

June 1980

Judicial Review of Decisions of the Occupational Safety and Health Review Commission - 1973-1978: An Empirical Study

Mark A. Rothstein

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [Law Commons](#)

Recommended Citation

Mark A. Rothstein, *Judicial Review of Decisions of the Occupational Safety and Health Review Commission - 1973-1978: An Empirical Study*, 56 Chi.-Kent L. Rev. 607 (1980).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol56/iss2/9>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.

JUDICIAL REVIEW OF DECISIONS OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION—1973-1978: AN EMPIRICAL STUDY

MARK A. ROTHSTEIN*

Section 11(a) of the Occupational Safety and Health Act of 1970¹ authorizes any person adversely affected or aggrieved by an order of the Occupational Safety and Health Review Commission² to obtain judicial review in a United States court of appeals.³ A petition must be filed within sixty days of the order in the court of appeals for the circuit in which the violation allegedly occurred, where the employer has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit. Pursuant to section 11(b),⁴ the Secretary of Labor⁵ may obtain review or enforcement of a final order of the Commission by filing a timely petition in the United States court of appeals for the circuit in which the violation allegedly occurred or in which the employer has its principal office.

Although the Act became effective in 1971, the first decisions of the courts of appeals were not issued until 1973. From 1973 until the end of 1978, there were 294 cases decided by the courts of appeals. These cases concern a wide range of legal issues and represent the decisions of all eleven circuits.

In analyzing the body of judicial decisions, various patterns and trends emerge. This information is quite helpful in studying the entire adjudicatory process of the Act, from the decisions of the administrative law judges⁶ through the Commission to the courts of appeals. In addition, the statistics are valuable in testing various theories and hypotheses about the resolution of OSHA cases and the performance of

* Visiting Associate Professor of Law, University of Pittsburgh. B.A., University of Pittsburgh; J.D., Georgetown University. The author is greatly indebted to James Gallagher, J.D., University of Pittsburgh, for his painstaking and valuable research assistance in compiling many of the statistics upon which this article is based.

1. 29 U.S.C. §§ 651-678 (1976). The Occupational Safety and Health Act is hereinafter referred to as OSHA.

2. 29 U.S.C. § 661 (1976). The Occupational Safety and Health Review Commission is hereinafter referred to as the Commission.

3. 29 U.S.C. § 660(a) (1976). *See generally* M. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW ch. 20 (1978) [hereinafter cited as ROTHSTEIN].

4. 29 U.S.C. § 660(b) (1976).

5. Hereinafter referred to as the Secretary.

6. Hereinafter referred to as ALJs.

the agencies and courts involved in enforcement and adjudication under OSHA.

METHODOLOGY

Of the 294 OSHA cases decided by the courts of appeals through the end of 1978, opinions were filed in only 149 cases. In the remaining 145 cases, the Commission was summarily affirmed, the appeal was withdrawn or dismissed, the case was settled, or some similar action was taken. Because this study sought to determine the reasons for judicial action, only the 149 cases with opinions were analyzed. This figure includes cases consolidated on appeal.

All of the cases included in the study were cases on judicial review pursuant to section 11 of OSHA following the issuance of a final order of the Commission. Specifically excluded were all cases brought under section 6(f) challenging the validity of the Secretary's rulemaking, all cases initiated in United States district courts involving inspection warrants, and all other cases that did not originate in the Occupational Safety and Health Review Commission.

The initial step was to determine the action taken by the court of appeals. With respect to the citation itself, the courts would, in effect, affirm or vacate the citations. With respect to the Commission's decision, the courts would affirm, reverse, remand, or order similar relief.

The next step was to identify the issue or issues upon which a court based its decision in each case. For each case, the number of issues identified was kept to a minimum. Only those matters having a direct bearing on the outcome of the case were noted.⁷ There were nine categories of issues, defined as follows:

1. *Statutory Interpretation*—The meaning and application of the actual words used in a particular section of the Act.⁸ Some examples would be the meaning of "reasonable promptness" in section 9(a)⁹ or "repeatedly" in section 17(a).¹⁰
2. *Standards Promulgation*—Substantive and procedural challenges

7. For example, suppose that on judicial review an employer argues that the Commission's interpretation of a standard is erroneous and that, in any event, the Act is unconstitutional. The court then summarily rejects the argument that the Act is unconstitutional and bases its decision on the proper interpretation of the standard. For purposes of this study, the case would only be noted as having involved the issue of standards interpretation.

