonly included in the ADR lexicons. As the name indicates, simplified proceedings aim to simplify the adjudicative process. Their basic purpose is consistent with the goals of ADR, and with the reasons commonly advanced for ADR—eliminating elaborate procedures, minimizing formalities, and reducing the time, expense, and other transactional costs of litigation.<sup>27</sup>

Among other things, the OSHRC simplified proceedings eliminate formal pleadings, ordinarily bar discovery, motions, or similar filings, and prohibit interlocutory appeals. Hearings are conducted in accordance with section 554 of the Administrative Procedure Act, but the Federal Rules of Evidence do not apply.<sup>28</sup> The concept itself is not revolutionary. As one leading commentator has recognized, although “[a]gencies have used informal ‘modified hearings’ for decades, given the current interest and the growth of experience with alternative means of dispute resolution, it is appropriate to ask when they can be used and how they need to be adapted to meet the dictates of the administrative process.”<sup>29</sup> Still, many summaries and lexicons<sup>30</sup> of ADR terminology do not seem to specify simplified procedures as a distinct form of ADR, although the concept of simplifying proceedings is well within the basic ADR rubric. For instance, some mention is made of “expedited procedures” in connection with small cases.<sup>31</sup> The OSHRC simplified proceedings could therefore be classified among the “case management” techniques which are related to ADR in spirit if not strictly in form.<sup>32</sup> Other analogues which come to mind are New York’s simplified procedure for court determination of disputes<sup>33</sup> and

27. ACUS RECOMMENDATION NO. 86-3, *supra* note 6.

28. 29 C.F.R. § 2200.200-.212 (1991).

29. Harter, *Dispute Resolution*, *supra* note 9, at 1411.

30. See ACUS RECOMMENDATION NO. 86-3, *supra* note 6; NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, PATHS TO JUSTICE: MAJOR PUBLIC POLICY ISSUES OF DISPUTE RESOLUTION (App. 2: Lexicon) (Report of the Ad Hoc Panel on Dispute Resolution and Public Policy) (1983), reprinted in ACUS SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION 42-46 (1987) [hereinafter ACUS SOURCEBOOK] (containing no mention of simplified proceedings).

31. CASE MANAGEMENT AS A TOOL FOR IMPROVING AGENCY ADJUDICATION, ACUS RECOMMENDATION NO. 86-7, 1 C.F.R. § 305.86-7 (1991).

32. See also Crowell & Pou Recommendation 87-11, *supra* note 7, at 36-37 (describing summary procedures for small contract claims).

33. See Carlisle, *Simplified Procedure for Court Determination of Disputes Under New York’s Civil Practice Law and Rules*, 54 BROOK. L. REV. 95 (1988).



the various kinds of small claims courts,<sup>34</sup> traffic courts, municipal courts, and other tribunals of limited jurisdiction which are intended to provide a forum for minor cases.

## II. OVERVIEW OF THE OSHA SYSTEM

### A. Introduction

Context is always important in understanding virtually any subject. In the case of OSHRC's settlement judges and simplified proceedings, some knowledge of the context in which these procedures operate is crucial. The settlement judges and simplified proceedings do not stand alone. They are part of an intricate statutory system which, in some respects, is unique to administrative law. Their use and effectiveness depend on a number of variables. These variables are linked to the nature, policies, and operation of the overall system. Changes in policies and operations elsewhere in the system will affect the frequency and nature—the how often and the how well—of the use of settlement judges and simplified proceedings.

Therefore, before focusing on the OSHRC settlement judges and simplified proceedings, this Article must lay some preliminary groundwork by providing an overview in Part II of the statutory system, and examining, in Part III, some important differences and similarities between the Occupational Safety and Health Administration (OSHA) system and the situation of other agencies where ADR is, or could be, used.

### B. Statutory, Policy, Operational, and Legal Context of OSHRC Adjudications

#### 1. Statutory and Policy Background

By any criteria, the passage of the Occupational Safety and Health Act (OSH Act)<sup>35</sup> in 1970 represented a significant milestone in administrative law. Substantively, it is the most comprehensive federal law ever enacted to deal with occupational safety and health.<sup>36</sup> Among its stated congressional purposes is the OSH Act's role "to assure, so far

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34. See Kulat, *Et Al.*: *Hairy Tales from Chicago's Pro Se Court Where You Don't Need a Lawyer to Help Solve Life's More Vexing Problems*, 13 STUDENT LAW. 14, 15 (Sept. 1984) (mentioning different types of small claims courts and trend towards experimentation).

35. Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified at 29 U.S.C. §§ 651-678 (1988)).

36. M. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW § 1 (2d ed. 1983 & Supp. 1989).

as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . . ."<sup>37</sup>

Jurisdictionally, the OSH Act's coverage of employers and employees in the private sector is, with some exceptions, coextensive with the full scope of the federal power to regulate commerce.<sup>38</sup> An estimated eighty million employees initially were covered by the OSH Act.<sup>39</sup> However, that number has decreased substantially, since more than twenty states have resumed direct enforcement responsibility for occupational safety and health under state programs which satisfy the "state plan" requirements of the OSH Act.<sup>40</sup>

Conceptually, the OSH Act follows a "law-enforcement" model, requiring employer compliance with substantive regulations, "occupational safety and health standards," promulgated by rulemaking.<sup>41</sup> Moreover, the OSH Act imposes a "general duty" on each covered employer to "furnish to each of his employees employment and a place of employment which [are] free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees."<sup>42</sup> Provisions are made for inspections, abatement of violations, sanctions including civil monetary penalties, and adjudication of disputed cases.<sup>43</sup>

One point should be emphasized at this juncture, a point which will bear repeating later. The OSH Act is qualitatively different, in some important respects, from the private-party civil litigation model which lies at the foundation of most traditional ADR techniques. OSHRC and its ALJs are not refereeing a dispute between private litigants. Although frequently more complex litigation under the OSH Act is akin to the enforcement of traffic regulations, building safety and fire codes,

37. 29 U.S.C. § 651(b) (1988).

38. See 29 U.S.C. § 652(5) (1988) (defining employer as "person engaged in a business affecting commerce"). See *Brennan v. Occupational Safety & Health Review Commission*, 492 F.2d 1027 (2d Cir. 1974) (applying definition of employer).

39. H.R. REP. NO. 1291, 91st Cong., 2d Sess. 14 (1970).

40. For statutory provisions pertaining to state plans, see 29 U.S.C. § 667 (1988). There seem to be 21 approved state plans where states have resumed direct responsibility for occupational safety and health. These states include California, Indiana, Maryland, Michigan, Minnesota, North Carolina, and Tennessee. O.S.H. Rep. (BNA): Reference File 81:1003 (1989). The number of employees and employers subject to direct federal enforcement jurisdiction therefore has decreased considerably. Precise figures are not particularly crucial to this Article, but the substantial number of "state plan" states, some of them populous and industrialized, does have considerable effect on the Occupational Safety and Health Review Commission (OSHRC) caseload, and thus indirectly on the use of ADR.

41. 29 U.S.C. §§ 654-655 (1988).

42. *Id.* § 654(a)(1).

43. *Id.* §§ 657-660.

and vehicle safety inspection laws. There are highly visible prosecutorial duties and important legal requirements—such as satisfying a burden of proof—imposed on government officials charged with representing the government in disputed cases.<sup>44</sup>

Administratively, the OSH Act takes an almost unique direction by creating two agencies, instead of a single agency, to carry out the enforcement scheme. The Department of Labor (DOL) is given the role of promulgating substantive occupational safety and health standards, conducting inspections and investigations, and prosecuting contested cases.<sup>45</sup> The OSHRC is completely independent of the DOL and adjudicates contested citations and penalties.<sup>46</sup> One commentator has labeled this arrangement the “split-enforcement” model.<sup>47</sup> As will be discussed in Part III, this bifurcation is not without potential significance as a factor in the actual use of settlement judges, simplified proceedings, and other ADR techniques. This “split-enforcement” system results in a situation where there are two agencies with different perspectives, institutional roles, and policies, which interact and may have considerable impact on the implementation of any particular form of ADR.

## 2. Operational and Legal Aspects

Adjudication by OSHRC and its ALJs occurs in an overall system which has features of varying complexity. In addition to the statutory “general duty” clause, there are several volumes of occupational safety and health standards (standards) published in the *Code of Federal Regulations*. One large block of these standards applies to virtually all private employers: General Industry and Health Standards.<sup>48</sup> Others, applicable to particular industries, override the general industry standard in case of conflict.<sup>49</sup>

Some of these standards are relatively precise and simple, involving measurements or common sense precautions. For example, some gen-

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44. See *infra* notes 80-87, 269-83 and accompanying text (discussing satisfying burden of proof).

45. 29 U.S.C. §§ 655, 657-659 (1988).

46. *Id.* §§ 659(c), 661.

47. Johnson, *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315 (1987).

48. 29 C.F.R. pt. 1910 (1991).

49. See S. BOKAT & H. THOMPSON, *OCCUPATIONAL SAFETY AND HEALTH LAW* 67 (1988) (noting that general industry standards are superseded by those created for specific industries). Examples of particular industry standards are found at 29 C.F.R. § 1915 (1991) (shipyards); *id.* § 1918 (longshoring); *id.* § 1926 (construction); and *id.* § 1928 (agriculture).

eral industry standards are rather specific regarding "single" portable wooden ladders, which are to be no longer than thirty feet,<sup>50</sup> and two-section extension wooden ladders, which are to be no more than sixty feet long.<sup>51</sup> Common sense inspired regulations such as the one prohibiting the placement of a ladder in front of a door which opens toward the ladder, unless the door is blocked, locked, or guarded.<sup>52</sup> Likewise, "ladders shall not be placed on boxes, barrels, or other unstable bases to obtain additional height."<sup>53</sup>

However, other standards are more open-ended, complex, or involve judgment calls. Even the ladder standards sometimes have a distinct element of open-endedness. For example, "[l]adders with broken or missing steps, rungs, or cleats, broken side rails, or *other faulty equipment* shall not be used . . . ."<sup>54</sup> Machine guarding standards also provide the same type of example.

The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefore, or, *in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator* from having any part of his body in the danger zone during the operating cycle.<sup>55</sup>

As to personal protective equipment, there are particular standards, such as those involving eye and face protection,<sup>56</sup> and a kind of "catch-all" general standard, which provides, among other things, "[p]rotective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing . . . and protective shields and barriers, shall be provided . . . and maintained . . . wherever it is necessary by reason of hazards of processes or environment . . . ."<sup>57</sup> "[A]ll personal protective equipment shall be of safe design and construction for the work to be performed."<sup>58</sup> These are only some of the less complex standards that may be encountered in cases contested before OSHRC.

Thus, as pointed out in one textbook,<sup>59</sup> there are various ways of categorizing standards. Some are "specification" standards, which detail the precise equipment, work processes, or materials required for

50. 29 C.F.R. § 1910.25(c)(3)(ii) (1991).

51. *Id.* § 1910.25(c)(3)(iii).

52. *Id.* § 1910.25(d)(2)(iv).

53. *Id.*

54. *Id.* § 1910.25(d)(2)(viii) (emphasis added).

55. 29 C.F.R. § 1910.212(a)(3) (1991) (emphasis added).

56. *Id.* § 1910.133.

57. *Id.* § 1910.132(a).

58. *Id.* § 1910.132(d).

59. M. ROTHSTEIN, *supra* note 36, § 1.

compliance. Others are "performance standards" which are more flexible and provide the employer with latitude as to the precise method of protecting employees from the hazard. Still others, such as the house-keeping and personal protective equipment standards, are general and somewhat open-ended.<sup>60</sup> Standards concerning employee safety training, hazard communication, and record-keeping, involve educating employees in safety and health matters, transmission of information, and maintaining documentation.<sup>61</sup>

Inspections for compliance with standards and the general duty clause generate a massive number of cited violations annually. In fiscal year 1988, there were 174,396 alleged violations resulting from inspections.<sup>62</sup> Moreover, the sheer number of standards, the great variety of types of standards and kinds of requirements imposed, and the number of cited violations, are not the only factors complicating the operational and legal aspects of enforcement and adjudication.

The system for adjudicating contested cases can be challenging, demanding, and complex. If an inspection discloses alleged violations a citation describing the violation is issued which includes a period for abatement of the violation, and there is a notification of proposed penalties, if any. A particular violation may be classified as willful,<sup>63</sup> serious,<sup>64</sup> or other than serious,<sup>65</sup> depending on a number of statutory factors and case precedents. The classification may affect the amount of civil penalty proposed or finally assessed.<sup>66</sup>

An employer who disagrees with the citation or proposed penalties can file, within fifteen days of receipt, a simple notice of contest.<sup>67</sup> All aspects of the citation and proposed penalties are subject to challenge, if timely contested. In one way or another, employers may dispute the existence of a violation, the time allowed for abatement of the violation, the nature of the measures required for abatement, the characterization of the alleged violation (willful, serious, or other), and the proposed penalties.<sup>68</sup> In addition, employees or their representatives can

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60. *Id.* §§ 93, 94.

61. *Cf. id.* § 95 (discussing standards regarding employer's duty to train and educate employees).

62. 19 O.S.H. Rep. (BNA) 1668 (Mar. 1, 1989).

63. 29 U.S.C. § 666(a) (1988).

64. *Id.* §§ 666(b), (k).

65. *See id.* § 666(c) (noting violations "determined not to be of a serious nature").

66. For a general discussion of the various categories of violation, see S. BOKAT & H. THOMPSON, *supra* note 49, at 257-76.

67. 29 U.S.C. § 659(a) (1989).

68. For general discussions of notices of contest, see S. BOKAT & H. THOMPSON, *supra* note 49, at 350-57; M. ROTHSTEIN, *supra* note 36, §§ 271-278.

elect party status if an employer files a notice of contest,<sup>69</sup> sometimes converting the litigation into a three-party affair. Furthermore, employees or their representatives are entitled to file a notice of contest as to the reasonableness of the time allowed for abatement in a citation.<sup>70</sup> Considerable litigation has resulted over the rights of employees with regard to settlements and other matters; by and large, the rights of employees or their representatives in OSHRC litigation have not been treated expansively.<sup>71</sup> For the sake of simplicity, this Article will not attempt to deal separately with whatever rights employee representatives may have with respect to OSHRC litigation, settlement judges, and simplified proceedings. The matters discussed in this Article will focus on litigation resulting from employer notices of contest, because employer contests form the vast bulk of the day-to-day litigation in the system.

Except for simplified proceedings, OSHRC procedural rules require the DOL's lawyers to file a relatively detailed complaint after receipt of a notice of contest.<sup>72</sup> This complaint requirement established by OSHRC regulations in 1986 represents something of a departure from the conventional "notice pleading" prevalent in judicial tribunals and many federal agency adjudications.

This requirement is significant in terms of ADR, and will be discussed at greater length elsewhere in this Article.<sup>73</sup> However, for background purposes, the following points should be noted. Although expressly intended as a device to impel better preparation of cases for trial,<sup>74</sup> this hybrid "fact pleading" requirement is remarkably in tune with the goals of ADR and strikingly in accord with the findings and recommendations of a special task force appointed by the chief judge of the District Court for the Northern District of California in 1982.<sup>75</sup>

A consensus gradually developed in the committee. It became convinced that the place where the most could be saved is in the formative stages of litigation. It is in those stages that patterns and expectations are set and thus it is in those

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69. 29 U.S.C. § 659(c) (1988); 29 C.F.R. § 2200.20(a) (1991).

70. 29 U.S.C. § 659(c) (1988); 29 C.F.R. § 2200.38 (1991).

71. For a discussion of employee rights relative to litigation and contested proceedings before OSHRC, see S. BOKAT & H. THOMPSON, *supra* note 49, at 468-80, and M. ROTHSTEIN, *supra* note 36, §§ 204, 279, 368, and 369.

72. 29 C.F.R. § 2200.35 (1991).

73. See *infra* notes 247-49 and accompanying text (addressing requirement of Department of Labor (DOL) attorneys to file detailed complaints after receipt of notice of contest).

74. See 51 Fed. Reg. 32,007 (1986) (codified at 29 C.F.R. § 2200 (1986)) (explaining final rule).

75. Brazil, Kahn, Newman, & Gold, *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE 252, 279 (1986).

stages where an infusion of intellectual discipline, common sense, and more direct communication might have the most beneficial effects. The committee identified several facts of early litigation life that make it difficult for lawyers and clients to resolve disputes efficiently. *One is notice pleading. Complaints and answers often do not communicate a great deal about the parties' positions and what supports them.* . . . These pleading practices have at least two ill effects on the cost of litigation: parties must use discovery to learn their opponent's *basic position* and to assay its underpinnings; and the scope of . . . discovery . . . is very broad because the scope of the litigation, as presented through the pleadings, is so broad. . . . Another problem is that some lawyers and litigants seem to find it difficult to squarely face their own situations early in the life of a lawsuit. Sometimes counsel have difficulty developing at the outset a coherent theory of their own case. . . . Sometimes litigants and lawyers are so pressed by other responsibilities that they can bring themselves to systematically analyze their own cause only when *some external event forces them to do so*.<sup>76</sup>

Intended or not, the "hybrid fact pleading" imposed by OSHRC serves an important "case management" purpose closely related to ADR. It is also one of several factors in the larger context of the enforcement and litigation system which affects the use of simplified proceedings.<sup>77</sup>

If a case is not settled, an OSHRC ALJ hears and decides the case.<sup>78</sup> The ALJ's decision is subject to review by OSHRC, and OSHRC's decision, whether in the form of declining to review and thereby letting the ALJ's decision become the final OSHRC decision or by grant of review and its own decision, is subject to judicial review.<sup>79</sup>

As could have been predicted, a substantial and somewhat complex body of legal doctrines and precedents has emerged from litigation before OSHRC over the past two decades. The developments most relevant to ADR seem to be very closely linked to the "law enforcement" model of the system. These developments involve matters such as the Secretary of Labor's (Secretary) burden of proof, the elements of a *prima facie* case, and the availability of affirmative defenses to alleged violations. In order to understand better the context in which the OSHRC settlement judge and simplified proceedings operate, a brief discussion of the elements of the system is necessary.

Even a casual reading of two standard textbooks<sup>80</sup> on occupational safety and health law indicates that OSHRC takes seriously the Secretary's burden of proof and has recognized a substantial number of af-

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76. *Id.* (emphasis added).

77. *See infra* notes 244-48 and accompanying text (explaining changes in rules governing pleadings).

78. 29 U.S.C. § 661 (1988).

79. *Id.* §§ 660-661 (1988).

80. M. ROTHSTEIN, *supra* note 36; S. BOKAT & H. THOMPSON, *supra* note 49.

firmative defenses. Some of the more significant points regarding the burden of proof and affirmative defenses are summarized below:

— In cases involving occupational safety and health standards, the Secretary's burden of proof includes establishing that: (1) the *cited* standard applies to the condition;<sup>81</sup> (2) the employer failed to comply with the requirements of the standard; (3) there was potential or actual *employee* exposure to the hazard posed by the violation; and (4) the employer knew or with the exercise of reasonable diligence could have known of the condition constituting a violation.<sup>82</sup>

— The type of standard involved will affect the particular evidence necessary to satisfy the *prima facie* burden of proof. Standards that specify the precise equipment, work processes, or materials required for compliance may require a different kind of evidence than "performance standards" which are more open-ended and leave the employer some latitude as to the precise method of protecting employees from hazards. Other standards, such as the housekeeping and personal protective equipment standards, are general and even more open-ended.<sup>83</sup> OSHRC's own procedural rules use the term "general standards"<sup>84</sup> to refer to standards "under which the obligation of the employer is contingent upon the existence of a hazard, [and to standards that do not] specify a means of abatement and [do] not provide a specific performance criterion."<sup>85</sup> Still other standards, such as those involving employee safety training, hazard communication, and record-keeping, may involve evidence in the form of documents and information within the possession of the employer.<sup>86</sup>

— In cases involving the general duty clause, the Secretary's *prima facie* burden of proof includes establishing: (1) that the employer failed to render the workplace free of "recognized" hazards; (2) that the hazard was "recognized" in the industry or by the employer; (3) that the hazard was causing or likely to cause death or serious physical harm; and (4) that there are specific, feasible measures which are likely to reduce the hazard.<sup>87</sup>

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81. See *Hoggatt, Inc.*, 13 O.S.H. Cas. (BNA) 1642 (1988) (citing simplified proceedings case in which ALJ declined to allow DOL to amend citation which cited inapplicable standard).

82. M. ROTHSTEIN, *supra* note 36, §§ 102-127; S. BOKAT & H. THOMPSON, *supra* note 49, at 376.

83. M. ROTHSTEIN, *supra* note 36, §§ 93-94.

84. 29 C.F.R. § 2200.35(d) (1991) (citing "[a]dditional requirements for complaints alleging violations of general standards").

85. *Id.*

86. *Cf.* M. ROTHSTEIN, *supra* note 36, § 95 (detailing employee training and education).

87. S. BOKAT & H. THOMPSON, *supra* note 49, at 114-38; M. ROTHSTEIN, *supra*



— The potential substantive defenses which could be raised are virtually unlimited.<sup>88</sup>

— OSHRC's rules are literally open-ended as to what constitutes "an avoidance or an affirmative defense" which supposedly is to be raised in the employer's answer to the Secretary's complaint. The pertinent rule states: "Such matters *include, but are not limited to*, the following: creation of a greater hazard by complying with a cited standard; . . . [and] infeasibility of compliance . . . ."<sup>89</sup> These OSHRC rules list at least nine such defenses.

— Textwriters have identified a substantial number of "defenses."<sup>90</sup> Among the more significant or complex are: (1) *res judicata*; (2) vagueness where the standard is general or open-ended and the existence of a hazard must be established;<sup>91</sup> (3) unpreventable employee misconduct; (4) impossibility of compliance; (5) compliance with the standard cited would create a greater hazard than noncompliance; (6) technological infeasibility; (7) economic infeasibility; and (8) when the citation is laid under the general duty clause but a specific standard applies.

— At multi-employer worksites, such as construction worksites, the proof and affirmative defense picture is even more complicated, involving matters of employer control of the conditions creating hazards and employee exposure.<sup>92</sup> A substantial percentage of simplified proceedings cases arise in the construction industry.<sup>93</sup>

On the surface, the adjudicative process appears simple and straightforward—a citation which includes an abatement period and a proposed penalty; a notice of contest; an adjudication before an OSHRC ALJ which is subject to review by OSHRC; and a subsequent judicial review. In actual operation, however, the process is considerably more complicated.

### C. Historical Context

The history of the OSH Act and its enforcement are an important part of the context in which the settlement judges and simplified pro-

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note 36, §§ 141-149.

88. M. ROTHSTEIN, *supra* note 36, §124.

89. 29 C.F.R. § 2200.36(b) (1991) (emphasis added).

90. S. BOKAT & H. THOMPSON, *supra* note 49, at 397-41; M. ROTHSTEIN, *supra* note 36, §§ 109-124.

91. M. ROTHSTEIN, *supra* note 36, § 114.

92. *See id.* § 161 (stating "multi-employer responsibility is one of the most difficult areas of OSHA law"). *See also* S. BOKAT & H. THOMPSON, *supra* note 49, at 411-17.

93. *See* Appendix (summarizing over 40 OSHRC and administrative law judge (ALJ) decisions reported in BNA's *Occupational Safety and Health Cases*).

ceedings operate. That history can be summarized in two words—controversial and fluid.

One academic observer summarized the first ten years of OSHA's experience succinctly:

OSHA has experienced profound difficulties. . . . From the outset the Act's implementation has been hampered by underfunding, poor administration, misdirected enforcement, and relentless assaults by critics. Moreover, since 1977, as the federal government has moved to implement the goals of the Act more forcefully, the criticism of OSHA has intensified. Serious questions regarding OSHA's expense, effectiveness, and priorities have been raised . . . .<sup>94</sup>

The OSHRC, though less controversial than OSHA, likewise was not free from perceived problems. "The Commission has been troubled by a lack of unanimity of its members, a lack of consistency in decisions, a lack of clarity in opinion writing, and an inability to decide cases promptly."<sup>95</sup>

The second decade of the OSH Act's history was a bit more placid. To describe most of the 1980's another commentator coined the term "President Reagan's OSHA."<sup>96</sup> More specifically, the tone and pace for the inspection/prosecutorial phase of enforcement during much of this decade was set by Assistant Secretary of Labor (OSHA) Thorne Auchter (1981-1984). This era placed great emphasis on: (1) a more cooperative relationship with employers; (2) education and training; (3) on-site consultations; and (4) delegation of increased authority to local OSHA area directors to settle enforcement disputes before they became contested cases formally submitted to OSHRC.<sup>97</sup>

Controversy, however, did not go away. Critics pointed to the reduced number of workplaces subject to inspection under the new policies, the forty-two percent decline in the number of citations for serious violations, and the enforcement emphasis on record-keeping violations rather than substantive hazards.<sup>98</sup> As summed up by one commentator near the end of the decade:

[Under a program begun in October 1981,] if a company maintained an injury/illness rate below the national average for manufacturing, any OSHA inspection would consist only of a review of the company's own records.

Because this records-only [inspection] policy put a premium on low injury rates, OSHA launched a controversial program to enforce the Act's records-

94. Rothstein, *OSHA After Ten Years: A Review and Some Proposed Reforms*, 34 VAND. L. REV. 71, 72 (1981).

95. *Id.* at 115 (footnotes omitted).

96. Goldsmith, *President Reagan's OSHA*, 14 EMPLOYEE REL. L.J. 633 (1989).

97. CONG. Q., FEDERAL REGULATORY DIRECTORY 413-14 (5th ed. 1986); OSHA Compl. Guide (CCH) ¶ 10,190 (1981).

98. CONG. Q., FEDERAL REGULATORY DIRECTORY 414 (5th ed. 1986).

keeping requirements. . . . By citing a company for numerous willful record-keeping violations, OSHA could accumulate the per-instance penalties to create mega-fines. Consequently, until recently, record-keeping violations have resulted in the largest proposed penalties in the history of the Act. For the most part, employers were justifiably enraged by the agency's 'overkill' on paperwork issues that had little direct bearing on worker safety and health.<sup>99</sup>

As noted by this same commentator, however, toward the end of the 1980's, OSHA extended the use of its large proposed civil penalties into more substantive safety and health areas, resulting in proposed penalties which ranged from \$1.5 million to \$5.11 million in particular cases.<sup>100</sup>

During the 1980's, OSHRC also underwent a number of changes. However, the most dramatic and the most obvious changes stemmed from a drastic decline in the number of contested cases. At the end of 1980, there were forty-four OSHRC ALJs located in nine different cities, with 7,515 new cases received during that year.<sup>101</sup> During 1981, incoming cases plunged from the 1980 high of 7,515 to 2,751.<sup>102</sup> In 1982, the decline continued with 1,242 new cases and an ALJ cadre of twenty four.<sup>103</sup> However, in recent years, the caseload has been gradually increasing. In 1988, the number of new contested cases climbed to 2,746, with a total ALJ complement of eighteen.<sup>104</sup>

This abbreviated treatment of the history of the OSH Act's implementation elucidates several points of relevance to settlement judges, simplified proceedings, and ADR in the OSHRC setting generally. Principally, these procedures do not operate in a vacuum. It is debatable, of course, whether OSHA's inspection, enforcement, and pre-contest settlement policies during the 1980's were the sole cause of the decline in contested cases reaching OSHRC. Nevertheless, the correlation between the policies and decline forcefully indicates that the policies of the inspection/prosecutorial arm are an important variable which can affect the number of cases and the kinds of cases before

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99. Goldsmith, *supra* note 96, at 639-40.

100. *Id.* at 640-41.

101. 1980 THE PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH, THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION 2 (all PRESIDENT'S REPORTS are on file with *The Administrative Law Journal*).

102. 1981 THE PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH, THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION 3 [hereinafter 1981 PRESIDENT'S REPORT].

103. 1982 THE PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH, THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION 2.

104. 1988 THE PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH, THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION 3, 5 [hereinafter 1988 PRESIDENT'S REPORT].

OSHC. Consequently, the number and nature of the cases where settlement judges, simplified proceedings, and other forms of ADR might be employed are affected by policies beyond OSHC's control. Therefore, if ADR is to be used in the OSH Act system, coordination between the inspection/prosecutorial arm and OSHC would seem imperative.

### III. IMPORTANT DIFFERENCES AND SIMILARITIES BETWEEN THE OSHA SYSTEM AND OTHER PROGRAMS AND AGENCIES USING ADR

#### A. Introduction

ADR techniques cannot be uprooted from one setting and transplanted wholesale to another. A technique or approach which operates successfully in one agency may be disastrous if superimposed on another. Perhaps the most certain way to insure failure in using ADR is to disregard the very real differences among federal agencies and programs. The Administrative Conference has stated very aptly, "the best procedure for a program, or even an individual dispute, must grow out of its own needs."<sup>105</sup>

In several important respects, the OSH Act adjudicative system is different from other federal programs in which ADR has been evolving with considerable success. These differences do not mean that ADR is irrelevant or unsuitable in the OSHA setting. Actually, these differences offer significant opportunities to experiment, develop, and extend ADR techniques into new territory. However, these differences must be considered carefully in designing and implementing ADR within each particular system.

#### B. Differences from Government Procurement Disputes

##### 1. Relationship of Parties

One of the earliest and most promising areas for the application of ADR in administrative law has been disputes arising out of government procurement and contracting. The problems and basic "landscape" of government contract appeals litigation have been described in a recent Administrative Conference Report.<sup>106</sup> However, the relationship between the parties to a contract dispute is substantially different from the relationship between the parties under the OSH Act scheme.

In government contracting, there is a commercial transaction between

105. ACUS RECOMMENDATION NO. 86-3, *supra* note 6.

106. Crowell and Pou Recommendation 87-11, *supra* note 7.

the parties. There is nothing inherently adversarial in the relationship. Indeed, the underlying relationship is voluntary, bilateral, cooperative, and often very symbiotic. Would-be contractors compete against each other for the privilege of dealing with the government. Insofar as can be determined, there is no competitive bidding among employers for the privilege of being inspected under the OSH Act.

In contracting, the relationship between the parties literally begins with accord and agreement—a contract. Any dispute arises later. To a large extent, the working relationship between company managers and government officials is primary. From the perspective of company and government managers, legal relationships established by a contract are very secondary.