8. See, e.g., *Marshall v. Western Waterproofing Co., Inc.*, 560 F.2d 947 (8th Cir. 1977); *Intercounty Constr. Co. v. OSHRC*, 522 F.2d 777 (4th Cir. 1975), *cert. denied*, 423 U.S. 1072 (1976); *California Stevedore & Ballast Co. v. OSHRC*, 517 F.2d 986 (9th Cir. 1975). See generally ROTHSTEIN, *supra* note 3, at § 488.

9. 29 U.S.C. § 658(a) (1976).

10. *Id.* § 666(a).

- to the Secretary's rulemaking activity under section 6.¹¹ Note: Only post-enforcement challenges pursuant to section 10¹² and section 11¹³ are included.
3. *Interpretation of Standards*—The applicability and requirements of specific OSHA standards cited under section 5(a)(2).¹⁴
 4. *Procedural Errors*—The validity of the enforcement procedures of the Secretary and the adjudicatory process of the Commission. The focus is on pleadings and other similar matters rather than the merits of the case.
 5. *Prima Facie Elements*—Issues related to the essential proof of the Secretary's case: noncompliance with a standard, employee exposure, employer knowledge, and in some instances the feasibility and utility of corrective measures.¹⁵
 6. *Defenses*—Substantive defenses raised by an employer cited under the Act.¹⁶ Note: Procedural defenses are included in *Procedural Errors*.
 7. *Penalty Assessment*—Whether penalties assessed by the Commission are in accord with the statutory criteria of section 17(j).¹⁷
 8. *Burden of Proof/Substantial Evidence*—Whether there is substantial evidence in the record, considered as a whole, to support the Commission's findings of fact.¹⁸
 9. *Questions of Law*—Concerned with matters of traditional legal analysis about which the Commission is not presumed to have unique expertise.¹⁹ Some examples would include questions of

11. *Id.* § 655. See, e.g., *Marshall v. Pittsburgh-Des Moines Steel Co.*, 584 F.2d 638 (3d Cir. 1978); *Usery v. Kennecott Copper Corp.*, 577 F.2d 1113 (10th Cir. 1977). See generally ROTHSTEIN, *supra* note 3, at § 87.

12. 29 U.S.C. § 659 (1976).

13. *Id.* § 660.

14. *Id.* § 654(a)(2). See, e.g., *General Elec. Co. v. OSHRC*, 583 F.2d 61 (2d Cir. 1978); *Amoco Oil Co. v. OSHRC*, 549 F.2d 1 (7th Cir. 1976); *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645 (5th Cir. 1976). See generally ROTHSTEIN, *supra* note 3, at §§ 104-106, 489.

15. See, e.g., *Brennan v. OSHRC (Underhill Constr. Corp.)*, 513 F.2d 1032 (2d Cir. 1975); *Brennan v. OSHRC (Raymond Hendrix)*, 511 F.2d 1139 (9th Cir. 1975). See generally ROTHSTEIN, *supra* note 3, at §§ 71-81. The prima facie elements of a general duty clause violation are also included in this category, although they are somewhat different. See, e.g., *Marshall v. L.E. Myers Co.*, 589 F.2d 270 (7th Cir. 1978); *Marshall v. Cities Serv. Oil Co.*, 577 F.2d 126 (10th Cir. 1978); *Getty Oil Co. v. OSHRC*, 530 F.2d 1143 (5th Cir. 1976); *American Smelting & Refining Co. v. OSHRC*, 501 F.2d 504 (8th Cir. 1974); *REA Express, Inc. v. Brennan*, 495 F.2d 822 (2d Cir. 1974); *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257 (D.C.Cir. 1973). See generally ROTHSTEIN, *supra* note 3, at §§ 123-24.

16. See, e.g., *Diebold, Inc. v. Marshall*, 585 F.2d 1327 (6th Cir. 1978); *General Elec. Co. v. Secretary of Labor*, 576 F.2d 558 (3d Cir. 1978); *Floyd S. Pike Elec. Contractor, Inc. v. OSHRC*, 576 F.2d 72 (5th Cir. 1978); *Wisconsin Elec. Co. v. OSHRC*, 567 F.2d 735 (7th Cir. 1977). See generally ROTHSTEIN, *supra* note 3, at §§ 82-103.