Moreover, disputes which culminate in “litigation” can impair ongoing or future commercial relationships between the parties. If one party prevails in litigation, the outcome may be so unsatisfactory to the other party that future dealings are difficult if not impossible. The party who “wins” the litigation often loses that intangible known as good will, and risks losing a customer or provider of goods and services.

In short, there are strong extra-legal incentives for reaching accord in contract disputes, including but not limited to future relationships. Perhaps the most important service performed by ADR in government procurement is to repair an existing commercial relationship.<sup>107</sup>

In contrast, the OSH Act system involves government-imposed regulatory requirements. There is no underlying commercial transaction or relationship. Although there is a strong mutual interest in workplace safety and health, the relationship hardly can be called voluntary and symbiotic. The relationship contains a degree of inherent adversariness because of possible citations, monetary sanctions, and expensive abatement measures. No matter how cordial the opening conference with an OSHA compliance officer might be, inchoate disputes and adversariness exist at the outset of the relationship.

Nor is the relationship on-going. Inspections are more or less sporadic. A government contractor ordinarily hopes for another contract. An employer ordinarily will not hope for another OSHA inspection. The extra-legal incentives for reaching accord in a dispute under OSHA do not include the prospects of future profits on the one hand, and future procurement of goods and services on the other. There are no continuing or future commercial relationships which provide an in-

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107. See Rich, *Alternative Dispute Resolution: Opening Doors to Settlement*, Chemical Week, Aug. 14, 1985, at 28-30, reprinted in ACUS SOURCEBOOK, *supra* note 30, at 71-73 (explaining importance of maintaining commercial relationships).

centive to use ADR; the incentives go more to avoiding future entanglements with OSHA. Accordingly, ADR in the OSH Act system would serve a very different function than it would in government procurement disputes. ADR in the OSH Act system does not repair an existing commercial relationship. It may, however, serve to mitigate and "soften" the adversarial aspects of the regulatory relationship.

## 2. *Models, Analogues, and Traditions*

Another important difference between contract procurement and OSHA is found in the radically different models on which the two are based, and in the ADR analogues and traditions related to those models. ADR in government contracting can draw on abundant models, analogues, and traditions in the private sector. Despite statutes, regulations, and bureaucracy, a contract with the government is still a contract. The essence of the transaction is commercial. A contract is a business relationship, as well as a legal relationship.<sup>108</sup> Citation is hardly needed for the proposition that commercial arbitration, commercial mediation, mini-trials, and other ADR techniques pre-date and are available models for government contract dispute resolution.<sup>109</sup> A major theme of the recent Administrative Conference study on the use of ADR in government procurement litigation is that ADR "methods successfully help resolve private conflicts raising questions similar to those heard by [Boards of Contract of Appeals],"<sup>110</sup> and that "many government contract cases resemble those others where ADR has been applied successfully."<sup>111</sup> ADR techniques in government procurement can draw from a well developed, and still developing, wealth of innovations and techniques in analogous private commercial dispute resolution.

In contrast, the OSHA system is largely based on a "law-enforcement" model. The government inspects for compliance with the law, requires correction of conditions violating the law, and can impose sanctions for non-compliance. The dispute is public, not private. The dispute is between a government agency and a citizen or company. Available analogues include enforcement of traffic laws, building codes, and other "police power" regulations. ADR certainly has no wealth of models readily available from the private sector in these areas. For the most part, the predominant available model remains the "plea bar-

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108. *Id.* at 30, 73.

109. See ACUS SOURCEBOOK, *supra* note 30, at 672, 683, 689 (reprinting materials from American Arbitration Association).

110. Crowell and Pou Recommendation 87-11, *supra* note 7, at 9.

111. *Id.* at 11.

gain," negotiated with the agency or the prosecutorial authority.

Even in those communities where prosecutors and criminal courts have used ADR in "community dispute settlement" programs to deal with minor crimes, the target has been "minor crimes between people with continuing relationships."<sup>112</sup> In other words, these programs focus on cases which are criminal in theory, involving conduct chargeable as assault, petty theft, or harassment, but which often are the by-product of disputes and troubled relationships between individuals.<sup>113</sup> Under the OSH Act system, an employee complaint may trigger an inspection, but any underlying friction between the employer and its employees is largely irrelevant to the existence of workplace hazards and noncompliance with the law. Resolving a neighborhood dispute may render a criminal charge moot; resolving labor disputes will not cause a hazardous condition to disappear. The application of ADR to agencies operating under the "law enforcement" model simply has no strong or obvious analogues in the private sector.

### *C. Differences from Regulatory Agencies Covering Only One Kind of Industry*

Many federal agencies are concerned primarily with regulating conditions in one kind of industry. Examples include the Federal Communications Commission, the Interstate Commerce Commission, the Federal Energy Regulatory Commission, and the Nuclear Regulatory Commission.<sup>114</sup> In a number of these agencies, the regulatory focus is on economic matters, such as rate-setting and licensing. Some of the industries have a long history of being closely regulated public utilities. Although there are considerable differences among these agencies, they have in common a "vertical" model of jurisdiction over certain kinds of industries. This model results in some crucial differences between the agencies and OSHA.

In terms of relationships between the agency and the regulated industry, there is a continuing and more or less pervasive regulatory oversight. This close relationship has led to criticisms that agencies have been "captured" by the very industry they are supposed to control, although such contentions often reflect considerable oversimplification.<sup>115</sup>

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112. L. SINGER, *SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES, AND THE LEGAL SYSTEM* 119 (1990).

113. *Id.* at 121.

114. For a good summary of these and other federal agencies' jurisdiction and missions, see CONG. Q., *FEDERAL REGULATORY DIRECTORY* (5th ed. 1986).

115. See Frohnmayer, *Regulatory Reform: A Slogan in Search of Substance*, 66 A.B.A. J. 871, 872 (1980) (regarding "capture theory").

However, the working relationship between agency and industry under such regulatory regimes is a relationship of continuity and constant interaction.

This has implications for ADR in those agencies which would not apply in the OSH Act context. The relationship between such agencies and their regulated industries is in some respects similar to the relationship between contracting agencies and contractors. There is an ongoing relationship with considerable continuity and stability. Consequently, within the system itself, there are strong incentives to accommodation. Antagonism and harsh adversariness are counterproductive on both sides. Metaphorically, the industry and the agency must live together and must take a long-range view. The incentives for coexistence and cooperation, rather than hostility and confrontation, are strong. These incentives make for an atmosphere where ADR techniques and mechanisms are likely to be used, even though the agency and the industry officials may never have heard the term "alternative dispute resolution."

In addition, the nature of regulation in many other agencies may be qualitatively different from that of the OSH Act system. Industries of the same kind will be more homogeneous and, therefore, will confront similar problems which are more susceptible to regulatory solutions that can be applied uniformly throughout the system. Under the OSH Act system, the regulated industries are very heterogeneous. Many workplace hazards and conditions vary radically from industry to industry. The construction industry, for example, presents unique safety problems stemming from the fact that the workplace literally changes hourly as the building progresses.

Furthermore, many other agencies primarily are concerned with the economic or special aspects of the regulated homogeneous industry—rates, routes, broadcast frequencies, and return on investment. Under the OSH Act, economics are secondary and the regulated industries are a heterogeneous collection of diverse interests with widely different workplace conditions.

#### *D. Differences from Most Agencies' Policy-Setting*

The so-called "split-enforcement" model established under the OSH Act has advantages and disadvantages.<sup>116</sup> One point is fairly clear, however. The existence of a separate, independent adjudicative agency

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116. See generally Johnson, *The Split-Enforcement Model: Some Conclusions from the OSHA and the MSHA Experiences*, 39 ADMIN. L. REV. 315 (1987) (analyzing "split-enforcement" model).



has consequences for the implementation of ADR under the OSH Act.

Under most regulatory systems, there is a single, ultimate policymaking authority, whether a cabinet official or an independent board or commission. Although in most agencies this policymaking authority must respect the independence of ALJs and may be limited in its control of particular adjudications by law<sup>117</sup> or by simple considerations of public relations and fairness, a unified policy can be imposed regarding such matters as ADR. All components of the agency can be consulted, with policy differences debated and resolved internally, before proposed rulemaking or other steps are taken. In short, the ultimate policymaking authority in most agencies can decide that certain ADR techniques will be used in certain situations, and everyone else in the agency is expected to quietly accept and implement the policy throughout the system. In a "split-enforcement" system, there are two independent policymakers, heading two agencies, whose personnel may be implementing two different sets of policies.

Perhaps more importantly, if there are features in some other part of the enforcement or adjudicative system which could adversely affect the implementation of ADR policies, appropriate adjustments can be made by a single policymaking authority. In other words, policies within a single agency can be coordinated so that the enforcement and prosecutorial arms, for instance, are not at odds with the adjudicative hearing or appeals component. To take a simple example, an agency that decides to reduce the paperwork and documentation previously required for the settlement of a case does not have to be concerned about cooperation from its own adjudicative branch.<sup>118</sup>

Unfortunately, the impact of one of the two agencies' policies upon ADR is not always going to be obvious. Incentives and disincentives to use the ADR machinery established by the adjudicative agency can be affected by the policies of the enforcement agency and vice-versa. New inspection priorities, new programs, reallocation of resources, and other policy changes in the enforcement arm will affect the nature and number of cases contested before the adjudicative agency. For example, the availability of informal, pre-notice-of-contest conferences with OSHA area officials could be expected to reduce the number of contested cases. However, at the same time those informal conferences also substantially reduced the number of cases where simplified proceedings

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117. See 5 U.S.C. §§ 554(d)(2), 5372, 7521 (1988).

118. See *infra* notes 147-48 and accompanying text (discussing explicit judicial recognition of DOL's authority to withdraw contested citation).

would otherwise have been requested.<sup>119</sup>

None of this detracts from the value of a statutorily independent adjudicative agency. It does, however, point to the need for tailoring ADR mechanisms and techniques to the unusual enforcement system that exists under the OSH Act. ADR mechanisms established by one agency in a "dual enforcement" system may be rendered useless by policies of the other agency which are outside its control.

### *E. An Important Similarity: External Constraints*

There is one feature that the bifurcated OSH Act system shares with virtually all other agencies: neither the DOL nor the OSHRC are free agents. Without statutory authority the DOL could not promulgate legally enforceable safety and health standards and the OSHRC could not adjudicate anything. Although, like all agencies, they have a considerable range of authority which can be implied from their respective statutory mandates, there are judicially enforceable limits on that authority.

Moreover, there are abundant extra-legal constraints. The DOL and, to a somewhat lesser extent, the OSHRC are demonstrably subject to media, interest group, and congressional scrutiny. Merely browsing through the index to one of the periodicals devoted to occupational safety and health will disclose numerous examples of this scrutiny of agency policies and actions.<sup>120</sup> Congressional scrutiny is constant and sometimes touches on matters clearly related to ADR. For example, the General Accounting Office (GAO) conducted a study of the informal conferences at area director's offices.<sup>121</sup> The reaction of those outside the agency to changes in enforcement, settlement, and ADR policies must be taken into account in making and implementing those policies.

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119. See *infra* notes 133-39 and accompanying text (explaining area directors' role in settlements).

120. See 18 O.S.H. Rep. (BNA) 793 (Sept. 7, 1988) (detailing OSHA "mega-fine" enforcement strategy criticized by National Safe Workplace Institute); *id.* at 799 (raising congressional inquiry regarding promotion of individual to position of OSHA deputy administrator); 18 O.S.H. Rep. (BNA) 1045 (Oct. 19, 1988) (articulating Solicitor of Labor response to General Accounting Office (GAO) study: "Getting Away with Murder In the Workplace: OSHA's Nonuse of Criminal Penalties for Safety Violations"); *id.* at 1047 (elaborating union protest, including 3,200 foot long list of companies alleged to have violated toxic chemical regulations).

121. See *infra* notes 233-36 and accompanying text (discussing role of area directors in settlements).

### *F. Conclusions*

All of the above notwithstanding, ADR is still significant in the OSH Act context. However, the fundamental premise is that the particular features of the OSH Act system must be taken into account in devising ADR techniques and machinery. The ADR experience and machinery of other agencies cannot be superimposed mindlessly on the OSH Act system. Adaptation, evolution, and experimentation are necessary. The ADR techniques and machinery must flow from, and be compatible with, the experience and nature of this particular regulatory context.

Moreover, given the inherent regulatory, investigative, legalistic, and adversarial elements of the OSH Act system, ADR may be quite important as a means to reduce tensions and frictions within the system. Very few people who have ever received a ticket for speeding, failing to stop at a stop sign, or driving with malfunctioning turn signals, are happy about it. An OSH Act citation can be much more serious and much more expensive. A certain amount of antagonism is a natural response, especially if one feels unfairly treated.

The inherent frictions and adversariness of the OSH Act system can be tempered. OSHRC could be an indispensable mediating influence for workable accommodations without compromise to safety and health. OSHRC is detached from both parties, independent and adjudicative. Its adjudicative role makes it a natural focal point for developing ADR techniques and machinery in cases which have been contested. However, great care must be exercised. OSHRC's credibility as a neutral adjudicator is crucial. The development, implementation, and viability of ADR techniques within the adjudicative setting largely depends upon OSHRC and its ALJs.

## IV. OSHRC SETTLEMENT JUDGES AND SIMPLIFIED PROCEEDINGS

### *A. The Common Context Shared by Settlement Judges and Simplified Proceedings: A Settlement-Prone System*

Taken as a whole, the OSH Act enforcement and adjudicative system is extremely pro settlement. About 60,000 to 70,000 OSHA inspections occur annually,<sup>122</sup> with approximately 170,000 alleged violations being found.<sup>123</sup> The great bulk of the cited violations are not contested. For example, OSHRC statistics for fiscal year 1988 reported

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122. See 18 O.S.H. Rep. (BNA) 859 (Sept. 21, 1988) (citing statistics reported for fiscal year 1986 and 1987).

123. See 18 O.S.H. Rep. (BNA) 1668 (March 1, 1989) (reporting fiscal year 1988 statistics).

2,746 new cases received.<sup>124</sup> Although many of these cases probably involved notices of contest challenging more than one cited violation, it is safe to conclude that no more than fifteen percent of the alleged violations are contested before OSHRC.

Of the cases actually contested before OSHRC, about ninety percent are resolved, ordinarily by settlement without a hearing before the ALJ. However, OSHRC rules do require settlement agreements to be approved by the ALJ,<sup>125</sup> so OSHRC tallies cases settled as also being "decisions." Thus, of 2,279 decisions rendered by ALJs in fiscal year 1988, 154 were rendered after a hearing (approximately seven percent).<sup>126</sup> The rest presumably were settlements. Of 1,813 decisions rendered by ALJs in fiscal year 1987, 190 were issued after a hearing (approximately 10.5%).<sup>127</sup> Therefore, the number of cases actually litigated in hearings before an OSHRC ALJ represent a mere fraction of the violations alleged in citations issued by OSHA. There are a number of factors which account for this low number. As will be discussed briefly below, the more obvious factors making a system conducive to avoiding formal litigation include: (1) extra-legal factors, primarily the "costs," in the broadest sense of the word, of litigation, coupled with; (2) the availability of informal conferences with the OSHA area director, prior to filing a notice of contest; (3) the DOL's own policies; (4) judicial precedents relevant to settlements; (5) the OSHRC rules and policies encouraging settlement; and (6) the interaction of all these factors.

First, the extra-legal factors providing an incentive against filing a notice of contest are easy to comprehend as a matter of common sense, although difficult to document in rigorous empirical fashion. Simply put, the most obvious disincentive to filing a notice of contest is the "cost" of contesting the notice compared to the potential benefits.<sup>128</sup> Many citations involve violations which would be upheld if contested. Even if a viable dispute may exist, the amount of civil penalty directly at stake is likely to be far less than the financial expense of contesting a citation. If a lawyer is not retained, and the civil penalty is more than \$1,000, a company appearing pro se through one of its management officials inevitably sacrifices the time of its officials and witness-employees.<sup>129</sup> Moreover, the less tangible "costs" of contesting a citation may

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124. 1988 PRESIDENT'S REPORT, *supra* note 104, at 5.

125. 29 C.F.R. §§ 2200.100(b)-(c) (1991).

126. 1988 PRESIDENT'S REPORT, *supra* note 104, at 5.

127. *Id.*

128. See M. ROTHSTEIN, *supra* note 36, § 271 (raising disincentives to contests).

129. Sand, *Contesting "Blockbuster" Citations: Recent Decisions in Several Areas*,

be considerable: potentially adverse publicity,<sup>130</sup> a fear that contesting a citation will increase the possibility of future inspections or inspections at other company worksites,<sup>131</sup> potential workplace friction with unions or non-unionized employees, and the risk of being perceived as insensitive to workplace safety and health.

The burdensome "costs" of full litigation are not exclusively shouldered by the employer. The government's resources are finite, and its agencies are staffed by human beings. Every inspector who has to testify at a hearing is an inspector who is not at a workplace looking for hazards to employee safety and health. Every government attorney trying a case which could legitimately have been settled has been diverted from other cases. Even more importantly, every contested violation represents a possible hazard which, if the notice of contest has been filed in good faith, does not have to be corrected before the litigation process has run its course.<sup>132</sup>

Second, closely related to these general extra-legal factors is the availability, especially since 1980, of informal conferences with the area director. By joint memorandum dated September 8, 1980, the Solicitor of Labor and the Assistant Secretary of Labor for Occupational Safety and Health authorized OSHA's area directors to enter into informal settlement agreements with an employer prior to notices of contest being filed.<sup>133</sup> With area directors being authorized to reduce penalties, modify abatement dates, reduce the characterization of the violation, such as from serious to other-than-serious, and even withdraw a citation,<sup>134</sup> OSHA itself provided a significant ADR mechanism. Although notices of contest must be filed within fifteen days after the citation or notice of proposed penalties is served,<sup>135</sup> this still leaves time for many disputed violations and penalties to be resolved by informal conference with the area director. A pro se employer, therefore, can avoid most of the costs associated with litigation if a conference with the area director is successful. Moreover, if there are disputed matters which cannot be resolved within the fifteen-day period, an employer still has an opportunity to continue negotiations with the area director after filing a formal notice of contest with OSHRC. Generally, if there

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14 EMPLOYEE REL. L.J. 123 (1988).

130. *Id.*

131. *Id.* at 123-24.

132. 29 U.S.C. §§ 659(b), 666(d) (1988). See M. ROTHSTEIN, *supra* note 36, § 298 (discussing problems stemming from provisions).

133. 10 O.S.H. Rep. (BNA) 533 (Oct. 16, 1980).

134. *Id.* at 552 (giving text of Joint Memorandum).

135. 29 U.S.C. § 659(b) (1988).

is reason to believe that a settlement is likely, the area director can request authority to continue negotiations while the case is still in the pleadings stage, in an effort to settle the matter.<sup>136</sup>

The impact of these policies was reflected by the immediate drop in the number of contested cases which occurred after their implementation in 1980. After the first two months, the notice of contest rate had declined from twenty-eight percent to fourteen percent, and the average number of contested cases received by OSHRC had declined from an average 160 new cases per week to sixty new cases per week.<sup>137</sup> During calendar year 1981, OSHRC also reported 2,751 new cases, as compared to the previous year's total of 7,515.<sup>138</sup> Of course, most of the cases informally settled with OSHA prior to the notice of contest probably would be among the ninety percent of those cases settled after notice of contest anyway, but the availability of informal conferences is most certainly a factor conducive to early settlement.

In sum, many disputed violations and proposed penalties never ripen into a full-fledged notice of contest and litigation because they are resolved informally at the area director's level.<sup>139</sup> As noted in a recent text oriented to the practicing attorney, "it is the general experience that an employer may obtain a reduction in the Secretary's proposed penalty of 50% in settling an OSHA citation."<sup>140</sup>

A third important factor is the DOL's own policies. In addition to settlement authority at the area director level, other DOL policies can directly or indirectly influence the number of contested violations and penalties. For the first half of the 1980's, for example, various programs recognizing firms with excellent safety programs, making exemptions from routine inspections, providing consultative visits by OSHA inspectors, and providing a generally cooperative atmosphere,<sup>141</sup> probably had both a direct impact on reducing notices of contest and

136. 10 O.S.H. Rep. (BNA) 553 (Oct. 16, 1980).

137. OSHA Compl. Guide (CCH) ¶ 10,191 (Apr. 1981).

138. 1981 PRESIDENT'S REPORT, *supra* note 102, at 3.

139. It should be noted that the implementation of these policies has not been free from criticism. A General Accounting Office (GAO) study of 150 randomly selected informal Occupational Safety and Health Administration (OSHA) settlements during 1983 indicated that the average penalty reduction was more than 50%. The study also found that the proposed penalties had been reduced in all but one of the cases. Of the 946 violations alleged in the 150 cases, however, only 24 had been reduced in character, such as from serious to other-than-serious, and 15 withdrawn.

OSHA Compl. Guide (CCH) ¶ 11,472 (Jan. 1985) (summarizing INFORMAL SETTLEMENT OF OSHA CITATIONS: COMMENTS ON THE LEGAL BASIS AND OTHER SELECTED ISSUES, GAO/HRD-85-11 (Oct. 26, 1984)).

140. S. BOKAT & H. THOMPSON, *supra* note 49, at 316.

141. CONG. Q., FEDERAL REGULATORY DIRECTORY 414 (5th ed. 1986).

an indirect effect of setting the overall tone for agency enforcement activity. When the assistant secretary fosters a program which commits resources to some 25,000 consultative visits a year by agency inspectors, under which employers are not cited for violations,<sup>142</sup> the number of enforcement inspections and cited violations necessarily will decrease. As described by one source, Assistant Secretary Auchter "initiated a policy of settling potentially contested cases in a way that eliminated the hazard but precluded the involvement of the Commission."<sup>143</sup> By April 1985, three percent of the citations were being contested compared to twenty-two percent in 1980.<sup>144</sup> Moreover, the "voluntary compliance" policies during this same period also limited many enforcement inspections to review of an employer's own records if the employer's injury/illness rate was below the national average for manufacturing.<sup>145</sup> This policy, in turn, led to an emphasis on record-keeping violations, numerous citations for "willfull" violation of record-keeping requirements, and penalties much larger than those proposed for violations which had resulted in death or serious injury.<sup>146</sup> In short, as the inspection arm's policies change so do the number and kinds of cases which are contested.

A fourth factor which emerged during the 1980's was explicit judicial recognition of DOL's authority to withdraw a citation which had been contested, and implicit recognition of substantial authority in the DOL to settle disputed cases. In a brief per curiam opinion, the Supreme Court indicated that the Secretary's decision to withdraw a citation was not reviewable by OSHRC.<sup>147</sup>

It is the Secretary, not the Commission, who sets the substantive standards for the workplace, and only the Secretary has the authority to determine if a citation should be issued to an employer. . . . A necessary adjunct of that power is the authority to withdraw a citation and enter into settlement discussions with the employer. . . . The Commission's function is to act as a neutral arbiter and determine whether the Secretary's citations should be enforced over employee or union objections. Its authority plainly does not extend to overturning the Secretary's decision not to issue or to withdraw a citation.

The Sixth Circuit's conclusion that the Commission can review the Secretary's decision to withdraw a citation would discourage the Secretary from seeking vol-

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142. *Id.*

143. *Id.*

144. *Id.*

145. Goldsmith, *supra* note 96, at 639.

146. *Id.* at 640; Sand, *Contesting "Blockbuster" Citations: Recent Decisions in Several Areas*, 14 EMPLOYEE REL. L.J. 123, 124 (1988). See 16 O.S.H. Rep. (BNA) 916 (Jan. 21, 1987) (discussing \$1.38 million proposed penalties against Union Carbide).

147. *Cuyahoga Valley Ry. v. United Transp. Union*, 474 U.S. 3 (1985).

untary settlements with employers in violation of the Act, thus unduly hampering the enforcement of the Act. Such a procedure would also allow the Commission to make both prosecutorial decisions and to serve as the adjudicator of the dispute, a commingling of roles that Congress did not intend . . . .<sup>148</sup>

Although the case itself was more narrowly concerned with withdrawal of citations, the Court seemed to go out of its way to mention that the DOL should not be discouraged from seeking settlements.

Finally, OSHRC has never been hostile to settlements. However, its early rules and policies did impose several conditions required for OSHRC approval of a settlement. For instance, at one time OSHRC rejected settlement agreements containing exculpatory language relative to the fact of violation,<sup>149</sup> although it later retreated from this position.<sup>150</sup> In 1986, OSHRC deleted from its rules a provision that allowed approval of a settlement agreement "when it is consistent with the provisions and objectives of the Act."<sup>151</sup> Responding to an objection to this deletion, OSHRC stated: "The Commission believes that deletion of this provision from the Commission's rules is in keeping with the Commission's *limited role in reviewing settlement agreements*."<sup>152</sup>

Current OSHRC rules of procedure are notably lacking in substantive content requirements:

(a) *Policy*. Settlement is permitted and encouraged by the Commission at any stage of the proceedings.<sup>153</sup>

(b) *Requirements*. The Commission does not require that the parties include any particular language in a settlement agreement, but does require that the agreement specify the terms of settlement for each contested item, specify any contested item or issue that remains to be decided . . . , and state whether any affected employees who have elected party status have raised an objection to the reasonableness of any abatement time. Unless the settlement agreement states otherwise, the withdrawal of a notice of contest, citation, notification of proposed penalty, or petition for modification of abatement period will be with prejudice.<sup>154</sup>

The net result of the factors discussed above has been a system where ninety percent of the cases are resolved without formal litigation. Settlement is the norm in this system. The attitudes and expectations of lawyers and parties familiar with the system are geared toward set-

148. *Id.* at 6-7.

149. *Matt J. Zaich Construction Co.*, 1 O.S.H. Cas. (BNA) 1225 (1973).

150. *Farmers Export Co.*, 8 O.S.H. Cas. (BNA) 1655 (1980).

151. 51 Fed. Reg. 32,013 (1986) (quoting prior rule at 29 C.F.R. § 2200.100(a) (1991)).

152. *Id.* (emphasis added).

153. 29 C.F.R. § 2200.100(a) (1991).

154. *Id.* § 2200.100(b).



tlement, and as the *Joseph & Gilbert Report* indicates, expectations and attitudes are an important element in achieving settlement.<sup>155</sup>

Most litigating lawyers are aware of a phenomenon which occurs when it becomes clear that a case will be settled. There is an attitudinal change, sometimes partially or wholly marked, when difficulties and disagreements become things to be understood and ironed out; from then on effort is expended on resolving differences rather than developing them into adversary positions.<sup>156</sup>

In a system where settlement is the norm, experienced parties, particularly the DOL officials and their lawyers, are likely to begin with the attitude that the contested case can be worked out and there is not even a need on their part for an "attitudinal change." Moreover, lawyers in cases contested before the OSHRC, particularly the DOL lawyers, not only develop a mind-set inclined toward expectations of settlement, but also necessarily gain some degree of expertise in negotiating and settling ninety percent of the contested cases. Techniques for arriving at alternatives, adjustments, and compromise become part of the experienced lawyers' working tools. To a certain extent, then, litigating any case of a type which is usually settled represents a departure from the norm.

Overall, the settlement judge procedures and simplified proceedings operate in the context of a system which is already very conducive to resolving cases without full and formal litigation. The various "costs" of formal adjudication, the policies of the prosecutorial agency, and the encouragement of the adjudicative agency provide substantial incentives and opportunities for settlement. This settlement-prone environment does have some consequences, however, affecting the use of settlement judges.

## *B. OSHRC Settlement Judge Procedures and Experience*

### *1. Background*

OSHRC's rules governing settlement judge (SJ) procedures actually pre-date the *Joseph & Gilbert Report* by almost two years. The proposed rule was published in June 1986.<sup>157</sup> Described in the notice of proposed rulemaking as "innovative and experimental,"<sup>158</sup> the OSHRC's final SJ rule was published on September 8, 1986, as one component in a comprehensive revision of its rules of procedure.<sup>159</sup>

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155. ACUS RECOMMENDATION NO. 88-5, *supra* note 19, at 21, 22-23, 28-31.

156. *Id.* at 24.

157. 51 Fed. Reg. 23,184, 23,193, 23,207-08 (1986).

158. *Id.* at 23,193.

159. Notice of Final Rule, 51 Fed. Reg. 32,002 (1986) (codified at 29 C.F.R. §

The SJ procedures apply to notices of contest by employers and actions for fees under the Equal Access to Justice Act.<sup>160</sup> Whenever "there is a reasonable prospect of substantial settlement with the assistance of *mediation* by a Settlement Judge,"<sup>161</sup> any party can move for the appointment of a SJ. With the parties' consent, the OSHRC chief ALJ or the chairman can *sua sponte* assign a SJ. It is worth emphasizing that the OSHRC explicitly uses the term "mediation" in describing the SJ process.

Although there are minor differences in details, the OSHRC SJ procedures are generally consistent with the key procedural recommendations of the *Joseph & Gilbert Report*.<sup>162</sup> Either party can veto the use of a SJ.<sup>163</sup> The SJ proceedings are limited to forty-five days in duration,<sup>164</sup> unless extended at the request of the SJ for another twenty days.<sup>165</sup> The SJ is to confer with the parties, may suspend or allow discovery while assigned to the case, and is expressly authorized to communicate privately with each party's attorney or other representative regarding concessions and the reasonableness of the party's position.<sup>166</sup> Discussions are usually by telephone<sup>167</sup> but provision is made for face-to-face conferences.<sup>168</sup>

To the extent a regulation can accomplish this feat the rule also requires the parties "to be completely candid with the Settlement Judge so that he may properly guide settlement discussions."<sup>169</sup> The SJ also is given rather open-ended authority, appropriate to the mission, to "make such other and additional requirements of the parties and persons having an interest in the outcome as to him shall seem proper in order to expedite an amicable resolution of the case."<sup>170</sup> The SJ proceedings can be terminated if a party fails to cooperate.<sup>171</sup> The confidential nature of the SJ proceedings is maintained by: (1) providing that no evidence of statements or conduct in SJ proceedings is admissi-

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2200.101 (1991)).

160. 29 C.F.R. § 2200.101(a) (1991).

161. *Id.* § 2200.101(a)(2) (emphasis added).

162. See ACUS RECOMMENDATION NO. 88-5, *supra* note 19, at 40-47 (summarizing various recommendations).

163. 29 C.F.R. § 2200.101(a)(2) (1991).

164. *Id.* § 2200.101(a)(3).

165. *Id.* § 2200.101(d)(1).

166. *Id.* § 2200.101(b).

167. *Id.* § 2200.101(c)(1).

168. 29 C.F.R. § 2200.101(c)(1) (1991).

169. *Id.* § 2200.101(c)(2).

170. *Id.*

171. *Id.*

ble in any subsequent hearing, except by stipulation of the parties;<sup>172</sup> (2) prohibiting later use in litigation of documents disclosed in the settlement process unless obtained through appropriate discovery or subpoena;<sup>173</sup> (3) prohibiting the SJ from discussing the merits of the case with any other person;<sup>174</sup> and (4) prohibiting the SJ from being called as a witness in any hearing of the case.<sup>175</sup> If the case remains unresolved, in whole or part, the SJ cannot serve as the presiding ALJ, unless requested by the parties.<sup>176</sup>

In terms of the characteristics of the adjudicating body's overall docket, the OSHRC caseload meets two of the three criteria suggested by the *Joseph & Gilbert Report*, as conditions precedent for establishing an SJ procedure: (1) a large proportion of the cases present factual issues which are not of major precedential importance; and (2) remedies under the OSH Act are susceptible to gradation and compromise.<sup>177</sup> Under the OSH Act there is considerable room for adjusting the amount of monetary penalty; the violations may be characterized as to degree, such as willful, serious, other than serious, and repeated; and even the details of abatement may be subject to compromise.

However, OSHRC SJ proceedings take place in a setting which only partially meets the third *Joseph & Gilbert* criterion—crowded dockets with relatively few cases being settled.<sup>178</sup> As noted elsewhere in this Article,<sup>179</sup> there is a ninety percent settlement rate, and settlement is something of a norm for contested cases before the OSHRC. This high settlement rate does appear to have affected the use of SJ proceedings, and the perspective of some DOL attorneys and OSHRC ALJs regarding SJ proceedings.

As a matter of considerable relevance to the implementation and operation of the SJ procedures during the first three years of their existence, it should be noted that the original proposal in 1986 generated objections and controversy from some key quarters. Five commentators on the proposed SJ rule—the Secretary of Labor and four of the OSHRC's own ALJs—opposed its adoption, contending that there was no need for a SJ procedure.<sup>180</sup> OSHRC disagreed, stating:

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172. *Id.* § 2200.101(c)(2).

173. 29 C.F.R. § 2200.101(c)(2) (1991).

174. *Id.* § 2200.101(d)(3).

175. *Id.*

176. *Id.*

177. ACUS RECOMMENDATION NO. 88-5, *supra* note 19, at 39-40.

178. *Id.* at 39.

179. See *supra* notes 126, 127 and accompanying text (providing statistics of ALJ decisions resolved by settlement and those actually litigated).

180. 51 Fed. Reg. 32,014 (1986).

[T]here are a substantial number of cases in which use of the Settlement Judge procedure can result in settlement of the case and avoidance of needless litigation. The Commission anticipates that this will occur, most commonly, in cases where, at some time during the pre-hearing stage of the litigation, the parties realize that they do not really want to go to trial but would prefer some other means of resolving their dispute. The Commission believes that, if the option of a mediated settlement is provided expressly and is available to the parties, they will utilize the procedure.<sup>181</sup>

However, the OSHRC also took a cautious posture which did not exactly get the SJ procedure off to a running start. In the explanatory preface to its final rule, OSHRC "emphasized . . . that the rule has been adopted and, particularly at the outset, will be implemented, on an experimental basis. The procedure will be used sparingly at first until problems can be worked out."<sup>182</sup>

The new SJ procedures thus began with some handicaps: (1) almost one-fourth of OSHRC's own eighteen ALJs<sup>183</sup> were demonstrably unenthusiastic about the procedures; (2) the DOL, the prosecutorial arm of the adjudicative system, initially was opposed to using SJs; (3) OSHRC itself suggested that SJs should be used sparingly; (4) there was a long history of ninety percent settlement rates in any event; (5) since the total caseload annually, at that time, was around 2,000, with a ninety percent settlement rate, this meant that only about 200 or so cases would be realistic candidates for SJ procedures; and (6) SJ proceedings, by their nature, should be relatively infrequent. In light of such handicaps, the most surprising feature of the OSHRC experience has not been the small number of cases in which SJ procedures have been invoked, but the fact that a base of experience, some successful use, and continuing, perhaps growing, support, exists for SJ procedures at all.

It must be emphasized that with a total caseload of two or three thousand cases in which only about ten percent ordinarily go to full hearing, there should be only a relative handful of SJ proceedings. A substantial upsurge in the number of SJ requests might be cause for concern, indicating the possibility that the procedure is being used ex-

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181. *Id.*

182. *Id.*

183. The OSHRC Annual Report for 1986 states that there were 18 ALJs employed and two of these were the Chief ALJ and the Deputy Chief ALJ. 1986 THE PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH, THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION 4 [hereinafter 1986 PRESIDENT'S REPORT]. ASSUMING THAT THE OBJECTIONS TO THE SJ PROPOSAL DID NOT COME FROM THE CHIEF ALJ, IT IS LIKELY THAT ONE-FOURTH OF THE SITTING ALJS WHO PRESIDED OVER THE VAST MAJORITY OF OSHRC CASES ALREADY HAD EXPRESSED THE VIEW THAT THE SJ PROCEDURES WERE UNNECESSARY.

cessively and in situations where it is not particularly appropriate, efficient, or useful. The SJ procedures are intended to be used when there is some form of impasse or barrier to settlement. Nevertheless, the small numbers should not detract from the significance of the procedure and the importance of its availability. SJ procedures are for exceptional situations. Without SJ procedures, the only alternative in those exceptional situations would be full litigation and an imposed resolution, rather than resolution by the parties.

However, the exceptional nature of SJ procedures itself signifies one inherent problem which could be christened the "out-of-sight-out-of-mind" syndrome. In the OSHA context the commonly used tools are bilateral negotiations supplemented to a greater or lesser degree by ordinary ALJ encouragement to settle. These tools work, and have worked rather successfully for more than fifteen years, in a system where only about ten percent of the contested cases actually go to hearing anyway.

Telling attorneys and ALJs experienced in working with the commonly-used tools that they should use the SJ procedures is akin to telling someone who regards himself as one of the world's ten best-dressed men that he should consider buying a new suit. Those who are accustomed to bilateral negotiation of settlements under the OSH Act simply may not appreciate the potential benefits of using a specialized procedure of recent vintage.<sup>184</sup> Needless to say, the private attorney who seldom handles a contested OSHA case and who does not study the OSHRC rules of procedure may not know about the SJ alternative at all.

## 2. *Actual OSHRC Experience and Operation*<sup>185</sup>

The following account is based on the recollections of OSHRC ALJs and DOL attorneys who provided information for this study during the first six months of 1990. Human memory being imperfect, it should be emphasized that the numbers below reflect estimates, unless otherwise indicated.

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184. Due to the confidentiality of the interviews conducted in researching this Article, much of the following material is not supported by specific interview cites.

185. Summaries of all interviews conducted by the author in preparation of this Article are on file both with *The Administrative Law Journal* and the author. This Article does not cite to the names of ALJs, attorneys, and paralegals who were interviewed during the author's research. The need for this form of confidentiality stems in part from the generally confidential and sensitive nature of the mediation process and in part from the OSHRC regulations. See 29 C.F.R. § 2200.101(c)(2) (1991) (forbidding settlement judge to discuss merits of cases with any ALJ or other person).

The number of SJ proceedings during the past two or three years probably is larger than the total number recalled by those who provided information. However, the exact numbers are secondary to the goal of obtaining information concerning the way in which the SJ procedures have been operating in actual practice.

Of the twelve ALJs contacted in the OSHRC field offices, five indicated that they had not served as an SJ. The other seven estimated, with varying degrees of certainty, the number of cases in which they had served as an SJ. A total of about fifteen SJ proceedings can be estimated as a reasonably conservative figure, but some of these were reported as occurring rather soon after the SJ procedures took effect. Recollections of the earlier and less memorable cases were hazy. These ALJs provided fairly detailed information on six SJ proceedings.

Supervisory attorneys, Counsel for OSHA (Counsel), in six of the eight regional solicitors' offices of the DOL were contacted. In addition, information was sought from seven staff attorneys. Two of the six Counsels reported no SJ cases, although one of them recalled that there had been experimental use of the procedure in one case initiated by OSHRC prior to the actual publication of the SJ rule in 1986. Four of the staff attorneys had never been involved in an SJ procedure, and two of the others had been contacted precisely because it was known that they had been involved in SJ proceedings. In total, the Counsels and attorneys recalled about nine SJ proceedings and provided fairly detailed information concerning five of them. Of these five, three were the same cases reported in some detail by the ALJs. These three cases provide, of course, an interesting opportunity to study the actual operation of SJ procedures from the differing perspectives of the litigator and the ALJ.

Overall, most of the observations, analysis, and recommendations of the *Joseph & Gilbert Report* are fairly consistent with the OSHRC experience as related by those who provided information for this Article. Where it seemed to be effective, the SJ procedure did overcome barriers to settlement posed by the adversarial situation, the attitudes of the parties, and the parties' lack of appreciation for how the deciding ALJ might view the case.<sup>186</sup> Some of the OSHRC SJ cases could serve as textbook models of how the process should work.

However, the *Joseph & Gilbert Report* may have understated or underemphasized at least two important factors in the SJ process: (1) the interest and aptitude of the appointed SJ,<sup>187</sup> and (2) the need for the

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186. See ACUS RECOMMENDATION No. 88-5, *supra* note 19, at 30-33.

187. *Id.* at 21.

SJ to invest work and effort in becoming familiar with the case.<sup>188</sup> Although the *Joseph & Gilbert Report* did not neglect these factors, the OSHRC experience and the information obtained in this study, limited as it is, indicates that they can be absolutely crucial.

Two of the most interesting cases resolved by an SJ involved trenching standard violations. The first will be referred to as Case A, partly in keeping with the spirit of the confidentiality of the SJ process, and, in any event, because the DOL attorney who described the proceedings did not remember the exact case name or docket number.

As described, Case A involved the death of an employee in a trenching cave-in. Here, the SJ seems to have "broken the ice" by giving the parties a candid "preview" of how an ALJ would regard the facts and law of the case. The employer was a subcontractor at the excavation site and the issues were fact-intensive, involving the classification of the violation as "willful" and the employer's control over the exposure of his employee to the hazardous violation at the worksite. A penalty of about \$48,000 had been proposed. The employer's attorney was particularly adamant regarding the classification of the violation as "willful." The SJ appeared to be familiar with the evidence in the case, met privately with each party, and then jointly with them, candidly evaluating the case as he saw it. The DOL attorney credited the SJ with helping the parties to overcome a major hurdle in the case—the mixed legal and factual issues of what constituted a "willful" violation of the standard and the requisite control. The SJ was described as candid but not arrogant. He analyzed the evidence, simplified the issues, and communicated his perception of the evidence in the course of private meetings and a joint conference which took a total of about two hours. One result was that the SJ's view of the case apparently convinced the employer's attorney that the violation as charged could be established. The case settled with a reduction of approximately \$16,000 in the proposed penalty.

Another positive result attributed by the DOL attorney to the SJ procedures was his perception of an improved relationship with the employer's attorney for settlement in future cases involving the attorney's other clients. Although not discussed in the *Joseph & Gilbert Report*, in retrospect the potential for this phenomenon seems natural. It is distinctly possible that an attorney representing members of the regulated industry after a positive experience with SJ proceedings, though not necessarily a favorable result, would have more confidence in the good-faith negotiating position of the DOL attorney. If the attorneys on both

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188. *Id.* at 35.

sides know that the SJ procedure is available, then a powerful check exists against crude negotiating ploys such as posturing and bluffing. The attorneys would realize that posturing and bluffing can be tested by invoking the SJ procedure. Somewhat ironically, over the long run this knowledge might reduce the actual number of times SJs are invoked by informed attorneys who acquire confidence in the bona fides of the positions maintained by their adversary.

Case B involved a more recent trenching case and in many respects could serve as a textbook example of SJ proceedings. There were no fatalities; however there were citations for two "serious" and one "other-than-serious" violations. In this case, the problems confronting the SJ were somewhat more complex because the dispute was very fact-intensive, turning on the application of the evidence to the standards in question. Again, the "preview" aspect appears to have been crucial. However, because of the fact-intensive nature of the dispute, the SJ had to do more preparation in order to be sufficiently familiar with the case to be a credible mediator and "predicter." The SJ indicates that he studied the file and materials obtained from the parties as if he were actually preparing to hear the case. This was necessary because, among other things, the trenching standards themselves are fairly complex with a substantial number of varying requirements depending upon such factors as the type of soil in which the trench is being dug.<sup>189</sup> Nor was the preparatory work limited to the SJ. He had the parties furnish copies of their file materials to him, in the spirit of laying "all cards on the table." Therefore, the SJ had an opportunity to study documents, pleadings already filed, photographs, reports regarding soil samples, and the positions of the parties. He also did a computer search on all OSHRC trenching violation cases. Having researched the law and studied the positions of the parties, and after some preliminary coordinating calls and discussions, the SJ held a telephone conference call with the parties, including the vice-president of the employer-corporation, a few days after receiving the materials from the parties. From the SJ's perspective, the lengthy conference call (about an hour-and-a-half) involved tough, step-by-step negotiation on a number of key disputed factual issues. He indicated that the SJ procedure in this case could not have succeeded without both parties furnishing to him their file materials so that he could take a "frank and reasoned position" on the disputed matters. The ALJ also indicated that all SJ proceedings would not necessarily require this much preparation, but that preparation commensurate with the nature of the dis-

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189. 29 C.F.R. §§ 1926.651, .652 (1991).



puted issues would be necessary. The SJ also indicated that he liked the "feel of the process." This was the first case in which he had served as a SJ, and he had gone into the process determined to make it work. A true settlement resulted in the sense that both parties yielded something from their previous positions. For example, one of the violations was, in effect, reduced from "serious" to "other-than-serious," and the penalties were reduced. The employer receded from its earlier position that there had been no violation. Prior to the SJ proceedings the parties had been at a virtual impasse. As recounted by the DOL attorney, the SJ's methodology included, among other things, a frank appraisal of the evidence in terms such as, "If I were the trial judge, this is what I'd be looking at, this is what would impress me, and this is what would not." The SJ pointed out weaknesses in the cases of both parties, giving them a candid "preview." The employer's attorney indicated that both he and the DOL attorney believed they had strong cases. He nevertheless felt that the case was one which should be negotiated and one in which the parties and their negotiations would benefit if they were able to discern where the OSHRC "was coming from." He stated that the SJ had done a fine job in handling the case, and noted that the telephone conference call and the whole procedure had saved his client time and expense. In addition, it should be noted that the SJ, when interviewed, expressed a strong pro-settlement attitude in general. He indicated that settlements should be encouraged and mentioned his practice of raising the possibility of settlement in all cases prior to pre-hearing conferences, at pre-hearing conferences, and even after hearings.

In two other cases, Cases C and D, the SJ procedure seems to have been helpful in dealing with another factor noted by the *Joseph & Gilbert Report*—the attitude of the client as an obstacle to the attorneys' settlement negotiations.<sup>190</sup> In Case C, both the SJ and the DOL attorney recalled the case which essentially had reached an impasse on the amount of civil penalties. However, the case also involved potential substantive complexities because there were many citations involving hazard communication and safety training standards, and the violations fell into the so-called "egregious" category. The proposed penalties totaled approximately \$400,000. During a one-hour conference call, the SJ pointed out that it looked like an actual trial of the case could be very long and drawn out, involving relatively new standards and violations, some of which might be difficult to prove. The SJ apparently emphasized the relatively small size of the company, the fact that it

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190. ACUS RECOMMENDATION NO. 88-5, *supra* note 19, at 26-27.

was already in some financial difficulties, and the ALJ and OSHRC's range of discretion in assessing penalties. Even if a large penalty was assessed, the government might have "to stand in line," so to speak, with a lot of other creditors. The SJ also reminded both parties that the case would have to be set for hearing in the relatively near future. The SJ's evaluation and "preview" in this case probably significantly influenced the DOL attorney's client to agree to a dramatically reduced penalty, approximately \$30,000. In the absence of such a "preview," the DOL authorities could have been without much justification in approving such a reduction.

Case D, a recent case in which a settlement had been reached but the paperwork was incomplete at the time of interview, involved a violation of the "general duty" clause, pertaining to exposure to toxic substances in confined spaces. The central issues involved operational and other changes necessary to abate the violation, matters on which special technical expertise would be needed. There were several conference calls, and the SJ asked the parties to call him every two weeks to report on the progress of their negotiations. The SJ indicated that much of the problem in this case was the attorneys' need to get the clients' approval on technologically complex matters. He recognized that the clients would have to be "sold" on a settlement and that the attorneys would have to do much of the "selling." He also indicated that the SJ procedure could be helpful in cases where the attorneys were willing to settle, but the clients were reluctant. The SJ's evaluation and views could be impressed on the clients, shifting the onus for potential breakthrough initiatives in negotiations to the SJ.

Another very recent case is particularly notable for the technique used by the SJ. The case arose out of an accident resulting in permanent, crippling injuries to an employee. A scaffold was involved, and civil personal injury litigation was pending. The violations alleged involved improper employee training and improper inspection of the scaffolding. There were issues involving application of the standards to the facts of the particular case. For example, the building had been under construction and was in the process of being turned over to the owner for occupancy. The standard itself required inspection every thirty days.

At the outset of the SJ procedures the parties were not inclined toward settling the case. An initial telephone conference call was fruitless. The SJ arranged for an in-person conference, which included both the attorneys and the principals. The SJ used an innovative technique loosely based on procedures used in a federal district court. He conducted the proceedings in a room which had an adjoining chamber. He

began by having both parties summarize their side of the case from their respective viewpoints. Then he met with each side separately, for about fifteen minutes at a time. The procedure seems to have been very efficient and very effective.

The SJ used his private conferences with the parties to address a cluster of related matters. During the first conference with the parties representing the government, he concentrated on their legal theories of liability under the standards and indicated his reservations about those theories. He indicated what he believed to be significant problems, and indicated how he would view those problems if he were the deciding ALJ. Then, after about fifteen minutes, he adjourned that conference and conducted a similar conference with the employer's representatives, where he concentrated on problems with their defenses. Next, he reconvened the government's representatives, this time concentrating on facts and evidentiary matters. Strengths and weaknesses in proof were pointed out. Likewise, in the next separate session with the employer's representatives the SJ addressed problems of proof, such as reconstruction of the accident and witnesses.

A key feature of this "rotating" technique was that it kept the momentum going in the process while allowing the parties to confer after each segment and assess their position. By narrowing the issues, and maintaining some mild pressure for intensive re-examination, the process became dynamic.

While the technique certainly is not a cure-all or universally applicable, it proved very effective in this instance. Instead of a lengthy conference, after which everyone went home and thought about it, the parties had time to confer on discrete aspects of the case, reassess their positions, and consider the issues which had been broken down into manageable segments. The opportunity for the parties to confer among themselves provided an immediate "reality check," as the SJ put it.

However, as the SJ emphasized, it is crucial that the parties do not feel they are being "railroaded" into a settlement. They must feel they are part of the process and involved in the resolution of the case. A "blunt" approach can backfire. Therefore, the particular technique used in this case requires finesse by the SJ, and works best when the principals, not just the lawyers, are present. However, the strongest aspect of the system is the way in which the rotating conference offers opportunities for a party's representatives to confer among themselves. This not only lends dynamism to the process, but allows an alert SJ to recognize, through the party's reactions during the next round of discussion, whether he might have erred on the side of bluntness. If so, more finesse can be applied. If the parties simply adjourned after a

group conference, with only one meeting with each side, the SJ would be less likely to recognize any signals demonstrating that a shift in negotiating tactics might be advisable. After the parties had left for the day, it would be too late.

In the case being examined, however, the dynamics of the process had early results. By the end of two conferences both sides were in a "settlement mode." The agenda decidedly had shifted to achieving settlement. The parties definitely were motivated to settle, and the conferences, using the same format, shifted to a focus on *how* to settle. One alleged violation was withdrawn, and the wording of the other citation was modified, with the amount of proposed penalty remaining the same. The SJ also made sure that a settlement agreement was drafted during the session so that the parties agreed on the precise wording of the agreement before the proceedings ended.

Again, the particular technique used in this case is not foolproof, but it does demonstrate at least two important points. First, an SJ must be alert to the possibilities of innovative techniques and well versed in different approaches to conducting a conference. The SJ needs some mastery over a fairly broad range of strategies and techniques. Second, the settlement process should be no less dynamic than an actual trial. Settlements achieved by crude horse-trading may not lead to a very satisfactory resolution of the dispute. Getting the parties involved, keeping them moving, and motivating them to reassess their positions instills a sense of participation which, as this case suggests, can be very effective and efficient. Trial of the case probably would have taken two days, a thick transcript, post-hearing briefs, and approximately a week to write the ALJ's decision. Moreover, by assuring that the representatives of the principals were present, potential further delays were avoided. There was no need to wait for a week or two while the attorneys "sold", or perhaps even failed to "sell", the settlement to their respective clients.

In two cases where information from both the ALJ and DOL attorneys was obtained, the SJ procedures did not, as such, result in a settlement. However, the parties requested that the SJ continue to serve as the regular hearing ALJ. Both cases eventually settled, one virtually on the day of the hearing. Both involved a large number of cited violations and substantial proposed penalties.

Not all SJ procedures are always successful. One case involving a penalty under \$1,000, noise violations, and disputed facts regarding the operation of fork lift trucks, seems to have been a complete failure. The SJ procedure did not result in settlement, and the net result was a two-month delay in resolving or hearing the case.

However, interest in using SJs seems to be growing. The OSHRC Chief ALJ has reported that at least three more SJ proceedings, not discussed in this Article, were pending as of June 20, 1990.

### 3. *Analysis and Synthesis*

#### a. Generally

Although there were variations in the detailed accounts of particular cases and in the perceptions and opinions of the participants, there was a fair degree of consensus regarding key factors and variables in deciding to invoke SJ proceedings, and in the successful and unsuccessful use of the SJ technique. Several factors are crucial to invoking a SJ proceeding: (1) knowledge, awareness, and understanding of the procedure; (2) the individual's confidence in the procedure; and (3) the individual's willingness to take some risks associated with the process. Crucial factors in the successful use of the SJ proceedings are: (1) the attitude, personality, and effort of the SJ; (2) the type of case; and (3) the parties' own situations and attitudes.

#### b. Factors and Variables

##### i. Factors in Deciding to Invoke the SJ Proceedings

##### (1) Knowledge, Awareness, and Understanding

As elementary as it sounds, parties cannot invoke a procedure which they do not know exists. Many employers' attorneys may not be aware that the SJ procedure even exists unless they litigate frequently under the OSH Act. One ALJ indicated that it was rare for the parties to even bring up the possibility of a SJ and expressed the opinion that the ALJs might need to take a more active role in suggesting it.

Closely related to the lack of knowledge about the SJ procedure is the lack of awareness about the procedure. An attorney may "know" in the abstract that a seldom-used procedure exists, but still may not be "aware" of it, in the sense of being alert to the possibilities of its use in a particular case. Related to knowledge and awareness of the SJ procedure is the factor of understanding its key distinguishing features and the advantages of those features. An attorney who understands the nature of the SJ procedures is in a position to invoke them in appropriate situations, neither ignoring nor over-using them. At one extreme were those who seemed to understand clearly the nature of the SJ procedures. One of the DOL attorneys who seemed to be most knowledgeable and enthusiastic about SJ procedures also demonstrated an excel-

lent understanding of the advantages, disadvantages, and limits of the procedures. This attorney understood rather clearly that: (1) the SJ procedures are designed for impasse situations, for example, where the lawyer or client was "adamant" in adhering to a weak position; (2) the SJ is essentially a mediator, a role which requires skill and preparation; (3) there are some kinds of cases where the parties can "sort through" complex or disputed issues better and more effectively "around a table" with a SJ; and (4) the SJ is of no benefit in situations where the parties are likely to negotiate successfully.

At the other extreme, one ALJ mentioned a case where the employer's attorney had totally misunderstood the nature of the SJ proceedings. Somehow, the attorney had formed the impression that the *only* way to settle a case was to invoke the SJ proceedings.

In between these extremes, the information gathered in the course of preparing this Article indicated varying degrees of understanding of the process. There were ALJs who indicated, directly or indirectly, that they believed the SJ procedures added very little because they are very similar to the regular ALJ procedures. At least one ALJ raised the possibility that, at least in some of the early SJ cases, the parties had invoked the SJ procedures in order to avoid or delay filing detailed pleadings, or utilized the SJ proceedings as something of a general delaying tactic. From the other side of the bench, some DOL attorneys also indicated that there was little difference between SJ procedures and the conduct of those ALJs who are somewhat active in encouraging settlements. One indicated that there was little reason to take a case out of its normal track if the ALJ was giving the parties plenty of time to negotiate a settlement themselves. Some of those interviewed indicated that they could not recall any case where there had been a need for a "mediator" in the sense of the full SJ model, or where they had encountered any scenario of the "recalcitrant client" who was impeding an attorney's settlement efforts. Two attorneys who had been involved in SJ proceedings indicated that the SJ really had not used the full range of techniques available: their perception was that the SJ "didn't do much" or "never was 'actively' involved."

None of the above should be regarded as criticism of those involved. However, among the SJs and the attorneys there appears to be a somewhat hazy notion of how and when a SJ could be most valuable, and precisely what a SJ could do that a regular ALJ could not do.

Given OSHRC's limited resources and its small number of ALJs, optimum use of SJs requires a realistic appreciation of the key differences between the settlement-inducing powers and limits of an ALJ and a SJ. A SJ is more than a new face in the negotiations, a substitute

for the assigned ALJ, or a tactic to gain time.

(2) Confidence in SJs: Experience, Expectations, and Perceptions

A key factor in invoking the SJ procedures is the attorney's confidence in the procedure. This confidence, or lack of it, is a result of a number of elements. The primary factors are the attorney's experience with ALJs generally and his expectations for, and perceptions of, the SJ process. For example, attorneys who conclude that the SJ "did not do much" or "did not become actively involved," will not perceive the SJ process as being very different from the ordinary pre-trial settlement process; they will have low expectations relative to any future use of SJs. Those expectations will be communicated throughout the particular regional office very quickly, and the institutional memory will work against future use of SJs.

A more serious problem of confidence can arise for attorneys who have formed a negative perception regarding certain ALJs on the basis of experience in past hearings and litigation. These attorneys will lack confidence in those ALJs' ability to function as SJs. Under the present system SJs are assigned on a rotational basis; often an individual was designated to serve as the SJ in their office for a six-month period. The parties cannot select a particular ALJ to serve as the SJ because serious problems of unbalanced workloads might arise if the parties could select a SJ.<sup>191</sup> With no assurance of who will be appointed SJ, some attorneys will be inclined against invoking the SJ procedures because they perceive no advantages. They perceive only the negative possibilities of an unfavorable SJ armed with the power of *ex parte* contacts and the authority to probe and comment on the merits of their case.

The present time limits on the SJ process also could be classified as a factor which influences the confidence level in the SJ process. Under present rules, the SJ process is limited to a total of sixty-five days.<sup>192</sup> If a case is complex, involving a union and many cited violations and issues, one could conclude that sixty days probably would be insufficient for proper mediation.

However, the time-limit problem poses something of a conundrum.

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191. If the parties could choose SJs like parties choose arbitrators the same kind of situation might arise which occurred with labor arbitrators. In the late 1970's it was estimated that 90% of collective bargaining agreement arbitrations were heard by 10% of the available arbitrators. R. SMITH, L. MERRIFIELD & T. ST. ANTOINE, *LABOR RELATIONS LAW: CASES AND MATERIALS* (6th ed. 1979) (citing 1977 *LABOR RELATIONS YEARBOOK* 206 (1978)).

192. See 29 C.F.R. §§ 2200.101(a)(3), 2200.101(d) (1991) (allocating 45 days for SJ process and giving Chief ALJ power to grant 20-day extension if parties consent).

On the one hand, the SJ process loses all credibility if it is used as a device to delay litigation. A time frame of limited duration is crucial in order to assure that the SJ process is efficient and effective. On the other hand, this situation brings to the surface a factor too often under-emphasized by ADR enthusiasts. In a difficult case mediation is time consuming and labor intensive. If the system is unwilling to invest and risk time, talent, and effort in the mediation of complex and difficult cases, mediation should not even be attempted in those cases. Although it may be an extreme and unusual example, one instance of complex, time-consuming mediation in the field of urban planning involved twenty-three group meetings during a period of ten weeks.<sup>193</sup>

Fortunately, in the context of the time limits on the SJ process, at least two possibilities exist for handling the problem under current OSHRC rules. First, there is a general waiver provision in the OSHRC rules. Under 29 C.F.R. section 2200.107, "[i]n special circumstances not contemplated by the provisions of these rules *or for good cause shown*, the Commission or Judge may, upon application by any party . . . waive any rule or make such orders as justice or the administration of the Act requires."<sup>194</sup> The OSHRC Chief ALJ also has suggested an intriguing possibility for creative use of the SJ in complex cases involving many cited violations, such as the so-called "egregious" cases. Nowhere do the OSHRC SJ rules absolutely require the SJ to tackle the *entire* case. The SJ process is not an all-or-nothing concept. In fact, the rules are rather explicit. "The Judge shall confer with the parties on subjects and issues of whole *or partial settlement* of the case."<sup>195</sup> "The Judge shall seek resolution of as many of the issues in the case as is *feasible*."<sup>196</sup> As suggested by the Chief ALJ, it is entirely possible that a SJ could take a "slice" of a case and run it through the SJ process, perhaps a "cross-section" of representative violations, which could give the parties an effective preview of key or typical parts of their cases.

In addition, another possibility is reflected in the way in which the parties responded to the problem in an actual case which involved, among other things, so many cited violations that the complaint alone was more than 150 pages long. The parties requested that the SJ continue serving as the ALJ assigned to hear the case. A settlement, al-

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193. L. SINGER, *supra* note 112, at 139.

194. 29 C.F.R. § 2200.107 (1991) (emphasis added).

195. *Id.* § 2200.101(b)(1) (emphasis added).

196. *Id.* § 2200.101(b)(4) (emphasis added).



though at the last minute before the hearing, ultimately resulted.