17. 29 U.S.C. § 666(i) (1976). See, e.g., *Desarrollos Metropolitanos, Inc. v. OSHRC*, 551 F.2d 874 (1st Cir. 1977); *California Stevedore & Ballast Co. v. OSHRC*, 517 F.2d 986 (9th Cir. 1975). See generally ROTHSTEIN, *supra* note 3, at §§ 123-329, 487.

18. See, e.g., *National Indus. Constructors, Inc. v. OSHRC*, 583 F.2d 1048 (8th Cir. 1978); *Greyhound Lines-West v. Marshall*, 575 F.2d 759 (9th Cir. 1978); *CTM, Inc. v. OSHRC*, 572 F.2d 262 (10th Cir. 1978); *Hartwell Excavating Co. v. Dunlop*, 537 F.2d 1071 (9th Cir. 1976). See generally ROTHSTEIN, *supra* note 3, at § 486.

19. See, e.g., *American Airlines, Inc. v. Secretary of Labor*, 578 F.2d 38 (2d Cir. 1978); *Mar-*

constitutional, evidence, or agency law. Note: Where an issue could be considered either a question of law or coming within another category (such as statutory interpretation) the issue was generally considered other than a question of law.²⁰

After analyzing the decision of the court of appeals in each case, the decision of the Commission was studied. Pursuant to section 12(j) of the Act,²¹ the decision and order of an ALJ is deemed a final order of the Commission unless within thirty days the decision of the ALJ is directed for review by a member of the Commission.²² Therefore, Commission final orders may be either unreviewed ALJs' decisions or decisions of the three member Commission. For cases that were not directed for review, the next step was to determine the action taken by the Commission. For both types of Commission final orders (reviewed and unreviewed ALJs' decisions), the last step was to review the decision of the ALJ.

In essence, the study consisted of looking backward from the court of appeals decision in each case and seeing what administrative action was taken on the issues ultimately decided on judicial review. For unreviewed ALJs' decisions, this was a two-step process. For cases in which there was a decision of the Commission, this was a three-step process.

WHAT TYPE OF CASE REACHES THE COURT OF APPEALS?

While the study reveals much interesting and hopefully useful information, it must be viewed in the proper context. The study focuses on the action taken by the various courts of appeals. Consequently, the percentages of the various parties, ALJs, Commissioners, issues, and other information is based on the judicial decisions. There is nothing to suggest that the courts have reached the "correct" result in every case or a given percentage of cases.²³ As a result, the value of many of the statistics is primarily comparative.

Another significant "limitation" of the study is that although all judicial decisions have been analyzed, the sample is not representative of the Commission's caseload and even less representative of all cita-

shall v. C.F.&I. Steel Corp., 576 F.2d 809 (10th Cir. 1978); Dunlop v. Haybuster Mfg. Co., 524 F.2d 222 (8th Cir. 1975). See generally ROTHSTEIN, *supra* note 3, at § 490.

20. See note 7 *supra*.

21. 29 U.S.C. § 661(i) (1976).

22. See, e.g., Keystone Roofing Co. v. OSHRC, 539 F.2d 960 (3d Cir. 1976). See generally ROTHSTEIN, *supra* note 3, at §§ 461-63.

23. This view would certainly be supported by the judges who have dissented in various cases, the Commissioners and ALJs who have been reversed, and the parties who have lost, as well as legal commentators.

tions issued by the Secretary, as indicated by the following figures for fiscal 1978:

TABLE 1
Degree of Violation of OSHA Cases
Decided by the Courts of Appeals—1973-1978

	N = 132 ²⁴	Percent
Nonserious	53	40.2
Serious	78	59.1
Repeated	9	6.8
Willful	8	6.1
Failure to Abate	7	5.3
TOTALS	132	100.0

These figures contrast sharply with the percentage of violations in each category that were cited by the Secretary. The most detailed breakdown available is for fiscal 1978.

TABLE 2
Alleged Violations Cited by Category—Fiscal Year 1978²⁵

	N = 134,484	Percent
Nonserious	96,356	71.6
Serious	33,155	24.7
Repeated	4,224	3.1
Willful	749	0.6
TOTALS	134,484	100.0

It must be remembered that cases decided on judicial review between 1973 and 1978 resulted from citations that probably were issued between 1971 and 1976. Thus, an even greater contrast is seen by considering the figures for fiscal 1973.