### (3) Willingness to Take Risks

An employer's attorney interviewed in connection with a SJ case he had handled accurately pinpointed the core problem and risk in settlement negotiations generally: "No one likes to make the first move." He described his decision to invoke the SJ procedure as "a delicate call." This expresses the essence of another important factor, rather intangible and highly personal to the individual attorneys involved: a willingness to take risks associated with settlements in general, and with the use of the SJ procedure in particular.

No responsible attorney wants to be perceived by the other side as negotiating from a position of weakness. To "make the first move" entails the risk of being perceived as admitting some weakness in one's case. If dealing with a pro se respondent or an attorney with whom they have had no previous contacts, the DOL attorneys may have some reservations about taking the settlement initiative. This is not a problem with attorneys who are familiar with the OSHRC system and know that ninety percent of the contested cases are settled. The expectation there is one of a negotiated settlement.

However, the DOL attorneys and private attorneys who work regularly with OSHA have a special problem if they invoke the SJ procedures. It must be emphasized that *none* of the individuals contacted for this Article expressed the problem in quite this way, but from the interviews there gradually emerged an impression of a sense of reluctance to admit that the norm of bilateral negotiations had failed. In a system where ninety percent of the contested cases are negotiated bilaterally to settlement, invoking the intervention of a SJ borders on appearing to admit that one's own negotiating skills have failed. There may be some reluctance, at least subconsciously, to invoke an exceptional and extraordinary procedure which suggests a departure from the norm.

Another problem peculiar to the SJ procedure also could have some impact on the system's effectiveness. Candid disclosures about one's case, including inevitably the disclosure of some elements of one's analysis and strategic thinking, are necessary for effective functioning of the SJ process. However, disclosures involve very real risks touching upon delicate considerations of professional responsibility. Although the OSHRC rules of confidentiality in the SJ process mitigate these concerns, no rules can protect completely against the subtle and indirect benefits which a skilled adversary can gain, quite ethically, from the SJ process. The attorney who invokes the SJ procedure must consider the

possibility that the SJ will not achieve a settlement and the case will go to trial. The disclosures, and the "preview" on the merits, often so integral and crucial to successful use of the SJ process, can also suggest ways in which the adversary can strengthen his case.

## ii. Factors in Successful Use of SJ Procedures

### (1) The SJ

The individuals who furnished information for this study, and all other sources of data, confirmed a truism, but it is a truism which is worth confirming. The single most important factor in the SJ process is the SJ. After all, if the parties have been unable to achieve settlement among themselves, it simply stands to reason that the outcome of the SJ process hinges on the SJ. But what is it about the SJ that makes the process successful or not? What qualities and characteristics and actions affect the outcome?

To the extent that there were common denominators among the DOL attorneys who voiced an opinion, it was the importance of the SJ. There were variations on two sometimes overlapping themes: the importance of the personality and abilities of the SJ and what the SJ did or should do. In terms of the personality and abilities of the SJ, significant phrases elicited during the interviews included: a skilled negotiator; one who can keep a dialogue going; one who can concisely articulate an analysis which is sensible to the parties; a "people person" who has an ability to deal with people, to listen, and to get to the heart of the issue, *without insulting anyone*; an inclination to get involved; an ability to establish rapport; and candidness. In terms of what the SJ did or should do, the following characteristics were mentioned: keep a dialogue going; know about the case; get to the heart of the issue; listen to the parties; do not insult the parties; get involved and tell the parties how he perceives the case; establish rapport; be well prepared; point out what he would consider if he were the ALJ; and point out the strengths and weaknesses of the parties' positions.

The ALJs themselves tended to agree, directly or indirectly, but there was less emphasis on attitude and personality and more emphasis on what the SJs did or should do. Among the factors the ALJs mentioned directly were: the SJ's attitude; getting the parties in the proper settlement frame of mind; going into the process determined to make it work; setting an agenda; giving the parties goals and homework; keeping their feet to the fire; and maintaining the dignity of the proceedings but avoiding rigid formalities. There were also some remarks which indirectly, and probably unintentionally, reflected the importance of the

attitude and techniques of the SJ. Among the ALJs, there was some mention of: (1) the fact that the SJ process could require more time and preparation than some ALJs might want to invest; (2) a concern about proper weight and credit in the ALJ's statistics for handling SJ cases; and (3) a summary of the ALJ's procedures as SJ—giving the parties an initial talk, encouraging settlement, or discussing with them alternatives to settlement such as delay, costs, and confrontation.

Some felt that the SJ procedure did not add much to the system and was very similar to regular procedures. This opinion was not unfounded. An ALJ who wants to facilitate and prod parties toward settlement can exert considerable pressure. Inflections of voice, body language, ambiguous remarks, hypotheticals, reminiscences about past cases or cases read, and rhetorical questions can, up to a point, have the same impact that a SJ can have. However, these are all ambiguous and potentially irritating signals. One virtue of the SJ procedure is that the SJ can go beyond the "up to a point." The SJ has no need to be Delphic, just diplomatic.

There was a consensus, however, on the importance of the SJ's attitude, personality, interpersonal skills, and preparation. This consensus supports the *Joseph & Gilbert Report's* point that not every ALJ necessarily has the aptitude for, and interest in, being a SJ.<sup>197</sup> The consensus as to the importance of the SJ's preparation, particularly among the attorneys who had appeared before SJs, emphasizes a factor which may not have received sufficient attention in the past. A SJ has to do enough homework to be familiar with the case and to appear credible to those whose dispute he is mediating. The *perception* of the parties regarding the SJ's efforts are very important. A recent book<sup>198</sup> on ADR has indicated, anecdotally at least, the importance of this factor. "The parties were impressed by the mediators' willingness to put in long hours in order to learn the necessary terminology."<sup>199</sup> The SJ who demonstrates a lack of preparation communicates an indifferent attitude, and he may be totally ineffective unless he is later able to counteract the parties' impression of his indifference.

One of the most interesting aspects of the SJ cases studied involves situations in which the parties requested the SJ to continue as the presiding and deciding ALJ, after the period for completing SJ proceedings had elapsed. The OSHRC Chief ALJ confirmed that it was not unusual for the parties to request that the SJ stay on the case as the

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197. ACUS RECOMMENDATION NO. 88-5, *supra* note 19, at 21.

198. L. SINGER, *supra* note 112.

199. *Id.* at 139.

deciding ALJ. This Article's sources indicated that the SJ continued on as the ALJ in four cases. It appears that those cases all ultimately were settled.

Although outside the scope of this Article, such developments, and the ADR experience generally, may call for a re-examination of what makes for a good adjudicator and what conduct by an adjudicator will be acceptable to the parties. The traditional and popular image of the proper judge as a detached, somewhat aloof individual who is rigorous in his logic and self-discipline may need to be tempered a bit. Rapport, trust, respect, empathy, an ability to communicate sympathetically, and other virtues may be more important than the mechanics of avoiding ex parte contacts and the like.

Closely related to the SJ's personality and preparation is the SJ's basic mind-set or judicial philosophy. No particular questions, interviews, or sources of information specifically gave rise to the following observations. However, the cumulative impact of various comments, statements, remarks, and even casual conversations resulted in the distinct, but subjective, impression that ALJs tend to fall into one of two philosophical camps: (1) those who adhere generally to the more traditional view of the adjudicator as primarily and foremost an umpire, who knows that most cases will settle but realizes the occasional need to encourage the parties to settle as a matter of case management; and (2) those who adhere to a slightly different model with a somewhat greater emphasis on resolving disputes and managing a caseload effectively. This impression, supported by remarks of some DOL attorneys and ALJs, is reflected in the fact that they would like to see more ALJs get involved in the settlement process.

Although ALJs' perceptions of their role in the SJ process differs, one point is clear. The ALJ's opinion regarding his role in the process *is* a significant factor or variable in SJ proceedings. An ALJ who is unaccustomed to an active role in the negotiating process, whose prior conditioning and outlook have attuned him to the predominately "umpire" role, will be uncomfortable when serving in the more activist role of a SJ. Those who enjoy attempting to resolve disputes, who believe that many cases could be resolved through means other than trial and that ALJs do not always put the case in a settlement posture, will be more comfortable in the SJ role.

## (2) Type of Case

The type of case was also explored and mentioned during the interviews. The opinions fell into two categories. There were individuals

who, based on their experience, expressed views which were consistent with the *Joseph & Gilbert Report*.<sup>200</sup> These individuals viewed the most likely candidates for SJ proceedings to be cases involving: (1) the amount of penalties; (2) the classification of violations, such as wilfull versus serious, or serious versus "other"; (3) unsophisticated respondents; (4) no major legal issues; (5) issues which would take a lot of time to resolve during trial; and (6) a large number of violations or issues. They viewed the least likely candidates to be causes involving: (1) major legal issues; (2) complex facts; (3) credibility issues; and (4) parties who were not genuinely interested in settlement.

However, a few individuals who had been involved in the SJ process, including the OSHRC Chief ALJ, had a somewhat more expansive view of the potential for SJ proceedings. One DOL attorney concluded that SJ proceedings could, if used properly, be valuable in almost any kind of case including those with many complex problems, numerous issues, and even unique or novel issues; the "feeling" was expressed that cases with such issues were of a sort which the parties could "sort through" better with a SJ around a table than by using traditional techniques. An ALJ believed that most or at least a large percentage of cases could lend themselves to the successful use of SJs. Likewise, the Chief ALJ, having seen reports from all SJs, expressed the view that SJs could be effective in complex cases involving arcane subjects or even a new standard.

The number of actual cases on which there was enough data to venture an analysis was small. Therefore, any conclusions must be very guarded. For cases where fairly definite information was available, however, some of the most successful cases involved a relatively limited range of fact-oriented issues applying a substantive regulation to the particular facts of the case. This was the case with the two trenching cases described earlier in this Article. Others involved penalties or disputed matters which, to the extent that they were recalled, did not involve policy, precedent-setting issues, or particularly complex, arcane subject matter. Nevertheless, there were some issues which involved: (1) highly technical aspects of the employer's operation; (2) special technical expertise and expert witnesses; or (3) a relatively new standard.

Accordingly, opinions and cases in which information was available indicate that the SJ procedure works well, all other factors being equal, in cases presenting factual issues of limited precedential value. This is especially true with cases which have issues involving the application of

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200. See ACUS RECOMMENDATION NO. 88-5, *supra* note 19, at 39-40.

law or regulations to the facts of the individual case. However, the available information and opinions indicate that the type of case, in terms of the type of issue, is not a factor which would outweigh or overwhelm other variables, notably the ability and effort of the SJ and the parties themselves.

Upon reviewing the information received from various individuals during the course of this study, a few other miscellaneous but interesting points emerged. First, ALJs who had served as SJs varied considerably in estimating the time and additional number of SJ cases which they believed they could handle without cutting into their regular caseload. One ALJ did not offer a precise figure, but indicated that some SJ proceedings are not particularly time consuming, while others, if handled properly, might require more time than some ALJs might want to invest. Another, whose service as a SJ in one case involved primarily a one-hour conference, concluded, of course, that a significant number of cases could be handled in this way without interfering with the time available for other cases. Another indicated that, in light of generally increasing caseloads, more SJ proceedings would further encroach on time available for other cases. Another estimated a capacity to absorb approximately ten SJ cases while maintaining their current workload. Overall, and discounting the fortunate ALJ whose SJ proceedings took only one hour, the ability of the present ALJs<sup>201</sup> to absorb a significant number of SJ proceedings without detriment to their other cases seems to be limited.

Second, of the ALJs who had served as SJs, two of those who were most supportive of the SJ procedures also indicated that they had had cases during the last two years which could have benefitted from the use of a SJ. One stated, "Yes, especially after three or four hours [of hearing] the case." Another stated that the SJ process could be beneficial in a number of cases, but it depended to a large extent on the lawyers. Others were more or less negative, or voiced no opinion as to the expansion of the SJ program.

### (3) The Parties

As indicated generally by the *Joseph & Gilbert Report*, no true settlement technique can be imposed successfully on parties who are completely against settlement. By giving each party absolute "veto" power, the rules governing SJ procedures contemplate parties who have not entirely rejected the possibility of settlement. This brings into play the

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201. There are approximately 18 ALJs, two of whom are committed to substantial administrative duties as Chief ALJ and Deputy Chief ALJ.

factor or variable of the parties themselves.

Among those interviewed, the parties' attitude and approach did not go unmentioned. Both an ALJ and a DOL attorney affirmatively indicated that the SJ procedure would be least likely to succeed in a case in which one or both parties were not using the proceedings properly or in good faith. Others commented on the importance of the parties' cooperation in the outcome of SJ proceedings.

As with ALJs, litigators and parties share a range of temperaments and outlooks. Although it is probably more accurate to speak in terms of extremes along a spectrum of possibilities, it is convenient and accurate to conclude that some are more settlement-prone than others. Of course, a party's position in a particular case may be dictated by external forces, the demands of the situation, or policy considerations. But over the long-term, the more an attorney actively enjoys the professional challenge of *settling* a case and resolving a dispute, the more likely he is to be a positive factor in successfully using the SJ procedures. The more combative, aggressive, adversarial, and prone to a win-lose philosophy, the less likely he is to be a positive factor in the SJ procedures.

All lawyers regularly involved in practice before the OSHRC are oriented towards settlement. But attitude and personal philosophy can make a difference in successful use of SJ procedures. At one extreme, the attorney who approaches every case with the sincere attitude of "how can we resolve this case," keeping in mind the goal of protecting peoples' lives and health, and who believes that virtually all cases potentially can be settled, stakes out a "high ground." It is more difficult to be adversarial and stubborn in the face of such a position. An impasse, if one occurs, is more likely to be the result of good faith differences which can benefit from mediation, rather than the result of stubborn adherence to hardened adversarial positions.

#### 4. Summary

Overall, the OSHRC experience with SJs confirms several basic points, conclusions, and recommendations of the *Joseph & Gilbert Report*. The SJ procedures are a valuable adjunct which, when properly used, can facilitate and achieve settlements in cases which would otherwise go to a hearing. The "preview" aspect of SJ proceedings seems to be particularly effective and dramatic in its impact on the parties.

A most interesting development has been the emergence of cases in which SJ proceedings did not result in immediate settlement, but may have facilitated eventual settlement, particularly in cases involving nu-

merous violations. With hindsight, this seems to be a natural offshoot of the SJ process. Perhaps the SJ has "thawed" the settlement "ice," rather than "broken" it. Of course, no one can say with any degree of certainty that a particular case would have settled anyway without the mediation and intercession of a SJ. However, it is significant that the parties themselves sometimes have requested the SJ to continue as the deciding ALJ in the case, and that all of those cases were later settled. Some kind of chemistry was at work in those cases. Although the OSHRC SJ rules provided for the parties to make such a request, it was apparently not foreseen that it would be invoked very often. The Chief ALJ described this development as "surprising."

Not quite as surprising was the infrequency with which the SJ procedure has been invoked. In terms of absolute numbers, SJs should be seldom used. The whole idea behind the SJ procedure is its extraordinary, exceptional nature. It supplements rather than displaces the parties' settlement negotiations. In the context of OSHRC litigation, with a ninety percent settlement rate, the absolute number of SJ cases should be modest. This fact does not detract from the importance of the availability of the SJ procedure, however.

If anything, there is a slight risk that encouragement of SJ proceedings could jeopardize the system. Both in terms of the capacity of the limited number of OSHRC ALJs to absorb additional workload in the face of rising numbers of contested cases, and in terms of disappointed expectations, too many SJ proceedings could be worse than too few. It would only take a few unsuccessful SJ proceedings to solidify and increase the perception that the SJs do not add much to the process.

At any rate, there are certain factors and variables which seem significant in a party's threshold decision to invoke the SJ proceedings. First, and most obvious, a party must know that the procedure exists. Second, but not quite so obvious, a party must be alert to the possibility of using the SJ procedures and have a solid understanding of how the SJ differs from the ALJ in terms of powers and authority. Third, and closely related, a party must have confidence in the SJ procedure.

Successful use of the SJ procedure hinges primarily upon the SJ, assuming that the parties are proceeding in good faith, have reached some impasse, and are genuinely interested in resolving the dispute short of full litigation. It should be emphasized that this latter qualification is *not* phrased in terms of the parties being interested merely in achieving a settlement. Aside from a few individuals who are obsessive-compulsive exhibitionists, lawyers and clients prefer settlement to the hazards and stress of a courtroom. But they prefer to get settlements on their own terms, thinking of settlements in terms of what they get,



rather than what they might have to give. The process stands or falls on the SJ's attitude, skills, preparation as a mediator, and his use of the additional available tools.

### 5. *Impediments to the Effective Use of SJs*

The main impediments to the *effective* use of SJs can be summarized as follows: (1) among those who do not regularly handle OSHA cases, a lack of knowledge exists that SJ procedures are available; (2) among those who regularly handle OSHA cases, a tendency exists to be insufficiently alert to the possibilities of using an SJ because it is an extraordinary procedure intended for exceptional situations; (3) it operates in a system where ninety percent of the cases are settled anyway; and (4) a perception exists that the ability of a SJ to facilitate settlement is not dramatically greater than that of an ALJ, which is symptomatic of an insufficient understanding or appreciation of the difference between SJs and regular ALJs, particularly the additional powers and authority of a SJ.

### C. *OSHRC Simplified Proceedings*

#### 1. *Contrast to SJ Procedures and Summary of OSHRC Simplified Proceedings*

In contrast to the SJ procedures, OSHRC's simplified proceedings are a very different kind of ADR mechanism. The use of a SJ temporarily removes the case from the litigation mainstream for intensive mediation efforts by a specially assigned ALJ. A party participating in the SJ procedure surrenders virtually no procedural rights, and the SJ procedure does not alter the rest of the litigation process. Simplified proceedings, however, involve the waiver of potentially important rights and can modify significantly the litigation process itself.

The essence of an OSHRC simplified proceedings case lies in what it eliminates; what it does not allow or require the parties to do. There are no pleadings, no complaint, and no answer.<sup>202</sup> The only documents initially informing the parties of each other's positions are the citation, which may contain little more than a close paraphrase of the standards allegedly violated, and the respondent's notice of contest, which may be a simple blanket statement contesting all citations and proposed penalties. Pre-trial discovery is not allowed except by order of the ALJ.<sup>203</sup>

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202. 29 C.F.R. § 2200.205(a) (1991).

203. *Id.* § 2200.210.

OSHRC's policy guidance to its ALJs on discovery is fairly clear. The "purpose" section of the OSHRC simplified proceedings rules states that "discovery is generally not permitted."<sup>204</sup> This limitation goes beyond discountenancing complicated and time-consuming depositions. Requests for admissions or production of documents, and even relatively simple interrogatories, are discouraged if not largely precluded under the simplified proceedings rules. Pre-trial motions are likewise discouraged,<sup>205</sup> and interlocutory appeals of an ALJ's rulings are not permitted.<sup>206</sup> If the case actually goes to hearing, the Federal Rules of Evidence do not apply.<sup>207</sup> Although the OSHRC rules provide for discontinuing simplified proceedings and resuming conventional proceedings, a showing of "sufficient reason" or consent by all parties is required before the motion will be granted.<sup>208</sup>

In lieu of pre-trial discovery, the parties are expected to engage in discussions to address settlement, narrowing of issues, an agreed statement of issues and facts, any defenses, witnesses, exhibits, motions, "and any other pertinent matter."<sup>209</sup> These unstructured discussions are supposed to occur within a reasonable time before a "conference/hearing," which is, as its name implies, a hybrid proceeding divided into two phases: a conference, followed by a hearing.<sup>210</sup> The OSHRC rules indicate that both phases normally are scheduled to occur on the same day.<sup>211</sup>

However, there are some categories of cases which are not eligible for simplified proceedings. OSHRC has long recognized that simplified proceedings are appropriate only in less complex and relatively simple cases.<sup>212</sup> Viewing certain generic types of cases as inherently complex, OSHRC has made cases arising under section 5(a)(1) of the OSH Act, the general duty clause, and various health standards ineligible for simplified proceedings.<sup>213</sup> For cases involving all other standards, the rules

204. *Id.* § 2200.200.

205. *Id.* § 2200.205(b).

206. *Id.* § 2200.211.

207. 29 C.F.R. § 2200.207(c)(1) (1991).

208. *Id.* § 2200.204.

209. *Id.* § 2200.206.

210. *Id.*

211. *Id.* § 2200.207(a). In 1982, OSHRC explained its amendments to the rules for simplified proceedings and stated its intention, "that the conference and hearing not be separated without good reason and that in most cases hearings will continue to be held at the conclusion of the conference." 47 Fed. Reg. 29,525, 29,527 (1982).

212. See 44 Fed. Reg. 70,106, 70,109 (1979) (discussing eligibility for simplified proceedings of health cases as compared to non-health cases); OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, A GUIDE TO PROCEDURES OF THE UNITED STATES OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION 14-17 (Rev. Nov. 1988).

213. 29 C.F.R. § 2200.202 (1991) (exemplifying alleged violations of standards at

draw no lines based on complexity, the need for discovery, or on anything else related to the facts and issues of the case. Any party may request simplified proceedings by written communication: "I request simplified proceedings" is sufficient. This request must be filed within ten days after notice of docketing is received.<sup>214</sup> A copy of the request must be sent to all parties because any other party, usually the Secretary of Labor, may veto simplified proceedings by responding with and serving on the other parties a written objection *within fifteen days* after the request is served.<sup>215</sup> An objecting party need not give any reason for the veto: "'I object to simplified proceedings' will suffice."<sup>216</sup>

The request for simplified proceedings, and any veto, must therefore be made very early in the case. As will be discussed later,<sup>217</sup> this time factor has significant implications for the use of simplified proceedings. The decision to request or object must be made at a time when the parties have little information and are least able to assess the potential complexity of the case as it might later develop.

## 2. Background and Context

As early as 1973, OSHRC Commissioner Timothy Cleary suggested that informal proceedings be made available in OSHRC adjudications.<sup>218</sup> Commissioner Cleary seemed to have in mind the situation of the pro se employer and employee representative. He expressed concern because "formal hearings . . . sometimes present complex procedural issues that are bewildering to a layman not represented by counsel. This real possibility may make contesting employers and employees reluctant to exercise their statutory rights, and thus, in effect, deny them their 'day in court.'"<sup>219</sup> He also suggested "that there are many situations, particularly when violations that are not serious are involved, [where the parties would prefer] an informal conference-type proceed-

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29 C.F.R. § 1910.94 (ventilation), § 1910.95 (occupational noise), § 1910.96 (ionizing radiation), and § 1910(z) (toxic and hazardous substances)).

214. 29 C.F.R. §§ 2200.203(a)(1)-(2) (1991).

215. *Id.* §§ 2200.203(b)(1)-(2) (emphasis added). This does not mean 15 working days. Under OSHRC rules regarding computation of time, intervening Saturdays, Sundays, and federal holidays are included in the computation of the time limit unless the period is less than 11 days. Therefore, the actual time in which to respond to a request for simplified proceedings would be less than 15 normal working days. *Id.* § 2200.4(a).

216. *Id.* § 2200.203(b)(3).

217. See *infra* notes 301-03 and accompanying text (discussing consideration of interaction between attorney's professional responsibilities and calculated risk which is inherent in requesting or agreeing to simplified proceedings).

218. Cleary, *Pleading and Practice Before the Occupational Safety and Health Review Commission*, 24 LAB. L.J. 779, 787 (1973).

219. *Id.*

ing."<sup>220</sup> Recognizing that adjudication is adversarial in character, Commissioner Cleary also voiced hopes that informal proceedings would reduce the antagonism that often accompanies formal adversary proceedings.<sup>221</sup>

Commissioner Cleary's views are set out in some detail because they provide a contrast to the reasons given for establishing simplified proceedings in OSHRC's original notice of proposed rulemaking in 1978. As described in the explanatory materials for the notice of proposed rulemaking:

The purpose of these proposed simplified rules is to eliminate unnecessary paperwork, reduce expenses to the parties and the Agency, and make Commission adjudication less complex and time consuming. It is hoped that the procedure is simple enough so that parties need not necessarily retain legal counsel to guide them through what might appear to be complex procedural rules. The Commission looks upon the rules . . . as experimental.<sup>222</sup>

The "purpose" described in the regulation itself was "to provide simplified procedures for resolving contests . . . so that parties before the Commission *may save time and expense while preserving fundamental procedural fairness*. The rules shall be construed and applied to accomplish these ends."<sup>223</sup>

Cleary's common sense, human concerns have a somewhat different focus than the *Federal Register's* pedestrian recital of vague economic considerations. The formal rulemaking emphasized transaction costs rather than the human element and the possibilities for tempering the adversariness of the litigation process.

The basic concept of simplified proceedings was hardly controversial. However, various commentators expressed misgivings<sup>224</sup> about the proposed rule. The proposed rule contained many features of the present simplified proceedings, such as the elimination of pleadings, restrictions on discovery, and the ineligibility of cases arising under the general duty clause and various health standards.<sup>225</sup> As one justification for eliminating pleadings, OSHRC noted that the complaint, under then-prevailing rules of pleading, alleged little more than what was set out

220. *Id.*

221. *Id.*

222. 43 Fed. Reg. 36,855 (1978).

223. 44 Fed. Reg. 70,112 (1979) (codified at 29 C.F.R. § 2200.200 (1991)) (emphasis added).

224. For example, some doubted that the proposed rule would achieve the stated goals. Others voiced concern about the impact of the rules, as proposed, on a party's rights. 44 Fed. Reg. 70,106, 70,108-9 (1979) (explaining final action adopting rules).

225. 43 Fed. Reg. 36,855-56 (1978).

in the original citation.<sup>226</sup> The only parties who could invoke simplified proceedings would have been parties who filed notice of contest, thereby excluding the Secretary of Labor. Furthermore, under the proposal, "other parties," usually the Secretary of Labor, could not object to the use of those proceedings.<sup>227</sup>

In response to comments received during the rulemaking process, OSHRC established the present procedure for vetoing the use of simplified proceedings.<sup>228</sup> Because of various concerns raised in the comments, OSHRC adopted the rules on an experimental basis, for a one-year period of evaluation.<sup>229</sup>

The experimental period bore mixed results. During the first three months, requests for simplified proceedings were filed in 262 cases, approximately twenty-two percent of the incoming cases. All but one of the requests came from respondents. DOL attorneys vetoed 101 of the requests,<sup>230</sup> about 38.6%. Of the remaining 161 which were not vetoed by the DOL, the OSHRC granted 105 requests. Denials by the OSHRC itself involved reasons such as ineligible types of cases or late filings.<sup>231</sup> OSHRC officials voiced concern over what they perceived as a low volume of requests.<sup>232</sup>

During OSHRC's experimental period, another development further reduced the number of contested cases where simplified proceedings otherwise might have been invoked. Effective October 1, 1980, OSHA area directors were authorized by the DOL to enter into informal settlement agreements, prior to notice of contest being filed.<sup>233</sup> By November 1980, the average number of contested cases docketed at the OSHRC had dropped to sixty per week, reduced from 160.<sup>234</sup> According to a GAO report, 11,841 cited violations were settled at the area director level during fiscal year 1981, some 10.6% of the total number of violations cited by the OSHA.<sup>235</sup> However, as the GAO report also

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226. *Id.* at 36,856.

227. *Id.*

228. 44 Fed. Reg. 70,106, 70,108-09 (1979).

229. *Id.* at 70,109.

230. 10 O.S.H. Rep. (BNA) 200 (Jul. 17, 1980).

231. Rothstein, *supra* note 94, at 122 n.330 (citing Empl. Safety & Health Guide (CCH) ¶ 480, at 11 (Jan. 1980)).

232. 10 O.S.H. Rep. (BNA) 200 (Jul. 17, 1980).

233. 10 O.S.H. Rep. (BNA) 533 (Oct. 16, 1980). *See also supra* notes 133-36 and accompanying text (discussing area director's role in settlements).

234. OSHA Compl. Guide (CCH) ¶ 10,190 (Mar. 1981).

235. *Report to Chairman, Subcomm. on Manpower and Housing, of the House Comm. on Govt. Operations, INFORMAL SETTLEMENT OF OSHA CITATIONS: COMMENTS ON THE LEGAL BASIS AND OTHER SELECTED ISSUES*, GAO/HRD-85-11 (Oct. 26, 1984), at 12.

indicated, most of these settlements involved lowering the civil penalty. Of the 150 files reviewed by GAO, OSHA area directors downgraded the classification of the violation in less than three percent of the cases and dropped a charged violation in less than two percent of the cases.<sup>236</sup>

During 1981, an article marking the tenth anniversary of the OSH Act asserted: "While at one time simplified proceedings may have alleviated the burden placed on employers cited for relatively trivial matters, OSHA enforcement and adjudication is now increasingly technical and complex. In short, simplified proceedings is an idea whose time has come and gone."<sup>237</sup>

The author's announcement of the demise of simplified proceedings was premature. Enforcement and adjudication certainly had become more technical and complex. Nevertheless, a residuum of less complex cases would remain, and not all of these could be expected to settle informally at the area director level.

As part of its evaluation of the experimental period, OSHRC requested comments on the actual operation of the rules. Among other things, OSHRC expressed particular interest in comments regarding: (1) expansion of the "ineligible" list; and (2) the elimination of a party's power to veto a request for simplified proceedings.<sup>238</sup> "Virtually all of the comments opposed the elimination of a party's right to object to simplified proceedings."<sup>239</sup> In terms of increasing the number of standards on the ineligible list, the comments suggested there was no need to enlarge the list "as long as parties retain the right to object to simplified proceedings."<sup>240</sup> OSHRC agreed and the final rules remained essentially the same as the rules governing simplified proceedings today.

It must be emphasized again that the OSHRC simplified proceedings do not exist in a vacuum. In order to understand the consequences and implications today of invoking, and agreeing to, simplified proceedings, one must contrast the situation in 1982 with the situation which later developed.

In 1982, a party who invoked or agreed to simplified proceedings surrendered few meaningful procedural rights. As OSHRC itself had indicated, the Secretary of Labor's complaint alleged "little more than what is set forth in the citation. Answers usually deny the substantive

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236. *Id.* at 13.

237. Rothstein, *supra* note 94, at 122.

238. 46 Fed. Reg. 51,933-34 (1981).

239. 47 Fed. Reg. 29,526 (1982) (amending rules for simplified proceedings).

240. *Id.* at 29,525-26.

portions of the complaint.”<sup>241</sup> Therefore, in 1982, eliminating the pleadings was a minor matter.

As far as discovery was concerned, in 1982 OSHRC’s general procedural rules allowed interrogatories and depositions pursuant only to a special order from the ALJ,<sup>242</sup> although requests for admissions could be made without special order.<sup>243</sup> Therefore, limiting discovery affected only requests for admissions, because special orders were required already for other forms of discovery. In 1986, when OSHRC thoroughly revised its procedural rules regarding all cases *other than simplified proceedings*, the larger context in which simplified proceedings operated changed significantly.<sup>244</sup> With regard to discovery, one text-writer noted, “[a]fter 15 years of discouraging discovery, the 1986 revisions of the Commission’s Rules of Procedure specifically authorize a wide range of discovery.”<sup>245</sup> OSHRC stated that a “mix” was authorized, including “depositions permissible only by agreement between the parties or with the approval of the Commission or the Judge; 25 requests for admissions and 25 interrogatories permissible without approval; and all other forms of discovery permissible without approval.”<sup>246</sup>

Likewise, the rules governing pleadings changed considerably in 1986. “The new rules impose strict requirements on pleadings, particularly complaints.”<sup>247</sup> OSHRC shifted from a generalized “notice” pleading which permits vague, conclusionary assertions in the pleadings to “a hybrid rule that requires specific pleading of the factual bases of some elements of an alleged violation . . . ,”<sup>248</sup> specifically: (1) that the cited standard applies to the workplace conditions; (2) that the employer failed to comply with the standards or the general duty clause; and (3) that employee exposure to violative conditions be addressed.<sup>249</sup> More stringent requirements also were imposed on the answer by requiring allegations of facts which serve as the basis of affirmative defenses.<sup>250</sup> OSHRC’s justification for the new pleading requirements was summarized as follows:

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241. 43 Fed. Reg. 36,856 (1978).

242. M. ROTHSTEIN, *supra* note 36, § 374.

243. *Id.* § 373.

244. 51 Fed. Reg. 23,184, 23,194 (1986).

245. M. ROTHSTEIN, *supra* note 36, § 371.5.

246. 51 Fed. Reg. 32,009 (1986).

247. *Id.* at 32,006.

248. *Id.*

249. 29 C.F.R. § 2200.35 (1991).

250. *Id.* § 2200.36. The new hybrid fact pleading requirements, whether intentionally or not, also serve indirectly to enhance settlement and ADR. *See supra* notes 73-75 and accompanying text (discussing study noting possibility that “notice-pleading” contributes to inefficient dispute resolution).

[B]ecause the present rules do not demand more detail than the citation contains, the Solicitor's Office generally files a standardized complaint. As a result . . . problems with the Secretary's case that could be discovered and corrected at an early stage are frequently overlooked and the proceedings are unnecessarily prolonged. And because the typical answer broadly denies the only substantive allegation of the complaint—that violations occurred as described in the citation—the pleadings do not narrow the issues significantly. The Commission therefore cannot rely on the notice pleadings of the federal rules to accomplish in its proceedings the function of *defining and narrowing issues*.<sup>251</sup>

In short, the potential consequences of requesting and agreeing to simplified proceedings changed in 1986. Today, a party requesting or agreeing to simplified proceedings gives up at least two potentially significant benefits of conventional procedures: pleadings that provide at least some factual information about the other party's version of the case and pre-trial discovery as a matter of right. Moreover, simplified proceedings now lose the "early focus" and early narrowing of issues which can be achieved by fact-oriented pleadings at the outset of the case.

In order to have an adequate perspective on the context in which simplified proceedings operate, two other significant background components must be considered. The first involves OSHRC's proposed rulemaking in 1987 to amend the rules governing simplified proceedings and the comments received in response to that proposal. The second involves further consideration of such mundane, but crucial, matters such as the burden of proof and affirmative defenses, which apply with equal force in both simplified proceedings and conventional litigation.

#### a. 1987 Proposed Rulemaking

During the rulemaking which led to major revisions of OSHRC's procedures in 1986, OSHRC deferred considering any changes to simplified proceedings.<sup>252</sup> It returned to this subject in 1987. The major thrust of the proposed amendments was to remove the Secretary of Labor's absolute veto power over requests for simplified proceedings. In addition, the proposal would have allowed late filing of a simplified proceedings request upon a showing of good cause; reduced the time period for objection to ten days; and made general duty clause cases eligible for simplified proceedings.<sup>253</sup>

251. 51 Fed. Reg. 32,002, 32,007 (1986) (emphasis added).

252. See 52 Fed. Reg. 4,917 (1987) (explaining development of proposed rules on simplified proceedings).

253. *Id.* at 4,918.



The proposed rule did not mention the Secretary of Labor by name. "The most significant changes would *strengthen the role of the Commission* when the *parties* cannot agree on whether to use simplified proceedings or conventional proceedings in trying a case."<sup>254</sup> The same special committee, composed solely of OSHRC officials and ALJs, which had conducted the study underpinning the 1986 rules changes,<sup>255</sup> reported that where they had been used, simplified proceedings had worked well. "The committee noted, however, that simplified proceedings were sparingly used, largely because of the widespread use of the absolute veto . . . ."<sup>256</sup> The committee also recommended a change in the rules that would give OSHRC and its judges "the final word on whether the rules should be utilized in a particular case after an election is made by one of the parties."<sup>257</sup> OSHRC agreed that "[t]he Commission's experience under its existing procedural rules has revealed that simplified proceedings are underutilized, primarily because the present rules give any party a veto over the use of simplified proceedings."<sup>258</sup> Objections to a request for simplified proceedings would have been resolved by the Chief ALJ or the judge to whom the case had been assigned.<sup>259</sup> However, the proposed "test" governing the judges' discretion had nothing to do with the complexity or difficulty of the case. Instead, the following standard based on the rather vague contours of "due process" was proposed. "If the objecting party shows that, *under the circumstances of the case*, simplified proceedings *would deny due process to the objecting party*, the Judge shall order that the case be conducted under conventional rules."<sup>260</sup> The proposed rule constantly orbited around "due process." For instance, "[p]roposed paragraphs (b)(3) and (d) of section 2200.203 and proposed paragraphs (a) and (b) of section 2200.204 state a *single criterion* for parties and judges to apply when a party objects . . . : that simplified proceedings would, 'under the particular circumstances of the case,' deny due process."<sup>261</sup>

The only mention of the complexity or substance of cases tried under simplified proceedings appears in connection with the proposal's treat-

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254. *Id.* at 4,917 (emphasis added).

255. *Id.* See 51 Fed. Reg. 23,184 (1986) (stating committee consisted of two OSHRC ALJs, OSHRC General Counsel, Deputy General Counsel, and Executive Director).

256. 52 Fed. Reg. 4,917 (1987).

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* at 4,920 (emphasis added).

261. 52 Fed. Reg. 4,918 (1987).

ment of the categorical exclusions. The ineligibility of health standards cases essentially would have been unchanged "because of the potential complexity of the legal issues that are presumed to be involved."<sup>262</sup> General duty clause cases would have become eligible for simplified proceedings because "[w]hile some 5(a)(1) cases are extremely complex and difficult to resolve, others are relatively simple and well suited to hearing under simplified proceedings."<sup>263</sup>

The DOL, and some representatives of employers, responded negatively.<sup>264</sup> An assistant counsel for a corporation commented that, among other things,

[t]he proposed amendments create a "Catch-22" situation: At the outset of the case, without the benefit of fact pleadings and discovery to determine the complexity and nature of the issues, let alone to learn what facts and issues may be in dispute, the objecting party is required to justify . . . why he will need the safeguards of fact pleadings, discovery, and the Rules of Evidence."<sup>265</sup>

The DOL's comments were extensive and highly critical of the proposed rule.

OSHRC's seeming reticence about explicitly mentioning the Secretary of Labor in its proposal did not go unnoted. "Although the Commission's proposal does not so state, we believe there can be little doubt but that it is employers who most frequently request simplified proceedings, and the Secretary who most frequently opposes their use."<sup>266</sup>

The reason for this pattern is simple and straightforward. The Secretary, as more fully discussed below, bears the initial burden of establishing all of the elements of a *prima facie* violation. He also must be prepared to rebut an employer's affirmative defenses, the burden of proof of which, under evolving case law, is becoming easier and easier for employers to meet.<sup>267</sup>

The DOL's comments and discussion of the relevant case law are too extensive for detailed treatment here. However, the comments, citing specific cases, specifically mentioned the frequent need for answer and discovery when there were issues such as: employer knowledge; unpreventable employee misconduct; the adequacy of employee training, employer instructions, or supervision of employees; economic and techno-

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262. *Id.*

263. 52 Fed. Reg. 4,917, 4,918 (1987).

264. 16 O.S.H. Rep. (BNA) 1222 (Apr. 15, 1987). One industry association, the Eastern Contractors Association, supported the proposal.

265. Letter from Lynn E. Pollan, Assistant Counsel, Bunge Corporation, to General Counsel, OSHRC, at 3 (Apr. 2, 1987).

266. Letter from George R. Salem, Solicitor of Labor, to Earl R. Ohman, General Counsel, OSHRC, at 1 (Apr. 3, 1987) (communicating DOL comments) [hereinafter Salem Letter].

267. *Id.*

logical feasibility of compliance; customary practice in the industry, such as personal protective equipment standards; and, in general duty clause cases, recognition in the industry of the hazard, as well as feasibility and likely utility of specific abatement measures.<sup>268</sup> The DOL's comments made a counter-proposal, suggesting a possibility that simplified proceedings might be accorded as a matter of right in cases where: (1) the amount of proposed penalty was the only item at issue; (2) the *only* issue was whether the employer's conduct constituted a violation as alleged in the citation; and (3) the employer stipulated as to coverage, OSHRC jurisdiction, actual or constructive knowledge of its supervisory employees regarding the condition allegedly violating the OSH Act, and that it has no affirmative defenses.<sup>269</sup>

OSHRC has taken no further action on the proposal. However, the proposed rulemaking may have left behind an unfortunate legacy. A year earlier, OSHRC rulemaking had imposed new, rather detailed, hybrid fact-pleading requirements. OSHRC justified those requirements, at least in part, by arguing that mere notice pleading had contributed to defective case preparation and to the failure of the DOL to discover and correct problems at an early stage of the case.<sup>270</sup> Coming soon after the imposition of the new requirements for hybrid fact pleading, the 1987 proposal may have seemed, at best, inconsistent. The same DOL attorneys who, under the regime of mere notice pleading had not discovered and corrected problems in the early stages of a case, would handle more simplified proceedings, where there were no pleadings or discovery as a matter of right. For an unpredictable, but certainly substantial, number of cases, OSHRC proposed to discard the new fact-pleading requirements. It proposed a virtual right to simplified proceedings upon request, without much apparent regard for: (1) the actual complexity of a case; (2) the actual suitability of a case for simplified proceedings; (3) the need for early development and narrowing of the issues; (4) whether a respondent, usually an employer, was appearing pro se or represented by counsel; (5) the anomaly of proposing a legalistic "due process" test for *denying* objections, especially the *government's* objections, to simplified proceedings; (6) the obvious redundancy of a "due process" standard in light of OSHRC's already-existing constitutional duty to afford due process; (7) the vague countours of the prevailing principles for determining "what process is

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268. *Id.* at 6-7.

269. *Id.* at 9-10.

270. 51 Fed. Reg. 32,002, 32,007 (1986).

due;"<sup>271</sup> (8) the appearance of extreme one-sidedness in the proposal; and (9) the government's burden of proof and its ability to meet affirmative defenses.

With hindsight, the proposed rule was unlikely to elicit cooperation. OSHRC's proposal may well be a concrete example of a generic problem with notice-and-comment rulemaking. Notice-and-comment rulemaking by its very nature can lead to misperceptions and misunderstandings, for there is only a published proposal and an invitation for comment in writing.<sup>272</sup> Under pure notice-and-comment rulemaking, there is no opportunity for face-to-face discussions but only paperwork. There is no opportunity to clarify one's intentions or to dispel misunderstandings. As one writer has observed, "[t]oday's rulemaking process often encourages parties to dig in and take extreme positions, and provides little chance for accommodating conflicting interests."<sup>273</sup> So, when OSHRC's explanatory statement referred to how the proposal "would strengthen the role of the Commission,"<sup>274</sup> and the fact that it was based on an *internal* OSHRC Committee's recommendation to give the Commission "'the final word . . .,'"<sup>275</sup> the Department of Labor might be expected to react negatively.

The proposed use of a "due process" touchstone for denying objections to simplified proceedings may well have been intended only to stimulate comments. But it shifted from one extreme to another—from absolute veto power to a near absolute right to simplified proceedings, tempered only by a "due process" standard in any eligible case. This proposed rule might even have appeared to contain the potential for seriously hampering the prosecutorial arm in a number of cases. This would be the case where information and documents were under the control of an adverse party who was alert to the benefits of invoking proceedings which would minimize pre-trial disclosure. At any rate, from the standpoint of the prosecutorial arm, the proposal undoubtedly appeared to offer nothing positive.

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271. See *Mathews v. Eldridge*, 424 U.S. 319 (1976) (establishing three-part test to include consideration of: (1) private interest which will be affected by governmental action; (2) risk of erroneous deprivation of private interest under procedures used and probable value of additional or substitute procedural safeguards; and (3) governmental interest involved).

272. See 5 U.S.C. § 553 (1988) (stating requirements of proposal in *Federal Register* and opportunity for persons to express their views of proposal in writing).

273. Pou, *Federal Agency Use of "ADR": The Experience to Date*, CONTAINING LEGAL COSTS: ADR STRATEGIES FOR CORPORATIONS, LAW FIRMS, AND GOVERNMENT 264 (E. Fine, ed., CPR Legal Program, 1988), reprinted in ACUS SOURCEBOOK, *supra* note 30, at 101.

274. 52 Fed. Reg. 4917 (1987) (codified at 29 C.F.R. § 2200 (1991)).

275. *Id.*

Overall, the tenor of the DOL's comments was strongly critical and in some places hostile. "The proposed rules for simplified proceedings cannot be viewed in a vacuum but must be evaluated in light of the pronounced tendency of the Commission to affirm citations only upon employer admissions or the clearest, most unequivocal factual showings."<sup>276</sup>

Whether the comments accurately described OSHRC's "tendency" to affirm citations is largely immaterial. The expressed perception, however, does matter. Given the perception that OSHRC demands strong evidence, those responsible for setting litigation policy in the prosecutorial arm are unlikely to encourage the use of any procedure which dilutes the agency's power to obtain evidence. Likewise, any receptivity to altering the status quo, which might have been latent in the prosecutorial arm, was not encouraged by the nature of the proposal. The proposal and its timing were not likely to induce anyone in the prosecutorial arm toward considering the potential value of greater use of simplified proceedings. In a phrase, the proposal seems to have been all stick and no carrot.

#### b. Burden of Proof and Affirmative Defenses

The complexities of litigation also affect the use of simplified proceedings. Proof of an alleged violation often depends on an almost indeterminate number of variables.<sup>277</sup> One important variable is the cited standard itself. There are literally volumes of standards in the *Code of Federal Regulations*. Many of these standards have an open-ended aspect to them.<sup>278</sup> Others call for information or documents in the possession of the employer.<sup>279</sup>

Another important variable is the facts in a given case. In cases involving occupational safety and health standards, the Secretary's burden of proof often hinges on establishing potential employee exposure and actual or constructive knowledge of the conditions. The Appendix, summarizing approximately forty reported simplified proceedings cases, indicates the vicissitudes of proof and the factual variables which may be encountered even in a "simple" case. The addition of "general duty clause" cases to those eligible for simplified proceedings would intro-

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276. Salem Letter, *supra* note 266, at 6 n.4.

277. See *supra* notes 80-87 and accompanying text (discussing Secretary's burden of proof).

278. See *supra* notes 50-61 and accompanying text (explaining different standards and their classifications).

279. See *supra* notes 81-87 and accompanying text (classifying standard of evidence necessary to satisfy prima facie burden of proof).

duce even more variables concerning the "recognition" of the hazard, the likelihood of death or serious physical harm, and the existence or not of specific feasible abatement measures.<sup>280</sup>

Affirmative defenses introduce another set of variables. The potential substantive defenses that could be raised are virtually unlimited.<sup>281</sup> OSHRC's own rules do not purport to exhaust the possibilities, at least at the pleadings stage. The rule states, "[s]uch matters [affirmative defenses and matters in avoidance] *include, but are not limited to*, the following: creation of a greater hazard by complying with a cited standard; [and] . . . infeasibility of compliance . . . ."<sup>282</sup> The OSHRC rules list at least nine such defenses.<sup>283</sup>

To understand how these variables interact on a more tangible level, a short lesson or case study may be helpful. To return to the very simple subject of ladders,<sup>284</sup> some of the ladder standards are truly simple. Portable wood stepladders must have uniform parallel spacing, not greater than twelve inches, between the steps.<sup>285</sup> Other ladder standards are more open-ended. "A metal spreader or locking device of *sufficient size and strength* to securely hold the front and back sections in open positions shall be a component of each stepladder."<sup>286</sup> Or, "ladders shall be maintained in *good condition* at all times, the joint between the steps and side rails shall be tight, all hardware and fittings securely attached, and the movable parts shall *operate freely without binding or undue play*."<sup>287</sup> Or, "safety feet . . . shall be kept in *good condition to ensure proper performance*."<sup>288</sup> The potential areas for dispute under such standards are fairly obvious. However, the potential value of obtaining information regarding the contesting party's reasons

280. M. ROTHSTEIN, *supra* note 36, §§ 141-149; S. BOKAT & H. THOMPSON, *supra* note 49, at 114-38 (explaining general duty clause).

281. M. ROTHSTEIN, *supra* note 36, § 124.

282. 29 C.F.R. § 2200.36(b)(1) (1991) (emphasis added).

283. *Id.*

Such matters include, but are not limited to, the following: creation of a greater hazard by complying with a cited standard; exemption under section 4(b)(1) of the Act, 29 U.S.C. 653 (b)(1); failure to issue a citation with reasonable promptness; infeasibility of compliance; invalidity of the cited standard; preemption of section 5 (a)(1) of the Act, 29 U.S.C. 654 (a)(1), by a specific standard; preemption of a standard by a more specifically applicable standard under 29 C.F.R. 1910.5(c)(1); res judicata; the six-month limitation period in section 9(c) of the Act, 29 U.S.C. 658(c); or unpreventable employee conduct.

*Id.*

284. See *supra* notes 51-53 and accompanying text (showing that some regulations are from common sense, while others involve complexity and judgment calls).

285. 29 C.F.R. § 1910.25(c)(2)(i)(b) (1991).

286. *Id.* § 1910.25(c)(2)(i)(f) (emphasis added).

287. *Id.* § 1910.25(d)(1)(i) (emphasis added).

288. *Id.* § 1910.25(d)(1)(iv) (emphasis added).

for contending that the ladder was "in good condition," or that the movable parts satisfied the requirement of operating freely "without binding or undue play" is less obvious.

Even a "simple" alleged violation of a ladder standard has potential for complications given the possibility of affirmative defenses and a burden of proof which often hinges on the information possessed by the employer. There may be an obviously defective ladder at the workplace with two or three rungs missing, but where it was located in the workplace and who might have been exposed to the hazards of using it might be less obvious. Thus, in one case, a citation was vacated because "[t]he ladder which was in the storage area was not in use, and the ladder which was observed in the skinning room belonged to an electrician who was wiring a lift hoist."<sup>289</sup> In another case, there was no evidence found to contradict the employer's assertion that the ladders had been located in the building when the employer acquired the building, "but were neither needed nor used by employees."<sup>290</sup> In yet another case, the ALJ found that a ladder with a broken side rail had been brought into the employer's plant on the day before the inspection, that the employer had no knowledge of its presence until the moment of inspection, and that the ladder had never been used at the worksite.<sup>291</sup> The potential for complications increases when the construction industry standards pertaining to ladders are at issue because of the multi-employer nature of the worksite.<sup>292</sup>

Most of the cases mentioned above pre-date OSHRC's current rules regarding hybrid fact pleadings. Therefore, they arose and were decided under a procedural regime where the pre-trial development was similar to the procedures which are used in simplified proceedings. The main point, however, is that potential complications and problems of proof can arise in facially simple cases. It takes very little reflection to realize that the cases mentioned and cited above required more than an occurrence witness and often involved information possessed by the other party.

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289. *Midwest By Products, Inc.*, 3 O.S.H. Cas. (BNA) 1408, 1408 (1975).

290. *Alpha Poster Service, Inc.*, 4 O.S.H. Cas. (BNA) 1883, 1885 (1976).

291. *Allied Equipment Co.*, 5 O.S.H. Cas. (BNA) 1401, 1402 (1977).

292. *See E.J. Conti, Inc.*, 12 O.S.H. Cas. (BNA) 1780, 1781 (1986) (involving citation for violation of 29 C.F.R. §§ 1926.450(b)(8), (b)(12) (1991) where compliance officer testified that he observed two employees using defective ladder, but "Conti's supervisor had his back to those employees [and] Conti's witness testified that its employees had their own ladders"); *John R. Hughes Construction Corp.*, 10 O.S.H. Cas. (BNA) 1989, 1990 (1982) (showing citation upheld on circumstantial evidence, where compliance officer did not observe employees using ladder); *Austin Power, Inc.*, 9 O.S.H. Cas. (BNA) 1502, 1504 (1981) (noting ladder did not lead to area where employees were working and had been withdrawn from service).

If further confirmation is needed to demonstrate the complexities which are inherent in proving any case, no matter how facially simple, the Appendix should be sufficient evidence. It summarizes more than forty reported simplified proceedings cases. Conflicts in testimony, affirmative defenses, open-ended or "general" standards, and most of the variables already discussed seem prevalent.

Some cases do in fact turn out to be simple enough to dispense with pleadings and discovery. In particular cases, the issues may be simple. Moreover, even before 1986, simplified proceedings probably were under-utilized because the DOL used its absolute veto power with considerable frequency.<sup>293</sup>

However, determining which particular case is suitable for simplified proceedings, in light of the potential complexities of proof and affirmative defenses, is another matter. It is far easier to evaluate a judgment call in hindsight than it is to be the person who has to make the judgment call in the first place.

### 3. *Actual Experience and Operation*

#### a. Preliminary Explanation

A somewhat different approach will be used in discussing simplified proceedings than was used in addressing the experience with, and operation of, the SJ procedures earlier in this Article. The reasons for the differences should be fairly obvious. Simplified proceedings have a longer history than SJs, and this history has been more controversial and has produced more friction. Also, the SJ has been the subject of a definitive study,<sup>294</sup> which provides criteria and touchstones for considering the actual operation of SJ procedures in a particular agency. Moreover, SJ procedures involve a distinct phase of a case, a temporary detour for mediation efforts.

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293. See 52 Fed. Reg. 4,917 (1987) (suggesting primary reason for underutilization was veto power). Nevertheless, it should be recalled that during the first few months of operation under simplified proceedings, the DOL vetoes were not automatic. Less than 40% of the requests for simplified proceedings were vetoed during this period. 10 O.S.H. Rep. (BNA) 200 (1980). Furthermore, as indicated in the Appendix, the BNA service reported decisions in 11 simplified proceedings cases docketed in 1980, and seven docketed in 1981. This total of 28 reported cases strongly suggests that there were a substantial number of other simplified proceedings cases which were settled and did not result in reported decisions. In addition, another nine decisions result from cases docketed in 1980 and 1981, but not reported in BNA's service. In short, the DOL veto became more frequent after a year or two of experience with simplified proceedings.

294. ACUS RECOMMENDATION NO. 88-5, *supra* note 19, at 39-47 (setting out recommendations for criteria and procedures for use of SJs).



In contrast, simplified proceedings involve the entire case. The circumstances that may be suitable for simplified proceedings are nebulous and simplistically defined.<sup>295</sup> The criteria by which the outcome of simplified proceedings may be evaluated are indefinite and relative to the evaluator. For instance, an ALJ and the OSHRC might consider a simplified proceedings case successful if it results in a settlement or decision several months sooner than a conventional case. A pro se party might feel some psychological satisfaction at having his "day in court," and evaluate the proceedings favorably if he prevails on part of the case.

Although simplified proceedings have generated a fair number of reported cases, many of these are decisions from the early 1980's.<sup>296</sup> Moreover, the reported decisions merely reflect the final outcome of particular cases. "Case studies" of reported cases are unlikely to be very enlightening. The final ALJ or OSHRC decision masks an intricate set of variables which explains little or nothing about the initial decision to veto or agree to simplified proceedings.

Accordingly, this Article will concentrate on certain matters which seem, on reflection, to be of significance in understanding the actual operation of simplified proceedings. Among these matters are: (1) information regarding the actual number of cases where simplified proceedings are requested; (2) DOL regional solicitors' policies on simplified proceedings; (3) considerations which should be involved in requesting or agreeing to simplified proceedings; (4) the actual outcome of reported ALJ and OSHRC cases where simplified proceedings were used; (5) the pro se nature of most requests for simplified proceedings; (6) the impact of an increasing caseload on the use of simplified proceedings; (7) an analysis of ALJs' experience with, and perspectives on, simplified proceedings; (8) a comparison of ALJ's and DOL's perspectives; and (9) the OSHRC's recently revised "Guide to Procedures," which is aimed primarily at the non-lawyer, pro se party.

#### b. Estimates and Numbers

Because the "under-utilization" of simplified proceedings is relevant to its success and the need for corrective measures, there is some need for data regarding the number of cases in which simplified proceedings actually are being requested. However, statistics are not maintained regarding the number of cases in which simplified proceedings have been

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295. See *infra* notes 373-81 and accompanying text (discussing what cases are suitable for simplified proceedings).

296. See Appendix (listing some relevant OSHA cases).

requested.<sup>297</sup> The lack of readily available statistics at the outset of this study led to some interesting estimates. DOL supervisory attorneys suggested figures ranging from a low of eight to ten percent of the incoming cases requesting simplified proceedings, to a high of twenty-five percent. ALJs' estimates, in terms of absolute numbers, ranged from a low of eight or ten of their assigned cases per year, to a high of fifty.

Fortunately, OSHRC provided a more precise nationwide figure for a two-month sampling period.<sup>298</sup> An OSHRC-conducted review of 646 cases which became final during March and April of 1990, showed employer-filed requests in eighty-seven of those cases—about 13.5%. The DOL filed objections in fifty-seven of the eighty-seven cases—about 65.5%. An interesting feature of the OSHRC survey was the number of cases in which DOL had requested simplified proceedings: seven cases from four different regional offices, a miniscule percentage but not without potential significance. Again, the files reviewed were those which had become *final* during March and April of 1990. This means that the requests, objections, agreements, and other related events occurred *prior* to March and April. If nothing else, this information confirms that some regional solicitors' offices have been in a period of re-evaluation and greater willingness to experiment with simplified proceedings.

### c. DOL Regional Office "Policies" on Simplified Proceedings

Apparently, the Solicitor of Labor has not imposed a rigid policy on the regional solicitors regarding simplified proceedings. The DOL OSH counsels and the other individuals in the regional solicitors' offices (regional offices or offices) who were contacted differed in their approach to simplified proceedings. Individuals in six of the DOL's eight regional offices and two of the regional sub-offices were contacted.

Overall, the regional offices contacted, with one exception, indicated some degree of flexibility in responding to requests for simplified proceedings. Only one office reported a firm policy against agreeing to simplified proceedings in any and all cases. The degree of flexibility in most of the other offices, however, was limited.

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297. If a request is not vetoed, the case docket-number has an "s" suffixed to it. However, the only way to determine which cases involve a vetoed request for simplified proceedings is to examine the case files themselves.

298. Except as otherwise indicated in the text, the information was provided in a letter to the author from Ray H. Darling Jr., Executive Secretary of the Occupational Safety and Health Review Commission (Jul. 27, 1990). The author wishes to express his appreciation for the information and for the extra work and effort of OSHRC personnel in compiling it.

d. Considerations Involved in Requesting or Agreeing to Simplified Proceedings

i. Preliminary Observation: Pro Se Parties

There was agreement on one point: pro se parties make most of the requests for simplified proceedings. There are exceptions, of course, and sometimes an employer retains an attorney after the initial request is agreed to or vetoed.<sup>299</sup> Nevertheless, there was a very strong consensus that requests for simplified proceedings usually come from pro se parties.

Furthermore, pro se parties are fairly common in litigation before the OSHRC. They are by no means limited to simplified proceedings. The significance of the pro se nature of much OSHRC litigation in general, and simplified proceedings in particular, will be discussed later in this Article.<sup>300</sup> However, at the present juncture, the pro se element is emphasized because the pro se party is a significant part of the real-world framework in which the considerations discussed below operate.

ii. Considerations

(1) Professional Responsibility and Problems of Predicting Suitability of a Case for Simplified Proceedings

One consideration which needs to be singled out for special attention is the interaction between an attorney's professional responsibilities and the calculated risk which is inherent in requesting or agreeing to simplified proceedings. Requesting or agreeing to simplified proceedings waives potentially important procedural rights. The attorney is not waiving rights personal to the attorney; the pro se party is. The pro se party is not encumbered by rules governing the attorney's professional responsibility toward a client;<sup>301</sup> the attorney is. A decision to opt for simplified proceedings, or any form of ADR, hinges on the client's best interests and not the attorney's or the judge's.

Although attorneys for a government agency are not in precisely the same position as attorneys for a private party, the relevant differences

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299. For example, filings in *Interior Constructors, Inc.*, 12 O.S.H. Cas. (BNA) 1942, 1942 (1986), indicate a request for simplified proceedings filed by the company superintendent in November 1985. Letter from R. Terry Oates, Superintendent, Interior Constructors, to OSHRC (Nov. 4, 1989). The transcript implies that an attorney representing respondent made his first appearance at the hearing. Transcript of Mar. 25, 1986, Hearing, at 4 (Mar. 25, 1986), *Secretary of Labor v. Interior Constructors, Inc.*, OSHRC Docket No. 85-1185-S.

300. See *infra* notes 319-38 and accompanying text (discussing pro se parties).

301. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 & comment (1983).

with respect to core professional responsibilities are minimal.<sup>302</sup> Considerations of professional responsibility apply with equal force to an attorney representing an employer. If the situations were reversed, an attorney representing an employer confronted with a government request for simplified proceedings certainly should consider the professional implications of waiving hybrid fact pleadings and discovery as a matter of right. In fact, a private attorney will have even less information on which to base an informed decision than will the DOL attorney during the early stages of a case.

The DOL attorney, time permitting, can review the investigative files, discuss the case with the compliance officer, and even attempt direct contact with a pro se party. Assuming these efforts yield indications that the case *probably* could be handled under simplified proceedings, a strong element of calculated risk remains. By investing time and effort shortly after receipt of the request for simplified proceedings, the risks would be reduced, but not eliminated.

Moreover, whether representing an employer or the government, the attorney's necessary information gathering requires time which cannot always be easily spared from other professional responsibilities. A request for simplified proceedings must compete with pleadings, discovery, negotiations, trial preparation, hearings, briefs, and a host of other demands in a lawyer's office.

Of course, the possibility exists, in theory, of reverting to conventional proceedings<sup>303</sup> or obtaining permission for discovery. At best, however, this means that the parties will have to resort to the very "paperwork" complications which could have been avoided if simplified proceedings were rejected in the first instance. At worst, the attorney must make an early decision to request or agree to simplified proceedings, especially if the other party is pro se.

## (2) Alternatives to Simplified Proceedings

Another general consideration involves the availability of informal alternatives to simplified proceedings. In light of alternative ways to "simplify" conventional proceedings, the incentives for an attorney to use simplified proceedings are weaker. Essentially, simplification is relative and a state of mind, not absolute and a set of rules. Parties who genuinely want to simplify the litigation of a case do not need to invoke

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302. *Id.* at Rules 1.2 ("Scope of Representation"), 1.3 ("Diligence"), 1.6 ("Confidentiality of Information"), 1.13 ("Organization as Client"), 2.1 ("Advisor"), 3.1 ("Meritorious Claims and Contentions").

303. 29 C.F.R. § 2200.204 (1991).

formally any rules regarding simplified proceedings. The parties can simplify the process by mutual consent, without the need for early commitment to simplified proceedings and the potential for later complications, if simplified proceedings turn out to be unsuitable.

For instance, there is absolutely no rule requiring the parties to engage in discovery. As a practical matter, parties can even agree to simplify the pleadings, unless the ALJ wants to act *sua sponte* and unilaterally by issuing a show cause order to both parties.<sup>304</sup> In other words, the parties can simplify matters between themselves without making an early commitment to the all-or-nothing simplification contemplated by simplified proceedings.

The lawyers who are experienced in OSH Act matters, and perhaps even the experienced or sophisticated pro se parties, already know that there are shortcuts and alternatives which can simplify the case on an ad hoc basis.<sup>305</sup> A lawyer who is not OSHA-experienced, but who wants to hold down costs to the client or avoid unnecessary paperwork, will be motivated to work out shortcuts and accommodations on an ad hoc basis, lawyer to lawyer, without jeopardizing flexibility at the very outset of the case. Moreover, a lawyer who is not OSHA-experienced probably will be very reluctant to waive pleadings and discovery at the outset of a case precisely because the lawyer is on unfamiliar legal terrain.<sup>306</sup> An experienced or sophisticated pro se party who is familiar with OSHRC proceedings, such as the safety director of a middle-sized company, can work out accommodations and shortcuts as well as, if not better than, an inexperienced lawyer. This leaves only the inexperienced or unsophisticated pro se party, who will be discussed in more detail later in this Article.<sup>307</sup> But even this party is not necessarily going to encounter the full panoply of procedural niceties.

The continuing substantial percentage of pro se parties in reported *conventional* cases<sup>308</sup> suggests one of two possibilities. Either some sim-

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304. *Id.* § 2200.41(a)(1).

305. Four attorneys with considerable experience in representing employers in OSHA cases and several DOL attorneys who were contacted during the study concurred with this point. Directly or indirectly, they all indicated that considerable simplification can be achieved through bilateral agreement and accommodation. If nothing else, in describing their approach to handling OSHA cases they indicated that there is a substantial amount of informal agreement on procedures and substance.

306. The point is not entirely speculative, however. A Little Rock, Arkansas attorney who has considerable experience in representing employers in OSHA cases stated that he has never used simplified proceedings and described the 10-day requirement for requesting simplified proceedings as a "weak point."

307. See *infra* notes 319-38, 365-68 and accompanying text (discussing pro se parties, employers, and complainants).

308. See *infra* note 328 and accompanying text (citing ratio of ALJ conventional

plification often occurs in fact, or conventional proceedings are not so complex as to present insurmountable barriers to substantial numbers of pro se parties. In short, the availability of informal alternatives is another consideration which operates against the use of simplified proceedings. Even the most complex case can be simplified if the parties cooperate with each other.

### (3) Calculated Risk Assessment: Variables and Factors

A third consideration is the risks involved in requesting or agreeing to simplified proceedings. This consideration subsumes a number of variables and factors which should be taken into account in determining whether to use simplified proceedings. For the most part, this consideration applies predominately to DOL attorneys who must decide whether to agree to a request for simplified proceedings. Therefore, most of the following discussion will be in terms of the risk assessment, variables, and factors of special relevance to the DOL. Theoretically, some of the variables and factors apply to, or have counterparts which should concern, parties other than the DOL.

Essentially, any decision to veto or to agree to simplified proceedings should involve a kind of risk assessment. From the DOL standpoint, the relatively more precise factors and criteria which might be included in this assessment are:

(1) hazard abatement, such as, a mooted hazard which is unlikely to recur versus a continuing potential hazard arising from conditions, equipment, or practices in the workplace;

(2) the safety consequences of a citation being vacated and *res judicata's* barring of subsequent required abatement;

(3) whether the employer in fact is unequivocally committed to contesting only the amount of penalty;<sup>309</sup> if the violation is conceded, and the amount of proposed penalty is small or even fairly substantial, the range of disputed issues is likely to be limited, with pleadings, discovery, and even a conference/hearing being superfluous;<sup>310</sup>

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proceedings and those involving pro se employers).

309. Complete reliance cannot be placed on the notice of contest itself, in determining whether the notice of contest is limited solely to the amount of proposed penalty. Firm and unequivocal commitment to disputing only the penalty is necessary, because OSHRC will allow an employer to later contest the citation if the employer shows that the original notice of contest was intended to challenge both the citation and penalty. *Turnbull Millwork Co.*, 3 O.S.H. Cas. (BNA) 1781-82 (1975). For a more complete discussion of this matter, see M. ROTHSTEIN, *supra* note 36, § 276, and S. BOKAT & H. THOMPSON, *supra* note 49, at 350-56.

310. See *King Tool*, 14 O.S.H. Cas. (BNA) 1342, 1345 (1989) (contesting only penalty, decision based on stipulations).

(4) the classification of the violations, whether serious, other than serious, or repeated;

(5) the number of contested items; as the number of contested items increases, the case becomes complex and more difficult to treat as "simple;"<sup>311</sup>

(6) whether the violation can be established definitely by testimony of the compliance officer(s) alone;

(7) the compliance officer's experience and capability as a witness;

(8) the quality of the investigative file; for example, details on essential elements of *prima facie* cases, photographs, and an indication of affirmative defenses;

(9) the requirements of the cited standards, such as specific, "measurable" requirements versus more open-ended, "general" requirements;<sup>312</sup>

(10) whether satisfying the *prima facie* burden of proof and meeting foreseeable affirmative defenses will require information or documents in the possession of the respondent;<sup>313</sup>

(11) the need for testimony and evidence from witnesses other than the respondent, especially witnesses who are employees of the respondent;

(12) the need for expert testimony;

(13) the possibility that the respondent will use expert testimony, bearing in mind that "expert" witnesses may include a wide range of individuals who may be *de facto* experts by virtue of experience and not just because they possess academic degrees;<sup>314</sup>

(14) overall workload, a factor of increasing importance, which warrants separate discussion;<sup>315</sup> and

(15) the likelihood, based on initial contacts or prior experience, that the *pro se* respondent will be cooperative in narrowing the issues in dispute.

There are also some less precise variables and factors. These more nebulous and inchoate factors include: (1) the attorney's sense of pro-

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311. See generally *Burnetex Industries, Inc.*, 13 O.S.H. Cas. (BNA) 1941 (1988) (addressing eleven violations); see also Appendix (summarizing this case).

312. See *supra* notes 48-58, 284-92 and accompanying text (discussing simplicity of some industry standards and complexity of others).

313. Cf. OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, A GUIDE TO PROCEDURES OF THE UNITED STATES OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION 17 (Rev. Nov. 1988).

314. Cf. *Texas Trident*, 13 O.S.H. Cas. 1615 (1988) (emphasizing company manager's 37 years of practical experience and practical, hands-on engineering).

315. See *infra* notes 339-42 and accompanying text (discussing OSHRC's increased workload).

fessional responsibility; (2) whether discovery will be needed; and (3) the prospects for settling the case.

In sum, an informed decision on vetoing or agreeing to simplified proceedings requires an objective and subjective risk assessment, based on limited information and, sometimes, initial contact with the pro se respondent. The DOL attorney has the burden of proof under the "law enforcement" model, as established by the OSH Act.<sup>316</sup> The cost-effectiveness of this exercise in risk assessment, however, might be questionable. The safest, and simplest, option may be to veto a request for simplified proceedings.

#### (4) The Type of "Simplification" Imposed by Simplified Proceedings

Although this consideration overlaps some of those already discussed, it has sufficient force to justify separate treatment. Simplified proceedings achieve "simplification" by eliminating hybrid fact pleadings and discovery as a matter of right.<sup>317</sup> How much case simplification results from this expedient process is open to question. The elimination of both pleadings and discovery as a matter of right does not convert a difficult case into a simple one. Indeed, it might result in complicating a simple case. Minimal need for hybrid fact pleadings and discovery is a symptom of a simple case, not its cause. Elimination of pleadings and discovery per se simplifies nothing about the merits of the case. As will be discussed toward the end of this Article, insufficient attention has been paid to what makes a case suitable for simplified proceedings.<sup>318</sup>

#### e. Outcome of Litigated Simplified Proceedings

The Appendix summarizes more than forty reported simplified proceedings cases. If nothing else, it should confirm that ALJs take seriously the DOL's burden of proof. The Appendix also confirms that the complexities of proving a case and meeting affirmative defenses certainly are not eliminated, or even simplified, by simplified proceedings. It verifies the need for being highly selective in agreeing to simplified proceedings.

The win-loss ratio, of course, should not be all-important. However,

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316. See *supra* notes 44, 80-89, 277-92 and accompanying text (discussing procedures and burdens placed on officials representing government, as well as burden of proof and affirmative defense requirements).

317. See *supra* notes 244-51 and accompanying text (discussing 1986 OSHRC revisions of its procedural rules).

318. See *infra* notes 373-81 and accompanying text (discussing suitable case for simplified proceedings).



the cases in the Appendix indicate that forty-eight alleged violations were affirmed, two were affirmed but modified, forty-two were vacated, and two were reduced to "de minimis," which is tantamount to being vacated.

Certainly, the outcome in every single case might have been the same even under conventional proceedings. Many variables influence the outcome of a case and the judge's decision. But a loss rate approximating forty-seven percent cannot be considered an incentive to agree to simplified proceedings. This is especially true when the tendency is to remember the simplified proceedings cases which were lost.

#### f. Pro Se Parties

A whole constellation of problems and opportunities arise from the fact that most simplified proceedings are requested by, and involve, pro se respondents. The pro se litigant is not unique to OSHRC,<sup>319</sup> and the pro se litigant's problems are closely related to the goals and purposes of ADR.<sup>320</sup>

Pro se litigants are not a new phenomena, but they are one of those discomfiting and very neglected problem children<sup>321</sup> of the legal system. The system as a whole is distinctly ambivalent about the pro se party. On the one hand, the right of a party to appear pro se is veritable hornbook law. On the other hand, as one commentator has observed,

[t]his basic right has created an ordeal in the courts arising from the statement, "I wish to represent myself." From this point on, the adversary system . . . is out of synchronization. The judge is faced with the task of balancing fundamental fairness and order in the proceedings. The *pro se* litigant must struggle with how to present his or her case. The opposing attorney must protect and advocate his or her client's interest, while meeting the legal obligation to bring the truth to the court's attention.<sup>322</sup>

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319. Aspen, *Assisting the Pro Se Litigant: Unauthorized Practice of Law or the Fulfillment of a Public Need?*, 28 N.Y.L. SCH. L. REV. 691 (1983); Committee on Federal Courts of the New York State Bar Association, *Pro Se Litigation in the Second Circuit*, 62 ST. JOHN'S L. REV. 571 (1988); Kim, *Legal Education for the Pro se Litigant: A Step Towards a Meaningful Right to Be Heard*, 96 YALE L.J. 1641 (1987).

320. See L. SINGER, *supra* note 112, at 4-5, 16 (explaining origins and growth of dispute settlement movement and problems associated with dispute resolution where private party is involved).

321. See Rubin, *The Civil Pro Se Litigant v. the Legal System*, 20 LOY. U. CHI. L. J. 999, 1000 n.6 (1989) (noting National Judicial College has very few materials on pro se parties in its resource bank and those apparently deal with trial disruption situations).

322. *Id.* at 1,000.

The problems are not limited to actual trial proceedings in the courtroom. An attorney dealing with a pro se party prior to trial is in a somewhat delicate ethical posture.<sup>323</sup> Every pro se litigant is a potential problem in an adversarial system such as our own. Lawyers' horror stories about pro se parties are not uncommon,<sup>324</sup> and one writer has referred to "a special club of paranoid trial lawyers: those who appreciate the difficulties of *pro se* litigation."<sup>325</sup>

To its credit, OSHRC has fostered a litigation atmosphere which is far from hostile to the pro se litigant. Pro se litigants are officially recognized,<sup>326</sup> and in fact OSHRC authorizes non-attorneys to represent parties in its proceedings.<sup>327</sup>

Conventional OSHRC proceedings involving pro se parties are rather common, especially in the reported ALJ decisions. Even cursory review of a volume of reported ALJ and OSHRC decisions gives the impression that a substantial proportion of employers appear pro se in *non-simplified* proceedings cases. To confirm this impression, a sampling of OSHRC ALJ decisions indicates that approximately 37.6% of the *conventional*, non-simplified proceedings cases involved pro se parties.<sup>328</sup> The tally disclosed about sixty-nine conventional proceedings cases decided by ALJs, with pro se employers in at least twenty-six of those cases.<sup>329</sup>

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323. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.3 (dealing with Unrepresented Person) (1984); G. HAZARD & W. HODES, 1 THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 439-44 (Supp. 1987).

324. Zuydhoek, *Litigation Against a Pro Se Plaintiff*, 15 LITIGATION 13 (1989).

325. *Id.* at 61.

326. 29 C.F.R. § 2200.22(a) (1991).

327. *Id.* See generally Hostetler, *Nonlawyer Assistance to Individuals in Federal Mass Justice Agencies: The Need for Improved Guidelines*, 2 ADMIN. L.J. 85 (1988) (discussing non-lawyer representation; based on study prepared for Administrative Conference of United States (Administrative Conference)).

328. 13 O.S.H. Cas. (BNA) 1001-100, 1300-500 (1988).

329. The methodology of this tally is rough. Those interested in the exact figures can consult the cases in 13 O.S.H. Cas. (BNA), at 1,001-100 and 1,300-500 (1988), to make their own count. The ALJ and OSHRC decisions were scanned rapidly, the parties' representatives noted, and totals for each 100-page block were totaled. Only the ALJ decisions were counted in the final total, because the other decisions were at the appellate level, rather than the trial level. It should be mentioned that BNA's OSHC Reporter also includes a number of state and federal court decisions interspersed with the ALJ and OSHRC decisions. The number of pro se employers actually may be understated because the only cases which were counted as pro se were those where the case clearly stated that the party was pro se, or the representative was identified as a company official, or the name of the company and its representative at the hearing were virtually identical. For example, Horace Hypothetical appeared for Hypothetical Construction. If the case merely indicated that a party was represented by a named individual, whose name was not reflected in the company or corporate name, the case was counted as not being pro se.

As far as pro se parties at the trial level are concerned, the following general description of trial judges' conduct of pro se hearings seems to apply with equal force to the OSHRC ALJs. "In attempting to be fair and to further the discovery of truth, a court may find itself explaining rules and procedures and asking questions of the witnesses. In this regard, the court has broad discretion as to its role in providing a fair trial to both sides."<sup>330</sup>

Even as to a pro se party's pleadings, judicial liberality in allowing amendments and in construing the pro se's pleadings is something of a norm.<sup>331</sup> OSHRC seems to follow the pattern of the courts in this respect. According to one text, "[t]he two most common errors made in answers have been untimeliness in filing and deficiencies in form. Both types of errors have been excused where there were extenuating circumstances, but this has usually involved pro se employers."<sup>332</sup> OSHRC itself has emphasized its liberality, even when ruling against a party:

While we attempt to afford parties every indulgence in order to provide them with their day in court, we cannot do so where a party continually ignores time limits of which it had actual knowledge, and, upon being requested to do so, offers no reason for not meeting those limits.<sup>333</sup>

However, OSHRC's latitude and flexibility regarding pro se parties does not reduce the problems inherent in dealing with pro se parties. In fact, by fostering an atmosphere favorable to pro se litigation, it increases the frequency with which government lawyers and OSHRC ALJs will encounter those problems. Indirectly, this probably contributes to the prosecutorial arm's negative attitude toward simplified proceedings for at least three reasons. First, all DOL regional offices have some experience with pro se parties under conventional procedures so. The DOL attorneys encounter many pro se parties who are quite capable of handling a case under conventional procedures. They know that ALJs give due consideration to pro se parties in conventional proceedings. From the attorneys' perspective, the main difference between a truly simple case under conventional proceedings and simplified proceedings may be that the government has no right to require the production of information from the other party prior to the conference

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330. Rubin, *supra* note 321, at 1,002.

331. *Id.* at 1,004-05; see *Ouzts v. Cummins*, 825 F.2d 1276 (8th Cir. 1987) (affirming pro se complaint should be liberally construed and not dismissed unless plaintiff can prove no set of facts to support claim).

332. M. ROTHSTEIN, *supra* note 36, § 358.

333. *Id.* (quoting *Chopko Construction Co.*, 4 O.S.H. Cas. (BNA) 1775, 1976-77 (1976)).

hearing.

Second, the DOL attorney who has encountered problems with pro se parties in conventional proceedings is unlikely to favor simplified proceedings involving a pro se respondent. Those problems can only be worse under a procedural regime where there is virtually no way to assure the needed pre-trial development and narrowing of issues if the pro se party fails to cooperate.

Third, even if the DOL attorney is favorably inclined toward pro se parties and the case is genuinely simple, the need for simplified proceedings is minimal. Again, there are alternatives. With a cooperative or relatively sophisticated pro se party, any number of simplifying measures can be implemented at the outset of the case, without waiving procedural rights. Nevertheless, *some* pro se parties are at a serious disadvantage in conventional proceedings. However, the word "some" is crucial.

There is an important aspect of the pro se "problem" which has gone largely unnoticed and which is responsible for a great deal of confusion, friction, and misunderstanding. Simply put, the pro se population is diverse. Like any other group, pro se parties cannot be stereotyped.

At one extreme is the very small employer who may operate a business on a part-time basis with only one or two employees. This may be an individual with a skilled specialty in the construction industry whose business may consist of some tools, a truck, and a cleared space on the kitchen table at home which serves as an office. This pro se employer may be quite difficult to contact away from the worksite,<sup>334</sup> may be uncomfortable when dealing with written materials, may genuinely need simplified proceedings, and may not even read the OSHRC "Guide to Procedures" (Guide).<sup>335</sup> This pro se employer may not even know that simplified proceedings exist, unless informed by someone else about them. It is this employer who comes to mind when the phrases "day in court" or "pro se" are uttered.

Many employers who appear pro se are several stages removed from this stereotype. A company large enough to have a safety supervisor or enough employees to have some kind of management staff or hierarchy is likely to be better informed, to have someone who has read the Guide, and is more likely to request simplified proceedings than is the stereotypical small employer. The substantial percentage of pro se par-

334. See *Knight & Knight Construction*, 14 O.S.H.R. Cas. (BNA) 1096 (1989) (describing scenario where compliance officer hand-delivered citation to employer's home address).

335. See *infra* notes 356-58 and accompanying text (discussing OSHRC's "Guide to Procedures").

ties in conventional proceedings<sup>336</sup> strongly tends to confirm that many pro se parties are either perfectly capable of handling conventional proceedings in a relatively simple case or that some kind of simplification occurs in those conventional proceedings anyway.

Thus, for many pro se parties their "day in court" is unlikely to be truly jeopardized by conventional proceedings. An individual does not have to be a lawyer to be capable of filing a sufficient and thorough answer even in a massive case.<sup>337</sup> For many pro se parties, therefore, simplified proceedings may be simply a matter of convenience and time savings. These interests are legitimate but not altogether persuasive. It is highly questionable whether convenience and time savings alone would justify simplified proceedings on demand. In any event, the present rules governing simplified proceedings indiscriminately lump together pro se parties who are quite capable of handling conventional proceedings with pro se parties whose need for simplified proceedings is much more acute. Furthermore, if the dominant purpose of simplified proceedings is cost effectiveness then OSHRC's recurrent proposals to eliminate the absolute veto and to substitute a near absolute right to simplified proceedings on request<sup>338</sup> could backfire. The time and effort saved by pro se parties who do not have to comply with pleadings and discovery requirements easily could be offset by the costs of an increased caseload and the inefficiency of sorting out issues at a conference hearing that could have been resolved during pleadings and discovery.

#### g. Increasing Workload

The number of contested cases has been increasing steadily over the past few years. In fiscal year 1986, OSHRC received 1,729 new cases.<sup>339</sup> In fiscal year 1988, there were 2,746.<sup>340</sup> Both the OSHRC and the DOL are feeling the effects of an increased caseload without a cor-

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336. See *supra* notes 328-29 and accompanying text (discussing frequency of OSHRC proceedings involving pro se parties).

337. A good example of a very thorough answer submitted by a company representative is found in the case file for Anderson-Tully Co., OSHRC Docket No. 87-158. The answer, denominated "Response to Complaint," addresses more than 180 items in a massive citation, and does so in a way which regrouped the cited items "by Mill or Department location to reduce the time lapses involved in locating witnesses . . . ." Letter from Anderson-Tully Company representative to Paul L. Brady, Administrative Law Judge (Jan. 11, 1988).

338. See *supra* notes 222, 223, 238-40 and accompanying text (discussing effects of rulemaking process and rules governing proposals).

339. 1986 PRESIDENT'S REPORT, *supra* note 183, at 4.

340. 1988 PRESIDENT'S REPORT, *supra* note 104, at 5.

responding increase in legal staff. The OSHRC is especially vulnerable to problems created by an increasing workload because it has a smaller number of ALJs among whom cases can be redistributed in the event of serious illness, incapacity, or other situations calling for a caseload reallocation. The number of OSHRC ALJs has remained at a total of eighteen,<sup>341</sup> although the Chief ALJ recently indicated that an additional ALJ had been hired. With regard to the DOL, there is a distinct possibility that the pressures of the increasing workload and limited staff resources may incline more regional offices to make use of simplified proceedings. Recent statistics provided by OSHRC indicate this already may be happening.<sup>342</sup>

There is both a positive and a negative side to this possible development. On the negative side, workload alone is not a sufficient reason for using simplified proceedings. If simplified proceedings have intrinsic merit, they should not be used merely as a temporary expedient subject to the ebb and flow of the workload. On the positive side, a broader base of recent experience may lead to improvements. If the experience is satisfactory, reassessment and reevaluation of policies may follow. Strengths and weaknesses in the present system can be judged on the basis of actual recent experience in several different regions. A much better concept of what makes a case suitable for simplified proceedings may develop, leading to a more informed exercise of the veto power and perhaps even to a workable consensus between the OSHRC and the DOL on simplified proceedings.

#### 4. *ALJ Experience and Perspective*

Summarizing the experience very generally, most ALJs who provided information for this Article viewed simplified proceedings favorably, although several have had no recent experience with them. Most but not all of the ALJs contacted believed that the DOL's power of absolute veto should be modified or eliminated. The ALJ's experience and perspectives will be analyzed below, at some risk of oversimplification, under three main topic headings: (1) pro se parties; (2) compliance with 29 C.F.R. section 2200.206; and (3) actual conduct of the conference/hearing.

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341. *Id.*

342. *See supra* note 298 and accompanying text (discussing cases closed during March and April of 1990).

a. Pro Se Parties

Despite considerable differences of opinion between ALJs and DOL attorneys on many aspects of simplified proceedings, the ALJs tended to confirm several points already made regarding pro se parties. Among the few ALJs who were experienced in presiding over simplified proceedings, there was a fairly strong two-fold consensus: (1) most simplified proceedings involve pro se respondents; and (2) the ALJs' handling of cases involving pro se parties, whether in simplified or conventional proceedings, is different from the way they would handle cases where a party is represented by an attorney. As suggested by one ALJ, the differences are hard to articulate, but for pro se respondents more latitude is the norm, and the atmosphere is probably more "personal." There were, of course, variations among these ALJs in style and in substance. However, some degree of latitude seems commonly accorded pro se parties in conventional proceedings. Consequently, from the ALJ perspective, the differences between a hearing in a pro se simplified proceedings case and a hearing in a pro se conventional case may be marginal. In fact, it is difficult to tell, simply by reading an ALJ's written opinion, whether or not a case has been tried under simplified proceedings. If the text of the opinion does not itself mention simplified proceedings, the only way to determine whether simplified proceedings were used would be the "s" added to the docket number, or an examination of the file itself.

The main difference between conventional proceedings and simplified proceedings, of course, is that conventional proceedings retain a pleading and discovery stage. Even there, the pro se party is not necessarily going to be held to the standards expected of an attorney. Although a pro se party in conventional proceedings is subject to the consequences of inadequate responsive pleadings and failure to respond to discovery,<sup>343</sup> the ALJs have considerable discretion regarding imposition of sanctions under the relevant OSHRC rules.<sup>344</sup>

At any rate, the differences between a pro se hearing in simplified proceedings cases and conventional cases seem minimal or non-existent. More specifically, in either type of proceeding, the ALJ may need to be somewhat active in asking questions, clarifying responses, and to a certain extent helping the pro se present his side of the case. This is not necessarily a matter of sympathy for the underdog. The ALJ has some

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343. 29 C.F.R. §§ 2200.41, 2200.52(e) (1991).

344. *Id.* § 2200.41 (stating that ALJ "in [his] discretion, *may* enter a decision against the defaulting party or strike any pleading or document not filed in accordance with these rules" (emphasis added)); *id.* § 2200.52(e).

duty to maintain a coherent record of the proceedings.<sup>345</sup> Many pro se parties have very little concept of what is relevant, and framing questions to elicit testimonial evidence is an art that even some attorneys fail to cultivate. Moreover, the substance of what the pro se party is trying to communicate is more important than legal jargon. The pro se party is very unlikely to say, "I have an affirmative defense of uncontrollable employee misconduct." More likely, he will say, "We have strict rules about wearing hard hats, and we enforce them. If you don't believe me, I fired a guy last year over it." The pro se party, of course, may also do things like "objecting" in the form of interrupting a witness and contradicting or giving his version of the particular matter—in effect testifying. As an example of the kind of "adjustments" that can be made in pro se hearing, the ALJ can put the pro se respondent under oath at the start of the proceedings, so that such statements can be considered evidence.

Although some pro se parties may not have much of a case and are mainly ventilating generalized grievances, ALJs in one way or another recognize the importance of a pro se party's "day in court," even if, and perhaps especially if, the party is mainly ventilating frustrations. Some pro se parties, however, are quite capable of presenting a case effectively and focusing on matters validly in dispute, rather than contesting anything and everything. As far as simplified proceedings are concerned, the reported cases demonstrate that pro se parties often fare rather well.<sup>346</sup> Whether this was in spite of or because of being pro se is arguable.

b. Compliance with 29 C.F.R. Section 2200.206

The OSHRC regulations contemplate that informal discussions between the parties will substitute for pleadings and discovery.<sup>347</sup> Therefore, if simplified proceedings are to be used, it would seem vital for the parties actually to conduct such discussions prior to the conference/hearing<sup>348</sup> and for the ALJs to police compliance with this requirement.

The ALJs' practices varied somewhat in the means which they used to assure that the informal communication between the parties would be attempted. Those who affirmatively "policed" the matter used various techniques, which included: a formal pre-hearing order, a required report from the DOL attorney, sending a notice or letter to the parties,

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345. 5 U.S.C. §§ 556(c)(5), 556(e) (1988).

346. See Appendix (providing examples of such cases).

347. 29 C.F.R. § 2200.206 (1991).

348. *Id.*



and sometimes a conference call. Others made informal inquiry when checking the status of the case a week or so before the scheduled hearing.

However, parties did not always adhere to the provisions of 29 C.F.R. section 2200.206, despite its importance. In cases which settled prior to the conference/hearing the parties had been in contact and in many instances informal discussions occurred. Still, ALJs mentioned enough incidents to elicit some cause for concern. A simplified proceedings case, no less than any other, should be developed before the hearing. The narrowing of disputed issues should not be dropped entirely in the lap of the ALJ at the conference/hearing. To do so invites confusion, complications, and error.

### c. Actual Conduct of the Conference/Hearing

The conference/hearing is flexible. ALJs can proceed with more, or less, formality depending on the circumstances and the parties. For example, the conference phase can be, and sometimes is, handled very much like an ordinary pre-trial conference, the main difference being that the conference phase is followed immediately by the more formal hearing. However, the procedure also can operate as a dispute resolution tool.

The potential for the conference/hearing to serve a dispute resolution role is indicated by an excerpt from the transcript quoted below. Because the conference phase was on the record, the ALJ was able essentially to decide the case in the manner contemplated by Commissioner Cleary, in "an informal conference-type proceeding."<sup>349</sup>

[ALJ]: This is the beginning of a simplified proceeding. What we do is talk it over and see if we can resolve the case, if I can help in any way. If not, then we'll go to an actual hearing. . . . Since it's simplified, we don't have the Federal Rules of Evidence. But what I'll do is put a witness chair over by the reporter so that if someone is testifying, they'll be over here to the right.

[Pro se employer]: They'll be sworn in and everything?

[ALJ]: Be sworn in and everything. It will be just like a regular trial.

[Pro se employer]: Well, I'd prefer to work it out this way.

[ALJ]: Well, let's see what we can do . . . .<sup>350</sup>

However, ALJs vary in their approach to the conference phase of the simplified proceedings. The ALJ in the case above essentially converted

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349. Cleary, *Pleading and Practice Before the Occupational Safety and Health Review Commission*, 24 LAB. L.J. 779, 787 (1973).

350. Transcript of Proceedings at 6, Dub Rose & Assoc., OSHRC Doc. No. 89-1128-S (Sept. 25, 1989).

the conference phase itself into an informal hearing and decided the case on the basis of the conference since the conference phase was already on the record.<sup>351</sup> Undoubtedly, other ALJs might have proceeded differently by concluding the conference phase earlier and having the parties present their cases more formally. Moreover, the ALJ in the above case probably would use a different approach under different circumstances. Nevertheless, the key word and concept is flexibility. The ALJ can proceed with greater or less formality as the case and the circumstances warrant.

### 5. *Comparison of ALJ and DOL Perspectives*

As might be expected, ALJs' outlook on simplified proceedings is considerably different from that of the DOL attorneys. Generally, the differences are attributable to the very different institutional roles played by ALJs and trial attorneys. DOL attorneys are constrained by their prosecutorial role under a law enforcement model with its burden of proof. They are representing a client, albeit a governmental institutional client, so the adversarial model is implicated in their role. ALJs serve as adjudicators vested with considerable discretion, who dispense justice under the law. These different perspectives and viewpoints are not easy to reconcile. These differences in perspective also are more than academic. Perspectives influence the actions, reactions, and policies of key participants in two crucial components of the OSH Act system. It seems worthwhile to consider the ways in which different aspects of simplified proceedings may be viewed from these different perspectives. Most emphatically, however, neither perspective is "right." Neither is "wrong." They are merely different because their institutional roles are different.

At the outset of the case when a request is made for simplified proceedings, the ALJ usually will have only the citation and notice of contest in a thin file. From the ALJ's perspective, the case may look very simple. There are three or four cited violations dealing with familiar subjects. The DOL attorney should have a somewhat thicker file, including material from the client agency's investigative file and, perhaps, some past experience with the compliance officer(s) involved.

From the attorney's perspective, a decision must be made within fifteen days or less. The decision on the request must be juggled with the rest of the attorney's workload. After attempting to reach the compliance officer for a day or two, the attorney talks to the compliance of-

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351. *Id.* at 4, 65.

ficer who has just returned from a two-day inspection fifty miles away. "Yes, the machine was being used. Well, the company had modified the original guard so as to speed up the cutting. Here's the problem with what they did. Well maybe I should send you a copy of the diagram I drew . . . ." And so forth.

In short, the DOL attorney is confronted with a request for simplified proceedings early in the case and must respond in a limited time frame. If time is available, and if the attorney is willing to invest that time in a fairly labor-intensive risk assessment, rather than simply starting to draft a complaint, any decision to agree to simplified proceedings still involves a calculated risk that unforeseen complications will arise. The simplest, easiest, and safest course is a one-sentence letter objecting to the request. From the ALJ's perspective, a response time of fifteen days probably seems ample for the attorney to make an informed choice in a facially simple case.

From the ALJ's perspective, OSHRC's simplified proceedings were designed to attract a class of "routine" cases. From the attorney's perspective, the class of "routine" cases may be small or non-existent, and certainly unpredictable. Someone else's frustration, and the goals of proceedings designed by another agency, are likely to be quite irrelevant.

A simplified proceedings case may be concluded several months sooner than a conventional case of similar magnitude. From the ALJs' perspective, all parties benefit from the more prompt adjudication of the dispute. However, from the perspective of an attorney, the ALJs may be seen as reacting to a simplified proceedings case with "let's set it on the trial calendar," and with some pressure to settle or try the case immediately as a matter of clearing their own case dockets.

The attorney may view the practical similarities between conventional proceedings involving a pro se party and simplified proceedings involving a pro se party as reducing the need for, or significance of, simplified proceedings. From the attorney's perspective, the pleadings and requests for admissions or interrogatories in a simple case should be simple enough for any literate pro se to understand. An ALJ may view the importance of a pro se party's "day in court" as offsetting any benefits of pleadings and discovery in conventional proceedings where the issues are relatively simple. From the ALJ's perspective, pleadings and discovery in a simple case are more likely to be a pitfall for the pro se litigant than a benefit to the process. Indeed, some ALJs might form the impression that government attorneys veto requests for simplified proceedings as a tactical ploy, perhaps hoping that the pro se party will drop the whole matter.

An attorney may have formed the impression that simplified proceedings often are invoked by companies which wish to litigate cheaply and which can either afford an attorney or have company officials quite capable of handling a truly simple case. To the attorney, the veto of a request for simplified proceedings will cause such employers to "get serious" about the case. From the ALJ's perspective, a pro se party uncomfortable with unfamiliar written documents in "legal" form and language often may abandon a potentially meritorious notice of contest with a sense of frustration and of being unfairly treated, after receiving the complaint, a request for admissions, or a set of twenty-five interrogatories. In the words of one pro se respondent, "I got so many papers from OSHA, I don't know which is which and what is what."<sup>352</sup> It is easy for an ALJ to remember and be sympathetic with such a lament. However, from the attorney's perspective, the attorney is likely to remember the same pro se respondent who, at the hearing, when he finally did read the request for admissions, disagreed with only one or two, and stated as to the rest: "They are facts."<sup>353</sup>

Then there is the problem where simplified proceedings have not been vetoed but the case turns out to be unsuitably complex, or the pro se party is uncooperative about informal discussions to narrow the issues. From the ALJ's perspective, those situations can be dealt with under OSHRC's rules which provide for a motion to discontinue simplified proceedings for cause and to resume handling the case under conventional procedures.<sup>354</sup> From the attorney's perspective, however, there may be some unwillingness to risk total reliance on the uncertainties inherent in obtaining such relief, especially when there is a pro se party and when such problems could be avoided by vetoing the request for simplified proceedings in the first place.

Finally, at least for purposes of the current discussion, those who have given some thought to the matter must consider the potential impact a surge in the number of simplified proceedings would have on the entire litigation system's caseload. If the present veto were abolished, what would be the impact on the quantity and quality of the workload? There immediately would be more cases, given about a fifteen percent rate of requests for simplified proceedings. Would there be even more requests for simplified proceedings if requests were granted as almost a matter of right? How many of those cases would involve valid dis-

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352. Transcript of Proceedings at 7, Phillips Elec., Inc., OSHRC Doc. No. 89-0503.

353. *Id.* at 8-11.

354. 29 C.F.R. § 2200.204 (1991).

putes? How many would essentially be ventilating frustrations? How many would be invoked on a theory that the pro se party, or a company official, can invest profitably a half day at a conference/hearing, where the respondent need prove nothing, the burden of proof is on the government, and at the very least the penalty may be lowered?<sup>355</sup>

#### 6. OSHRC's "Guide to Procedures"

OSHRC itself has recently published an excellent revision of its booklet explaining its litigation procedures, "A Guide to Procedures" (Guide).<sup>356</sup> An individual who files a notice of contest receives a copy of the Guide with the notice of docketing. The Guide explains both conventional and simplified proceedings in layperson's terms, with key aspects of the procedures often underlined, printed in bold-face type, or otherwise emphasized. There are several appendices with examples of pleadings, which make it a useful but not definitive formbook even for attorneys.

With reference to simplified proceedings, the Guide carefully describes the differences between simplified proceedings and conventional proceedings. Of special relevance to this Article, the Guide cautions respondents:

There are cases that, though technically eligible for simplified proceedings, should not be considered for litigation under those proceedings. If you foresee the need to use discovery or to keep certain information confidential, you should not request simplified proceedings.

When deciding whether to request simplified proceedings, ask yourself the following questions. If the answer to any of them is "yes," you probably should NOT request simplified proceedings.

*Question 1.* Will the presentation of my case require me to obtain information in the possession of any other party?

Remember: In simplified proceedings discovery is allowed only with the permission of the Judge and his ruling CANNOT be appealed until after the decision is issued.

*Question 2.* If I do not intend to have an attorney, will I need the testimony of expert witnesses to establish my case? . . .<sup>357</sup>

The Guide goes on to suggest other potential problems and to explain

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355. For examples of cases where the penalty was lowered, see cases summarized in the Appendix. In theory, a proposed penalty could be raised, but none of the simplified proceedings cases in the Appendix indicate on their face a higher penalty than originally proposed.

356. OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, A GUIDE TO PROCEDURES OF THE UNITED STATES OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION (rev. Nov. 1988) [hereinafter GUIDE].

357. *Id.* at 17 (emphasis in original).

carefully the various steps involved in a simplified proceedings case. The party is reminded that any other party can veto the request for simplified proceedings. Most significantly, the Guide emphasizes that the parties are required to discuss the case informally between themselves.

*[A]ll parties are to participate in a mandatory discussion.* This mandatory discussion can be conducted in person or by telephone and is to be arranged by the parties themselves. . . . Even if a settlement cannot be reached, the parties are required to attempt agreement on as much as possible regarding the case.

The following topics must be discussed:

(1) *Narrowing of Issues.* — The parties are expected to discuss the substance of the points on which they differ, called the issues, and to resolve as many of those issues as possible. The issues upon which agreement cannot be reached, and will therefore come before the Judge for decision, must be listed. The issues remaining to be resolved might include, for example, specific defenses to the citation. . . .

(2) *A Statement of Facts.* — The parties are expected to agree on as many of the facts underlying the case as possible. For example: the size of the business, the safety history, details of the inspection, and the nature of the worksite as well as any machinery or equipment involved in the citation.

(3) *A Statement of Defenses.* — You will be required to list any specific defenses you might have to the citation. You could, for example, argue that the condition in violation was the result of an employee acting contrary to a work rule that has been effectively communicated and enforced . . . .<sup>358</sup>

The effect of the Guide on the number and quality of simplified proceedings cannot yet be determined. In some cases, it may make little difference. For example, a “really small” employer may not even read the Guide. Further, the respondent who merely wants to vent some frustration is not likely to study it carefully. But the Guide does offer an opportunity for a pro se party to make an informed request and places the party on notice that cooperation in narrowing the issues prior to any hearing is expected.

Perhaps even more significantly, the Guide comes at an opportune time when there are indications that some DOL regional offices may be more favorably inclined toward simplified proceedings. The Guide may reflect, and provide the potential for, some common ground in the development of better consensus between the DOL and the OSHRC. Coupled with the factors and variables considered by those DOL offices and attorneys who are more receptive to agreeing to requests for simplified proceedings, the factors recognized in the Guide could provide the nucleus for further development.

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358. *Id.* at 19-20 (emphasis in original).

### 7. *Summary Analysis and Synthesis: Incentives and Impediments*

Several external factors have affected the use of simplified proceedings. The DOL's implementation in 1980 of informal pre-notice of contest conferences, coupled with a dramatic decline in the number of cases contested before OSHRC, reduced the market for simplified proceedings from the beginning. The availability of an informal conference with DOL area officials served some of the same purposes as OSHRC's simplified proceedings. An employer could discuss the matter and reach some accommodations in a conference setting.

In 1986, new OSHRC procedural rules applicable to conventional proceedings altered the context in which the decision is made to request or veto simplified proceedings. At least on the face of things the stakes became different and the consequences of agreeing to simplified proceedings changed. The parties in simplified proceedings would give up any benefits that might result from hybrid fact pleading and discovery as a matter of right.

In the meantime, doctrines and precedents regarding the DOL's burden of proof and an employer's affirmative defenses had been developing in the traditional, incremental, case-by-case manner. By 1986, enough of these had crystallized to make it fairly clear that simply showing up at a hearing with the compliance officer would be insufficient to prove a case.

All along, the occupational safety and health standards were a mixed bag—some relatively precise and others rather open-ended. As precedents accumulated concerning the more “general” standards, a compliance officer's direct observation of workplace conditions often was only the beginning and not the end of determining whether a violation of such standards had occurred. Actual experience with litigation under simplified proceedings seems to confirm the vicissitudes of proof under many standards.

Most of the requests for simplified proceedings continuously came from pro se employers. Apart from the general problems which can arise when dealing with a pro se party, simplified proceedings severely curtail any right to obtain information, which may be needed, from that party prior to the hearing.

The interaction between these external factors and the rules governing simplified proceedings reduced the incentive to agree to simplified proceedings. Any decision to agree to simplified proceedings must be made at an early stage of the proceedings when the amount of information is at its lowest point. Obtaining preliminary information from a pro se party can be labor-intensive at best. Once committed to simpli-

fied proceedings, there is a theoretical possibility of moving to revert to conventional proceedings. But the outcome of such a motion would be, to say the least, uncertain. That uncertainty offers no incentive to incur the risk of unnecessary complications in extricating oneself from a situation which could have been avoided by a simple veto in the first instance.

To a certain extent, many of these considerations became informally internalized by the prosecutorial arm which was never particularly enthusiastic about simplified proceedings anyway. The pure veto rate was initially forty percent,<sup>359</sup> and even before 1986 probably went much higher. Yet, on the other side of the coin, that same veto rate indicates a fair number of early cases where simplified proceedings were not vetoed. There seems to have been an early period of some willingness to experiment with simplified proceedings. That willingness has since evaporated.

For the most part, a rather strong presumption against agreeing to simplified proceedings became the norm. From the attorney's perspective, factors against agreeing to simplified proceedings ordinarily outweigh those in favor of agreeing. Experience with conventional proceedings involving pro se parties was likely to reinforce the attorney's perceptions. Furthermore, if the parties bilaterally wanted to simplify the proceedings formal invocation of simplified proceedings would be unnecessary.

Until recently, the incentives for agreeing to simplified proceedings were minimal. However, with an increasing number of contested cases, simplified proceedings may become slightly more attractive in direct proportion to the caseload. Certainly, simplified proceedings are an attractive option to the informed pro se employer. They could become more attractive to the prosecutorial arm if a gradually expanded use of the system proves to be cost effective and does not compromise the professional responsibility of effective governmental client representation.

## 8. *Concerns for the Future*

A tentative trend is discernible. However, even if the prosecutorial arm becomes, under the pressure of workload, more amenable to simplified proceedings, the use of simplified proceedings should not depend entirely on the ebb and flow of workload.

Three concerns need to be discussed. The first is one which exists at

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359. See *supra* notes 233-36 and accompanying text (discussing results of experimental period).



a practical, more immediate level. The other two are more basic and fundamental.

a. Compliance with 29 C.F.R. Section 2200.206

At a practical and more immediate level, OSHRC simplified proceedings regulations contemplate that informal discussions between the parties will substitute adequately for written pleadings and discovery as a matter of right. Sometimes they do; sometimes they may not even occur. If the number of simplified proceedings cases increases, enforcement of this rule would seem to be vital. Although some ALJs take affirmative measures to police the requirement, others do not. OSHRC's Guide emphasizes the importance of these informal discussions. This is a good start but there still is a need to be alert to potential problems.

There is the two-fold problem of the uncooperative pro se party, on the one side, and the inert attorney, on the other side, who makes little or no effort to comply with the rule. Neither should be coddled. If the parties agree to use simplified proceedings they should follow the few but important rules for narrowing disputed issues. Attorneys who make no effort to contact the opposing party should suffer the professional consequences. Attorneys who discover the uncooperative side of a pro se party in simplified proceedings should be able to move for, and get, reversion to conventional proceedings. Although the relevant OSHRC rule may not expressly require a party to be cooperative, the requirement to confer and discuss seems to imply some element of good-faith effort.<sup>360</sup> One encounter with an uncooperative pro se party, and one indifferent response from an ALJ to complaints about lack of cooperation, could be enough to sour an entire regional office on simplified proceedings for another ten years.

b. Basic Concepts

There are two important problems which must be considered if simplified proceedings are to be used optimally and to their full potential. The first focuses on the purpose and goals of simplified proceedings. The second involves the murky threshold question of what kinds of cases are suitable for simplified proceedings.

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360. 29 C.F.R. § 2200.206 (1991).

i. The Purpose of Simplified Proceedings: Cost Effectiveness or "Simple Justice"?

From the very outset, there has been a dual vision of simplified proceedings. One view, noted by former Commissioner Cleary and many ALJs, focuses on concerns for the pro se party's "day in court," and tempering the adversariness of an inherently adversarial situation.<sup>361</sup> The other is reflected in the "official" goals, cost savings or cost effectiveness, expressed in the formal rulemaking process.<sup>362</sup> While not mutually exclusive, the two visions are not synchronous. The purposes of simplified proceedings vacillate between the official cost saving goal and the unofficial concern for pro se parties.

The official purpose seems to focus on holding down the "costs" of litigation: eliminating unnecessary paperwork, reducing expenses to the parties and the agency, making adjudication less complex and time consuming,<sup>363</sup> and saving "time and expense while preserving fundamental procedural fairness."<sup>364</sup> While worthy goals, they apply with equal theoretical force to all kinds of parties. The "official" idea is that simplified proceedings can be used in "routine" cases where the benefits of hybrid fact pleadings and discovery are minimal, whether a party is pro se or not. The "official" purpose focuses on efficiency—providing a forum where parties address the dispute without a lot of legalistic fanfare.

The unofficial purpose, not forcefully explicit in OSHRC's formal explanation of its rulemaking, is "simple justice"—a two-fold legitimate concern: (1) consideration for pro se parties for whom the costs of an attorney genuinely are not feasible in a relatively small case, and for whom even relatively simple adversarial pleadings and litigation are an intimidating handicap; and (2) reducing the adversariness of an inherently adversary system patterned on the law enforcement model. However, the "official" justifications for simplified proceedings have downplayed and obscured the element of simple justice. Any official reference to "pro se" parties has been indirect and left-handed. "It is hoped that the procedure is simple enough so that parties need not necessarily retain legal counsel to guide them through what might appear to be complex procedural rules."<sup>365</sup>

361. Cleary, *Pleading and Practice Before the Occupational Safety and Health Review Commission*, 24 LAB. L.J. 779, 787 (1973).

362. 43 Fed. Reg. 36,855 (1978) (proposed July 31, 1978); 29 C.F.R. § 2200.200 (1991).

363. 43 Fed. Reg. 36,855 (1978).

364. 29 C.F.R. § 2200.200 (1991).

365. 43 Fed. Reg. 36,855 (proposed July 31, 1978).

On the one hand, if the purpose is cost effectiveness simplified proceedings appear to be an ineffective means to reduce the costs of litigation. Simplified proceedings virtually operate in an all-or-nothing fashion. True cost savings or cost effectiveness probably involves more than eliminating some paperwork. For one thing, parties who are represented by a competent lawyer or who have experience in dealing with the OSH Act system can trim their costs in ways more carefully tailored to the needs of a particular case without invoking simplified proceedings. The truly simple cases should "self-simplify" to a certain extent. For another, eliminating pleadings and discovery of right can be a false economy. Complex procedures have been cast as something of a villain throughout the simplified proceedings scenario. The casting has some validity because procedures that are unnecessarily complex, relative to the issues, can be a pure waste. However, procedural requirements are not always mere niceties and technicalities. The simplest disputes can take on a very complex hue when an ALJ hears them for the first time at a conference/hearing.<sup>366</sup> Complex issues and disputed facts do not become easier to resolve merely because pleadings and discovery of right have been discarded. The false economy of being penny-wise and dollar-foolish comes to mind. OSHRC's own Guide quite appropriately counsels caution in requesting simplified proceedings.<sup>367</sup> Therefore, the cost savings achieved under simplified proceedings in truly simple cases may be marginal if costs to the entire system are taken into account. In any event, the actual cost savings or cost effectiveness of simplified proceedings does not appear to have been the subject of any meaningful, systematic cost benefit or other analysis.

On the other hand, if the purpose is "simple justice" to assure a "day in court" for the unsophisticated, small, pro se party of limited means, simplified proceedings are over-inclusive. Simplified proceedings indiscriminately embrace parties with lawyers, relatively sophisticated pro se parties who have a marginal need for simplified proceedings in a truly "simple" case (the only kind which is supposed to be in the simplified proceedings mode anyway), and pro se parties whose "day in court" may be jeopardized, even in a truly simple case, if reasonable

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366. Although ALJs contacted for this study indicated few or no "simple" cases which became unmanageable at the hearing, it must be remembered that the few ALJs with recent experience in simplified proceedings cases have presided over a handful of simplified proceedings. See Appendix (discussing OSHRC and ALJ decisions reported in BNA's Occupational Safety and Health Cases).

367. See *supra* note 356 and accompanying text (discussing OSHRC's "Guide to Procedures" explanation of differences between simplified proceedings and conventional proceedings); GUIDE, *supra* note 356, at 17.

allowances are not made.

The substantial percentage of pro se parties in conventional proceedings, as reflected in the reported cases, seems to compel a conclusion that some pro se parties are quite capable of litigation before OSHRC in conventional proceedings in a truly simple case, with appropriate consideration from the ALJ. For them, simplified proceedings are a convenient cost-cutting or time-saving device, rather than a necessity. Fostering a litigation atmosphere conducive to pro se parties is commendable. Reducing the adversariness of an inherently adversary system statutorily patterned on the law enforcement model is admirable. But making the process merely congenial to the economy-minded bargain hunter is another matter. Making a process too inexpensive can cheapen it, lowering quality, increasing demand, and losing sight of the purposes of the process.

No matter how obscure the purposes of the OSH Act may become in the tangle of the law enforcement model, OSHRC is not a small claims court designed to accommodate pro se parties disputing over return of a rent deposit, a minor traffic mishap, or a ruined shirt.<sup>368</sup> Much more is at stake. Even though a defective ladder may seem trivial, someone can get hurt if it is not corrected. For most of us, the only way to get our attention is to impose some costs.

As to the reduction of adversariness, the conference/hearing format can be a helpful tool in resolving the dispute rather than just "adjudicating" it.<sup>369</sup> However, the key factor in taking the edge off of adversariness is not the format of the proceedings. The parties and the ALJs are much more significant factors than procedural format. A pre-trial conference in conventional proceedings can serve the same purpose as the "conference" phase of simplified proceedings. An astute ALJ attuned to the dispute resolution model is not limited to simplified proceedings.

If confined to tinkering with simplified proceedings, the alternatives seem limited. To date, the absolute veto has allowed easy assertions about "underutilization" of simplified proceedings. The extent of underutilization, and the number of genuinely "simple" cases arising under the OSH Act system remain to be seen. Going to the opposite extreme, an absolute right to simplified proceedings inevitably would

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368. See Kulat, *supra* note 34, at 14 (recounting interesting cases from Chicago court).

369. Transcript of Proceedings (Jan. 4, 1990) Lone Star Corrugated Container Corp., OSHRC Doc. No. 89-2119, (case unreported because settled; abatement of machine guarding violation worked out at conference); Transcript of Proceedings, at 4-7, 65 (Sept. 25, 1989) Dub Rose & Assoc., OSHRC Doc. No. 89-1128-S.

increase the number of simplified proceedings. The impact on workload and on the quality of adjudication is unpredictable; however, a fundamental tenet of economics seems to be that lowering the cost of something increases the demand. Opting for ALJ discretion has its own problems. Certainly, unbridled discretion would be questionable. Vesting authority in ALJs pursuant to some verbal formula or "test" requires the formulation of that "test," which would not be easy. If the most important goal is to enhance the small pro se party's opportunity for a "day in court," then tinkering with simplified proceedings may be a dead end. An alternative worth considering is to bypass simplified proceedings, as such. It could be possible to take a more direct approach to the problems of the small pro se party who is genuinely unable to afford an attorney to contest a small penalty case, and who is genuinely handicapped in dealing with conventional proceedings.

Given the substantial percentage of pro se cases in the system anyway, the time may have come for the OSHRC and the DOL to address the problems of the pro se party more directly. However, there are very few "models" available. Pro se cases are a very neglected feature of our legal system; indeed, they are barely tolerated. Yet OSHRC established the SJ procedures at a time when nobody had much experience with SJs. OSHRC and the DOL have a long history of experience with pro se parties. That experience may not always have endeared pro se parties to the DOL lawyers, but there is a great deal which they and OSHRC's ALJs may be able to teach other agencies and the rest of the legal system about pro se cases.

Literature and "models" on pro se cases are limited, but with the momentum generally for ADR, more will appear. OSHRC's Guide, moreover, is an excellent start for the relatively sophisticated pro se party. Special pro se rules could be triggered by objective criteria such as the number of employees, the number of alleged violations, the classification of the violations, and the amount of the proposed penalty. Pleadings could be modified, instead of eliminated, for some categories of pro se parties or cases. The "paperwork" could be simplified and stripped of legalese. In one state court jurisdiction pre-printed pro se form complaints with space for necessary information to be written in are available for simple contract disputes.<sup>370</sup> Although such forms are not directly applicable to "answers," they suggest possibilities. After all, if the case is truly simple, with only two or three simple alleged violations, the difficulties of framing a "form answer" could be man-

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370. Rubin, *The Civil Pro Se Litigant v. The Legal System*, 20 LOY. U. CHI. L.J. 999, 1010 (1989).

aged.<sup>371</sup> OSHRC and the DOL might collaborate on the development of some kind of "form answer."

If OSHRC wants to be more venturesome, it might consider a recent innovation in workers' compensation cases. In at least one state, provision is made for a pro se claimant to "confer with a legal advisor on the staff of the [Workers' Compensation Commission] . . . ."<sup>372</sup> Additional OSHRC staff and an "800" number might be a sound investment, if it were carefully handled, and led to better-informed pro se parties.

At the very least, addressing the pro se party's problems directly would have the virtue of considering those problems individually, rather than lumping them in with cost-saving goals and generalizations. The problems of the pro se party deserve more direct attention. Continuing to subsume them under simplified proceedings may not do justice to either the pro se party or simplified proceedings.

## ii. Carts and Horses: Cases Suitable for Simplified Proceedings

Little systematic attention has been paid to the crucial threshold question of what makes a particular case "simple" and therefore suitable for simplified proceedings. To say that a case is simple because the parties do not need fact pleadings and discovery as a matter of right is flagrant question begging. Likewise, this Article must ignore the temptation to offer a definition such as: "A simple case is one which turns out not to have any complications."

On an abstract level, the type of case which is suitable for simplified proceedings may be easy to describe: a routine case involving a few "other-than-serious" violations, low penalties, the facts at issue provable by "occurrence witnesses" with little need for "expertise" or expert testimony, and preferably with a hazard which essentially has been mooted. Added to these elements should be a factor which OSHRC recognizes in its Guide: whether presentation of the case will require information in the possession of any other party.<sup>373</sup>

However, the number of alleged violations to which the above criteria would apply in the "real world" remains to be seen. The amount of

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371. A potential "form" answer might read as follows: "Mr. Jones, we want to know more about your problem with OSHA. Why do you think they're wrong? Below are several questions, with space after each question, for any answer you would like to make. (1) Are you claiming that there wasn't a violation? If so, please explain. (2) Are you claiming that the citation involves conditions that were not your fault? If so, please explain."

372. ARK. CODE ANN. § 11-9-703 (1987).

373. See *supra* note 356 and accompanying text (quoting OSHRC's "Guide to Procedures" exploration of difference between simplified proceedings and conventional proceedings).

the proposed penalty, the number of alleged violations, and the classification of the alleged violation are simple enough. But crucial problems arise from the nature of many OSHA standards and the statutory imposition of a law enforcement model with its burden of proof. Although noncompliance with some standards can be established by simple observation and measuring, noncompliance with many other standards involves a much larger zone of potential dispute.<sup>374</sup>

Quite possibly, a very large cart may have been put before a small horse. Essentially OSHRC decided *how* to simplify, but was rather vague on *what* to simplify. What is it that makes a case suitable for simplified proceedings? What kinds of cases are suitable for a procedural regime which eliminates pleadings and discovery as a matter of right? The simplified proceedings' answer, or non-answer, to such questions has been to: (1) establish a procedural regime eliminating pleadings and discovery of right; (2) exclude certain categories of cases wholesale, such as cases arising under the general duty clause and certain health standards; and (3) leave the rest up to agreement by the parties.

As previously suggested,<sup>375</sup> simplified proceedings cannot by themselves simplify issues and factual disputes which are not simple. The procedures in simplified proceedings may be the cart which has been put in front of the horse. The horse may be small, because the number of cases suitable for simplified proceedings over the objections of a party may be limited. Of course, if both parties agree to use simplified proceedings that is an entirely different matter. Even if the horse were made larger, as by eliminating the present veto power, the cart would still be in front of the animal. Legal and factual issues do not obligingly go away just because the procedural rules dispense with pleadings and discovery as a matter of right. A good litigator does more than maneuver a course through procedural niceties. A good litigator must be prepared to argue both the facts and merits of the case. Again, very little systematic attention has been paid to the threshold question of what constitutes a case that is suitable for simplified proceedings. OSHRC rules and rulemaking imply a few hints here and there. At one extreme, general duty clause cases and certain generic kinds of cases arising under certain health standards have been made categorically ineligible for simplified proceedings.<sup>376</sup> Beyond the categorical ex-

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374. See *supra* notes 277-93 and accompanying text (discussing burden of proof and affirmative defenses).

375. See *supra* note 317 and accompanying text (discussing type of simplification imposed by simplified proceedings).

376. 29 C.F.R. § 2200.202 (1991). See generally *supra* notes 212-13 and accompa-

clusions, however, vagueness prevails. In the explanatory statement accompanying the experimental, one-year rule that first established simplified proceedings in 1979, OSHRC's response to comments objecting to the limitations on discovery and interlocutory appeals was, "[i]t is expected that simplified proceedings will be used in cases where the *factual and legal issues are relatively uncomplicated*."<sup>377</sup> To the very significant point that many cases arising under non-health standards might likewise be too complex for handling under simplified proceedings, OSHRC responded: OSHRC "*recognizes that many non-health cases may be too complex for simplified proceedings*, but is confident that the right of any party, including the Secretary, to preclude simplified proceedings in such case is an adequate safeguard at this time."<sup>378</sup>

Therefore, it is obvious that OSHRC has recognized the unsuitability of many cases theoretically eligible for simplified proceedings. However, it has not gone much further. Subsequent rulemaking has not refined or clarified the concept of what kinds of cases are suitable for simplified proceedings.<sup>379</sup> The aborted proposal to hinge everything on "due process" certainly represented no refinement or clarification.<sup>380</sup>

Overall, OSHRC implicitly seems to have recognized the difficulties of providing an alternative to the present scheme through rulemaking. To a suggestion that the objecting party be required to state a reason for its objection, OSHRC responded: "Such a requirement would be likely to lead to litigation over the validity of the reasons given and delay the progress of cases."<sup>381</sup> OSHRC might well have added, "and besides, what reasons would be acceptable, under what principles and criteria? How do we write the rule? What guidance do we give ALJs and the parties?" OSHRC has maintained a shaky status quo to date:

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nying text (explaining categorical exclusions). The rationale for the health standard exclusion has been, and more or less continues to be, the presumed complexity of cases under those standards. Most, if not all, of the excluded health standards "require engineering controls as a primary method of abatement and require personal protective equipment as a secondary measure. Cases involving such standards are unusually complex and involve a certain amount of necessary discovery." 43 Fed. Reg. 36,856 (1978) (proposed July 31, 1978).

377. 44 Fed. Reg. 70,110 (1979) (explanatory statement accompanying Final Rule) (emphasis added).

378. 44 Fed. Reg. 70,109 (emphasis added) (explanatory statement accompanying final rule).

379. See 47 Fed. Reg. 29,525-26 (1982) (containing explanatory statement accompanying amendment of rule).

380. See *supra* notes 252-68 and accompanying text (discussing proposed rulemaking on simplified proceedings).

381. 47 Fed. Reg. 29,526 (1982) (explanatory statement accompanying amendment of rules).



certain broad categories of cases are ineligible for simplified proceedings, and the rest is up to the agreement of the parties. The status quo is not without advantages: (1) it is simple to administer because OSHRC and its ALJs do not have to become embroiled in drawing fine lines between cases that are “relatively simple” and cases which are unsuitably complex for simplified proceedings; (2) it essentially moots the need for any rules or criteria which attempt to “test” the suitability of a case for simplified proceedings; (3) it allows the parties to make a decision in the first twenty-five days after docketing the case, that they *both* conclude it is suitable for simplified proceedings; and (4) it promotes simplified proceedings as a form of ADR by establishing a consensual regime, rather than a proceeding imposed at the unilateral will of one party or the third-party adjudicator.

The status quo is not without disadvantages, however. The main disadvantages of the status quo are “under-utilization” and the dissatisfaction among pro se parties, or would-be pro se parties, caused by the frequent use of the veto. However, the number of cases in which simplified proceedings would be suitable is uncertain, so “under-utilization” may not be the proper word. Criteria for suitability are virtually nonexistent. The dissatisfaction among pro se parties may need to be addressed by means more direct and more tailored to the needs of pro se parties than simplified proceedings.

None of this necessarily compels a conclusion that the status quo should be maintained. However, if changes are to be made in the rules for simplified proceedings, it would seem necessary to develop a better idea of what kinds of cases are suitable for simplified proceedings.

## V. OVERALL CONCLUSIONS

### A. *Settlement Judges*

The procedures are working well. Some of the cases in which SJs have been used are textbook examples of how the process should work. Concerns about the relatively small number of SJ cases may be premature. The main reason for any under-use of SJs lies primarily in the novelty of the procedure, lack of knowledge of its very existence, and lack of sensitivity to its possibilities in a system where historically there has been a ninety percent settlement rate. The SJ procedure is an extraordinary procedure, so the number of SJ cases should be relatively small. The greatest potential problem with SJs lies not in under-use, but potential over-use, and even abuse. Over-use could develop, straining OSHRC’s resources, if SJs were invoked short of true impasse. Abuse could occur because the “preview” feature might be very attrac-

tive to a lawyer who is alert to the potential of a free "mock jury."

### *B. Simplified Proceedings*

Simplified proceedings probably are under-utilized. However, the degree of genuine under-utilization is indeterminable under present circumstances. A fair assessment regarding under-use can only be made if there is some clear concept of, or consensus on, what makes a case suitable for simplified proceedings. It is distinctly possible that the universe of cases objectively suitable for proceedings which eliminate pleadings and discovery as a matter of right may be relatively small, given, among other things: (1) the OSH Act's law enforcement model and the appropriateness under that model of a fairly strict burden of proof; (2) the large number of "general" or open-ended standards; (3) the number of affirmative defenses; and (4) the number of cases which hinge on evidence and information in the possession of one party.

Two major issues must be settled before simplified proceedings become an effective means of dispute resolution. First, the goals and purposes of simplified proceedings must be more clearly settled. Is the main goal cost effectiveness? If so, then calculate the costs, all of them, in all parts of the system: OSHRC, the prosecutorial arm, employers, employees, and the public. If the most important goal is to provide fair treatment for the small pro se party with a small case, then the question arises whether simplified proceedings are the optimal way to reach this goal, or whether the problems of the pro se parties should be treated more directly by rules tailored to their special needs.

Second, OSHRC, the DOL, and all others concerned, need to develop a more clear picture or idea of what kinds of cases are suitable for simplified proceedings. It is not enough to conclude that some cases do not need hybrid fact pleadings and discovery as a matter of right, and leave it at that, unless the status quo is deemed to be satisfactory.

### AUTHOR'S RECOMMENDATIONS

1. The DOL should encourage regional solicitors to selectively and carefully experiment with simplified proceedings. A broader base of experience, carefully tracked and analyzed, could be beneficial in two ways. First, if experience is satisfactory more efficient case processing could result from careful use of simplified proceedings in the future. Second, if experience is unsatisfactory there will be data and a base of recent experience justifying use of the veto.

2. The OSHRC and the DOL both should consider developing rules and policies pertaining to cases involving pro se parties, especially pro

se parties of limited means in simple cases involving few violations and low penalties.

3. The OSHRC should consider ways in which to make the informal discussion provisions, presently "required" by 29 C.F.R. section 2200.206, more effective. As it stands, these informal discussions are the only substitute for hybrid fact pleadings and discovery as a matter of right. OSHRC's "Guide to Procedures" sets the proper tone. The rules and their enforcement should follow suit. Although parties cannot be made to reach any particular result, good faith contact and discussion should be a condition precedent to further proceedings. For instance, complete failure to cooperate in the informal discussions should be express grounds for reverting to conventional proceedings.

4. To the extent feasible and allowable under applicable law, in the future all major OSHRC rulemaking on simplified proceedings should be preceded by some form of advisory committee studies. In the alternative, "negotiated rulemaking" might be considered. Purely in-house committees composed of ALJs and OSHRC officials are undoubtedly competent but they are limited to the OSHRC adjudicative perspective. They do not bring the perspective of all participants in the litigation process to the crucial formative stages of rulemaking. Those representing major principals are reduced to reacting to a written proposal. Among those who might serve on advisory or developmental committees are representatives from the DOL, employer associations, the relevant American Bar Association committee(s), and unions. In any event, pure notice-and-comment rulemaking may be insufficient if major changes are being considered or developed.

## APPENDIX

This Appendix is a summary of more than forty OSHRC and ALJ decisions reported in BNA's Occupational Safety and Health Cases. Although BNA refers to its treatment of ALJ decisions as "digests," these "digests" seem fairly thorough, relative to the substantive points in the case.

For each case summarized, the Appendix gives the name of the respondent, docket number, the DOL regional office which tried the case, whether the respondent appeared pro se (where information on pro se status was available), and the cite to the BNA reporting service. Next, it identifies the standard(s) allegedly violated, and summarizes pertinent information about the decision. The final item generally concerns whether the citation, as to the alleged violation, was affirmed, vacated, modified, or reduced to de minimis. The Appendix was originally presented in chart form; for purposes of this Article, the chart was transformed into this summary, so there may have been some minor errors made in the transition.

## SIMPLIFIED PROCEEDINGS CASES

(1) *Vacu Maid* (80-1509-S, Dallas, pro se, 9 OSHC 1429 (1981)). Standard: 1910.212(a)(1) - machine guarding (several citations for various machines).

a) That standard not applicable to type of lathe; Defenses asserted were the impossibility of guarding; and cost. Citation was affirmed because the employer failed to prove impossibility and made no attempt to use guards on swing lathes.

b) As to South Bend Lathe, DOL failed to prove lathe was ever used with jaws uncovered. Vacated.

(2) *Haring Contractors* (80-1987-S, Cleveland, pro se, 9 OSHC 1301 (1981)). Standards:

a) 1926.300(b)(2) - guard moving parts of mortar mixer - operating it with motor housing in "up" position. Defense asserted was that the employee violated company work rules - unpreventable employee misconduct. Vacated.

b) 1903.2(a)(1) - poster. Defense asserted was that it was a small, transitory, work force, therefore, posting at office was sufficient. Vacated.

(3) *Campton Constr.* (80-226-S, Denver, pro se, 9 OSHC 1303 (1981)). Standards:

a) 1926.652(c) - trenching; slope and shoring; hard or compact soil. Evidence: conflict of testimony. Vacated.

b) 1926.652(i)(1) - store or retain excavated material at least 2 feet from edge of trench. Evidence: testimony showed trench not finished yet and no proof that any employees were in the trench. Vacated.

(4) *Marine Terminals Corp.* (80-2540-S, Los Angeles, pro se (safety director), 9 OSHC 1341 (1981)). Standard:

a) 1918.81(a) - failure to safety sling concrete pilings before hoisting them by crane. Evidence: employer did not determine proper way to secure. Compliance Officer was eyewitness. Serious classification upheld. Affirmed.

(5) *Novak & Co.* (80-2946-S, New York, pro se, OSHRC decision, 11 OSHC 1783 (1984)). Standard:

a) 1926.500(b)(1) - unguarded floor holes - subcontractor. Evidence: insufficient to establish Novak knew or should have known of condition. Subcontractor's own employees not shown on regular route near holes (multi-employer worksite). Vacated.

(6) *Nester Bros.* (80-5271-S, Region not indicated, 9 OSHC 1962 (1981)). Standards: (4 cites, all serious)

a) 1926.28(a) - safety toed shoes, handling concrete blocks, protective equipment. Evidence: reasonable person would not be on notice that shoes were needed; AGC manual (construction contractors' association manual) only recommends. Vacated.

b) 1926.152(a)(1) - failure to store flammable liquid in approved container. Evidence: compliance officer testimony unrefuted. Affirmed.

c) 1926.450(a)(1) - ladders for safe access to all elevations of construction. Evidence: compliance officer testimony unrefuted. Affirmed.

d) 1926.451(a)(4) - lack of guardrails and toeboards more than ten feet above ground. Evidence: compliance officer testimony unrefuted. Affirmed.

(7) *Southwestern Sound Control* (80-5288-S, Dallas, pro se, 9 OSHC 2048 (1981)). Standard:

a) 1926.500(b)(1) - removing temporary guardrails at front and side of elevator shaft while work going on. Defense: affirmative defense of impossibility of performance. Vacated.

(8) *Colorado Aggregate* (80-5575-S, Denver, pro se, 9 OSHC 1295 (1981)). Procedural: notice of contest not timely filed. Motion to dismiss notice of contest granted.

(9) *Eckel Mfg. Co.* (80-7140-S, Dallas, pro se (safety director), 9 OSHC 2145 (1981)). Standards:

a) 1910.212(a) - machine guard, turning lathe. Evidence: haz-

ard did not exist at 20 r.p.m. Vacated.

b) 1903.2(a)(1) - poster display. Evidence: absence undisputed. Affirmed.

c) 1910.178(1) - failure to train forklift operators in safe operation. Evidence: rested on interpretation of standards. Affirmed.

d) 1910.179(j)(2)(iv) - monthly inspections of hoist chains (load-bearing chains). Evidence: record does not adequately describe the equipment to determine applicability of the standard. Vacated.

e) 1910.179(m)(1) - no monthly inspection program for running ropes on cranes, including written, dated signed reports. Condition: admitted; later checklist insufficient. Affirmed.

f) 1910.252(a)(2)(i)(b) - failure to legibly mark gas content of compressed gas. Evidence: rested on interpretation of standard. Affirmed.

g) 1910.252(e)(2)(iii) - lack of flameproof screens and required goggles in welding area. Evidence: plywood screens not acceptable; goggles not of the required type. Affirmed.

(10) *Was Bros. Constr.* (80-7175-S, Boston, pro se, 10 OSHC 1030 (1981)). Standards:

a) 1926.651(c) - adequate slope, shore, support walls of excavation. Evidence: photos, testimony. Affirmed.

b) 1926.651(q) - failing to protect, shore, brace, walls of excavation due to superimposed loads. Evidence: established heavy equipment and traffic close by, but Secretary failed to present evidence which applied specifically to the need for shoring at this site. Vacated.

(11) *Universal Rundle* (80-7351-S, Dallas, 9 OSHC 2168 (1981)). Standard:

a) 1910.132(a) - failing to require employees handling heavy objects to wear safety-toed workshoes. Defense: only 12 foot injuries over the past four years; defense rejected. Affirmed.

(12) *Crayton's Southern Sausage* (81-346-S, Cleveland, 10 OSHC 1366 (1982)). Standard:

a) 1910.23(d)(1)(ii) - unguarded stairways; two flights around loading dock. Defense: no injuries and compliance with standard would create greater hazard. Affirmed.

(13) *NL Industries* (81-223-S, Dallas, 11 OSHC 1124 (1983)). Standard:

a) 1910.132(a) or alternatively 1926.28(a) - failure to require use of safety belt and line while working 30-50 feet above ground. Defense: impossible to tie off and employee misconduct.

Affirmed.

(14) *Syntron* (81-1491-S, Dallas, not pro se, OSHRC decision, 11 OSHC 1158, 11 OSHC 1868 (1984)). Standards:

a) 1910.212(a)(1) - machine guarding, saw. Case had been remanded to ALJ in 1982 because ALJ decision lacked sufficient specificity in findings of fact. ALJ held on remand that evidence insufficient (photo not a photo of saw at issue; employer testimony credited; DOL failed to show hazard existed). OSHRC decision: employee normally a foot away from unguarded blade. Dissent: physical guards needed. Vacated.

b) 1903.2(a)(1) - poster. Evidence: no notice of contest filed. Affirmed.

c) 1904.2 - poster. Evidence: no notice of contest filed. Affirmed.

(15) *Pengo Oil Tool Div.* (81-1655-S, Dallas, 10 OSHC 1669 (1982)). Standard:

a) 1910.132(a) - use of personal protective equipment. Fatality case. Defense: unforeseeable employee misconduct in failing to wear hard hat. Vacated.

(16) *Farrell Roofing & Sheet Metal* (81-0954-S & 81-1121-S, Dallas 10 OSHC 1430 (1982)). Standards:

a) 1926.500(g)(1) - protection against fall from low-pitched roof. Evidence: failure to call witness (compliance officer) who observed the violation. Vacated.

b) 1926.500(g)(1)(iii) - safety monitoring system. Affirmed.

c) 1926.500(b)(1) - skylight opening. Defense: multi-employer worksite; independent contractors responsible for violation. Vacated.

d) 1926.500(f)(6) - side rails of ladder not 36 inches above landing. Defense: same as (c). Vacated.

(17) *Volk Construction* (81-2669, Dallas, pro se, 10 OSHC 1843 (1982)). Standard:

a) 1926.451(c)(6) - tube and coupler scaffolds must post on "suitable base." Issue 1 - interpretative; did "suitable base" include sills? Held: no, affirmed but modified - failure to have metal base under scaffold post. Issue 2 - whether the scaffold base was on frozen ground, therefore posts and scaffold could not be easily dislodged? Held: yes, violation found to be de minimis.

(18) *Robert P. Loveland* (82-136-S, Denver, pro se, 11 OSHC 1096 (1982)). Procedural issue - agreed to file settlement agreement but never filed; no response; no forwarding address. Default Judgment.

Affirmed.

(19) *APAC-Ga., Inc.* (82-1215-S, Atlanta, not pro se, 11 OSHC 1774 (1983)). Standard:

a) 1926.602(a)(9)(ii) - reverse signal alarms must be sufficiently audible to distinguish from surrounding noise level (wheel loader and scraper paving a parking lot). Evidence: compliance officer made readings at an angle to the movement of vehicle; standard merely requires signal to be distinguishable from surrounding noise level. Vacated.

(20) *Firman Carswell* (83-104-S, Kansas City, pro se, 11 OSHC 1871 (1984)). Standard:

a) 1910.212(a)(3) - failure to guard point of operation on series of press brakes. Defense: feasibility - employer failed to show hazards of compliance greater than hazards of noncompliance, or otherwise justify lack of guards; did not even attempt to guard. Affirmed.

(21) *Weinland Constr.* (83-322-S, Kansas City, pro se, 11 OSHC 1736 (1984)). Standards:

a) 1926.651(i)(1) - failure to store or retain excavated or other material two feet or more from edge of excavation. Evidence: clear violation, with photos, etc. Affirmed.

b) 1926.652(c) - failure to slope or shore walls of trench. Evidence: failure to establish prima facie case; did not establish that significant portion of trench sides was hard or compact soil. Vacated.

c) 1926.50(c) - failure to have a person at worksite with valid first aid certificate, if hospital, clinic etc., is not "reasonably accessible." Evidence: DOL failed to prove violation. Vacated.

(22) *United Sheet Metal* (83-363-S, Philadelphia, 11 OSHC 1766 (1983)). Standards:

a) 1926.28 (a) - failure to provide safety belts (employees on edge of roof). Evidence: employee held to hoist with one hand while reaching beyond roof to swing materials onto roof - serious violation. Affirmed.

b) 1926.500(g)(1) and (g)(6) - working along unprotected edge of roof and failure to provide safety training programs. Interpretation of standard: applicable by its terms to "employees engaged in built-up roofing work," which was not the case here. Vacated.

c) 1926.400(h)(1) and .401(a)(1) - electric grounding prong; lack of ground fault protection. Evidence: virtually admitted by employer. Serious violation affirmed.



d) 1904.5 - failure to post at worksite annual summary of injuries, illnesses, etc. Affirmed.

e) 1926.450(b)(12) - rungs of ladder not inset into edges of side rails and similar deficiencies (job-made ladder). Evidence: supports citation, non-serious violation. Affirmed.

(23) *Michael Duff* (83-0366-S, New York, pro se, 11 OSHC 1839 (1984)). Standards:

a) 1926.400(h)(1) and .401(a)(1) - "Sawzall" which was not double insulated, grounding prong broken and plugged into temporary wiring lacking ground-fault circuit protection; also electric drill not double insulated and not plugged into power source. Evidence: No evidence that tools were used in a wet environment (basement was wet but employees were not working there at time of inspection). Reduced from serious to non-serious violation. No penalty. Affirmed as modified.

(24) *Component Struct., Inc.* (84-173-S, Kansas City, 12 OSHC 1056 (1984)). Penalty Calculation - penalties reduced by 50% from \$800 to \$400 and \$480 to \$240.

(25) *Fisherman's Boat Shop* (84-411-S, Seattle, pro se, 12 OSHC 1151 (1984)). Standard:

a) 1915.71(j)(1) - guardrails on over-the-water staging required over bow of vessel (being repaired). Repeat Violation. Evidence: Different vessel 18 mos. earlier. Held: repeat violation \$100. Affirmed.

(26) *A.G. Building Specialists, Inc.* (84-1020-S, Dallas, pro se, 12 OSHC 1424 (1985)). Standard:

a) 1926.451(e)(8) - casters or wheels on scaffold must be locked, to prevent movement. Evidence: employer admitted employees rarely used locks; just troublesome and time consuming to comply when moving small scaffold along doing acoustical tile work. Affirmed.

(27) *Interior Constructors, Inc.* (85-1185-S, Dallas, not pro se, 12 OSHC 1942 (1986)). Standards:

a) 1926.451(i)(8) - employee on scaffold without approved safety belt. Affirmed.

b) 1926.451(i)(9) - failure to secure scaffold lashed to building to prevent swaying. Employees observed by compliance officer painting walls of building on scaffold. Evidence: supported DOL as employees had been working for three hours before compliance officer inspection and scaffold in plain view of management employee. Defense: unpreventable employee misconduct (OSHA then had "national emphasis program" on two-

point suspension scaffolds). Affirmed.

(28) *Structural Dev. Corp.* (85-1370-S, Dallas, no appearance (DOL still required to prove case), 12 OSHC 1872 (1986)). Standard:

a) 1926.500(d)(1) - failure to guard openings into elevator shafts with standard guardrails. Evidence: violation readily apparent; existed for two days; firm's superintendant expressed no surprise - \$120 for serious violation. Affirmed.

(29) *Western Steel & Boiler* (85-1433-S, Denver, pro se, 12 OSHC 1943 (1986)). Standard:

a) 1910.212(a)(3)(ii) - failure to guard saw blade (metal band saw). No dispute over violation. Contended \$300 proposed penalty would put strain on its business. Reduced from \$300 to \$150.

(30) *Kry-Lin* (85-1444-S, Dallas, no appearance (DOL still required to prove case), 12 OSHC 1888 (1986)). Standard:

a) 1926.350(h) - failure to maintain oxygen and fuel gas pressure regulators and gauges in proper working order. Evidence: proved violation. Affirmed.

(31) *Wes's Inc.* (86-29-S, Seattle, pro se, 12 OSHC 2147 (1986)). Standards:

a) 1910.179(f)(1)(J) - failure to equip a 10-ton overhead crane with a holding brake. Evidence: undisputed. Affirmed.

b) 1910.212(a)(3)(ii) - guard hydraulic press brake. Evidence: prior citation dismissed by Secretary same machine. Vacated. Failure to guard shearing station on "Ironworker." No factual dispute. Affirmed.

(32) *HRD Masonry* (86-221-S, Dallas, pro se, 13 OSHC 1029 (1986)). Standards:

a) 1926.451(a)(4) - guardrails on scaffold. Defense: feasibility-burden on DOL to prove compliance is feasible when infeasibility is raised as a defense. Held: DOL failed to meet burden of proof. Vacated.

b) 1926.500(d)(1) - failure to guard open-sided floors. Violation not proved and employee misconduct. Vacated.

c) 1926.500(d)(1) and .552(b)(2) - unguarded hoistway. Evidence: held for DOL. Also, issue as to repeated violation; earlier citation regarding earlier violation had been settled with area director and never contested. Affirmed.

(33) *Texas Trident* (87-0442-S, Dallas, 13 OSHC 1615 (1988)). Standards:

a) 1926.300(b)(1) - When power-operated tools designed to accommodate guards are used, they shall be equipped with guards

when in use. Defense: infeasible. Evidence: burden of proof not satisfied. Employer's witness more credible than DOL's compliance officer. Vacated.

b) 1926.304(f) - radial saw not equipped with adjustment stop and cutting head to return gently when released by operator. Defense: infeasible, and also greater hazard (fairly detailed ALJ discussion of facts). Employer's witness more credible. Vacated.

(34) *Hoggatt, Inc.*, (87-522-S, Dallas, pro se, 13 OSHC 1642 (1988) (two consolidated cases)). Standards:

a) 1903.2(a)(4) - failure to provide adequate lanyard on safety belt. DOL withdrew citation. Vacated.

b) 1926.404(b)(1)(i) - failure to have either an assured grounding conductor (AEGC) or operable ground-fault circuit interrupter (GFCI) on 120-volt receptacle outlet. Evidence: Employer claimed GFCI operable when tested that morning. Held: employer proved reasonable diligence. Vacated.

c) 1926.451(d)(10) - lack of guardrails on 3rd tier of scaffold and proper toeboards on second tier. Evidence: Employee photographed on violative scaffold. Affirmed.

d) 1904.5(b), (c) and (d)(1) - prepare and post annual summary of injuries. Evidence: Employer told compliance officer were no summaries prepared; unsworn employer statements during hearing to the effect that he had prepared and sent copy before the deadline. Held: DOL failed to meet burden of proof. Vacated.

e) 1926.416(e)(1) - use of frayed or worn electric cables. Proof showed only splice. No amendment of citation allowed. Vacated.

(35) *Peterson Bros.* (87-0805-S, Dallas, pro se, 13 OSHC 1936 (1988)). Standard:

a) 1926.750(b)(1)(i) - decking or planking on derrick or erected floors be laid tight and secured to prevent movement. Two serious violations cited. First, defense: cited under wrong standards; held - standards clearly applicable, undisputed evidence. Heavy planks, hard to move. Affirmed, but de minimis. Second, on 9th floor, obvious gap, danger of fall. Affirmed.

b) 1926.350(a)(9) - failure to secure compressed gas cylinders in an upright position except when being hoisted or carried. Evidence: employer owned and controlled the cylinders. Affirmed.

c) 1926.350(j) - failure to separate oxygen acetylene cylinders in storage minimum of 20 feet. OSHRC precedent regarding

storage - not in storage if being used intermittently. Held: not in storage here. Vacated.

(36) *Dodd & Frerich Welding Co.* (87-8585, Dallas, pro se, 13 OSHC 1838 (1988)). Standards:

a) 1926.450(a)(9) - requiring ladder to extend 36 inches above landing or provide guardrails as to handhold, for secure grip. Evidence: photographic; only 12 inches above landing. Defense: compliance impossible and column nearby was sufficient handhold (detailed discussion by ALJ). Affirmed.

b) 1903.2(a)(1) - OSHA poster. Repeated violation. Evidence clear. Affirmed.

(37) *Burnetex Industries, Inc.* (87-1936-S, Dallas, 13 OSHC 1941 (1988)). Standards:

a) 1910.133(a)(1) - failure to require employee operating a woodsander to wear eye protection where hazards of flying objects, glare, liquids, etc. Evidence: nature of particles ("billed") and goggles clouded by dust. Affirmed.

b) 1910.213(h)(1) - failure to guard blade of radial saw. Evidence: lower portion of blade was unguarded - 20% of cuts could not be made with guard in place. Held: guard could be removed for that 20%. Affirmed.

c) 1910.213(h)(4) - failure to ensure cutting head of radial arm saw returned automatically after use to starting position. Evidence: saw was equipped with automatic return device which did not work because it was dirty. Defense: claimed compliance would require elevation of front of unit creating hazard. Defense: had adjusted saw so it would not move when released and trained employees not to release handle until it was safe. Affirmed.

d) 1910.213(i)(1) - failure to guard non-working part of band-saw blade. Evidence: compliance officer did not testify to seeing the saw in operation. Employer claimed guard was provided and used. Vacated.

e) 1910.219(d)(1) & (e)(1) - failure to guard pulleys and belts on small bandsaw. Evidence: similar to (d). Vacated.

f) 1910.305(j)(2)(i) - using an extension cord with 15 amp capacity to connect 30 amp outlet to 40 amp drill press. Evidence: "apparent" that compliance officer misread the label on the extension cord. Vacated.

g) 1910.141(a)(3)(i) - failure to keep toilet clean and sanitary. Held: de minimis (accumulated dirt and rust in restroom). Vacated.

h) 1910.106(e)(2)(iv)(a) - failure to keep flammable liquid in covered containers when not in use. Citation listed cans of oil, adhesive MPT and 3M, but compliance officer in testifying identified as "a spray can of some kind of flammable material." Vacated.

i) 1910.212(a)(3)(ii) - failure to guard broken bit return spring (point of operation guarding). Vacated.

j) 1910.212(b) - failure to anchor drill press designed for a fixed location. "Designed for fixed location" - compliance officer testified that drill press had slots in the base for bolts and could fall over in use. Evidence: small portable press, labeled "heavy duty" by Taiwan manufacturer, but no machine shop in United States would classify it as "heavy duty." When used on a bench it was clamped down. Vacated.

k) 1910.242(a) - cracked handle of ball peen hammer. Vacated.

(38) *Flasher, Co.* (88-0353-S, Dallas, Okla. City, 13 OSHC 2134 (1989)). Standards:

a) 1926.200(g)(2) - Fatality - failure to provide effectively located traffic controls to protect highway construction workers. Secretary argued additional protective measures needed (channelizing and traffic cones, etc.). Employer had used barrels, warning signs, etc., ALJ referred to "general language" of general standard. Vacated.

b) 1926.21(b)(2) - Failure to instruct employees in recognition and avoidance of unsafe conditions. Evidence: employee testified that he had received no preliminary training; no safety meeting; some general warnings (e.g., keep eyes open for traffic, wear orange vest, hard hat). Employer representative admitted never determined if supervisors convey safety information to employees. Basic safety training limited to drivers and supervisors. \$320 penalty. Affirmed.

(39) *L.H. Land Painting Co.* (88-1087-S, Dallas, pro se, 13 OSHC 2130 (1989)). Standards:

a) 1910.20(g)(1)(i), (ii) and (g)(2) - requiring that employees be informed of existence, location, availability of records access, etc. for material safety data sheets (MSDS) for coat primer, lacquer thinning and wood primer. MSDS are included in definition of employee records covered by standard. Evidence: employer stipulated that painting materials are toxic substance. No penalty. Affirmed.

(40) *Derr Constr.*, (88-1672-S, Dallas, pro se, 14 OSHRC 1023 (1989)). Standards:

a) 1926.450(a)(10) - portable extension ladder not tied or secured. Multi-employer worksite. Two employees using 25 foot ladder without securing it. Possible defense, unpreventable employee misconduct not explicitly raised and first element of defense not proved. Serious, but reduced from \$350 to \$200. Affirmed.

b) 1926.351(e) - failing to shield employees from arc welding and cutting operations. Evidence: established violation. Affirmed.

(41) *Knight & Knight Constr.* (88-1487-S, Dallas, pro se, 14 OSHRC 1096 (1989)). Standards:

a) Timely notice of contest - held timely; earlier certified mail service returned unclaimed. Compliance officer hand delivered to employers home. Multi-employer worksite.

b) 1926.403(i)(2)(i) - failure to guard properly the live parts of a breaker box. Serious. Evidence: employer admitted knowledge of violative conditions. Employee pulling out circuit breaking boxes from wall and could have contacted live parts of circuit breaker. \$180 reduced to \$75. Affirmed.

(42) *King Tool* (89-66-S, Kansas City, pro se, 14 OSHC 1342, (1989)). Standard:

a) 1910.217(b)(3)(i) - failure to have single-stroke mechanism on 25 ton power press which used full revolution clutch. Contested penalty only; reduced from \$280 to \$100.

(43) *Austin Crider* (89-610-S, Dallas, pro se, 14 OSHC 1397 (1989)). Six violations. DOL failed to present any evidence establishing employer engaged in a business affecting interstate commerce. All vacated.

(44) *Dub Rose & Associates* (89-1128-S, Dallas, pro se, 14 OSHC 1313 (1989)). Standards:

a) 1926.451(a)(4) - requires guardrails and toeboards on all open sides and ends of platforms more than seven to ten feet above ground. During conference, violations determined to exist and employer agreed. Affirmed.

b) 1926.500(b)(5) - requires pit and trap door floor openings to be guarded. Penalties lowered for both violations.