TABLE 3
Alleged Violations Cited by Category—Fiscal Year 1973²⁶

	N = 152,996	Percent
Nonserious	150,947	98.7
Serious, Repeated and Willful ²⁷	2,049	1.3
TOTALS	152,996	100.0

The Commission does not maintain any figures for the degree of violation of adjudicated cases. Nevertheless, it may be theorized that

24. Of the 149 cases analyzed, only 132 concerned the degree of violation. See, e.g., Marshall v. Haugan, 586 F.2d 1263 (8th Cir. 1978) (validity of notice of contest); UAW v. OSHRC, 557 F.2d 607 (7th Cir. 1977) (abatement date).

25. See OSHA COMPLIANCE ACTIVITY REPORT FOR FY 1978 (Oct. 28, 1978).

26. See OSHA COMPLIANCE ACTIVITY REPORT FOR FY 1973 (May 7, 1974).

27. These figures were not further broken down.

the Commission's percentages would fall between those of violations cited and violations on judicial review.

Between fiscal 1973 and fiscal 1978, the percentage of citations contested increased yearly from two percent in fiscal 1973 to ten percent in fiscal 1978.²⁸ The percentage of Commission decisions for which judicial review was sought through 1978 was 1.8 percent.²⁹ Therefore, it is likely that the adjudicatory process operates to screen out the more trivial cases, which results in an uncharacteristically high proportion of cases involving serious, repeated, willful, and failure to abate charges.

Further evidence of the fact that the more "substantial" cases reach the appellate level can be seen in the penalties. The Commission assessed total penalties of \$143,244 in the 132 cases decided by the courts of appeals. The mean was \$1,085.18. The range of penalties is indicated in *Table 4*.

TABLE 4

Range of Penalties Assessed by the
Commission in Cases Decided by
the Courts of Appeals—1973-1978

	N = 132	Percent
\$0	10	7.6
\$1-\$99	18	13.6
\$100-\$499	26	19.7
\$500-\$999	51	38.6
\$1,000-\$4,999	20	15.2
\$5,000-\$9,999	3	2.3
\$10,000+	4	3.0
TOTALS	132	100.0

These figures are much higher than the average penalty proposed by the Secretary for each violation cited. This is especially true if the fiscal 1977 and fiscal 1978 figures are not included, because penalties assessed in those years probably did not become final judicial decisions by the end of 1978.

28. OSHA COMPLIANCE ACTIVITY REPORT FOR FY 1978 (Oct. 28, 1978); OSHA COMPLIANCE ACTIVITY REPORT FOR FY 1977 (Oct. 27, 1977); OSHA COMPLIANCE ACTIVITY REPORT FOR FY 1976 (July 23, 1976); OSHA COMPLIANCE ACTIVITY REPORT FOR FY 1975 (July 22, 1975); OSHA COMPLIANCE ACTIVITY REPORT FOR FY 1974 (Apr. 30, 1976); OSHA COMPLIANCE ACTIVITY REPORT FOR FY 1973 (May 7, 1974).

29. Between 1972 and 1978, excluding petitions for modification of abatement [hereinafter referred to as PMAs], there were 19,816 decisions of the Commission. Through 1978, petitions for judicial review were filed in 361 cases.

TABLE 5

Amount of Penalty Proposed by Secretary
Per Violation—Fiscal Year 1973-Fiscal Year 1978³⁰

FY	Violations	Penalties	Average Penalty
1973	152,996	\$ 4,942,972	\$ 32.30
1974	292,185	6,825,328	23.36
1975	318,792	8,245,496	25.86
1976	380,356	12,449,706	32.73
1977	181,942	11,601,062	63.76
1978	134,484	19,839,467	147.52
TOTALS	1,460,755	\$63,904,031	\$ 43.75

Although there may be more than one violation at issue in a case on judicial review, this does not begin to account for the wide disparity in penalties.³¹

Another factor distinguishing cases brought on judicial review may be the cost of abatement. Despite the lack of data, it may be postulated that cases that reached the appellate level had more costly abatement requirements. For example, in one case³² the employer was cited for a nonserious violation for failure to comply with the noise standard³³ and a \$75 penalty was assessed. The estimated cost of abatement was \$30,000.

As indicated in *Table 6*, most of the petitions for judicial review have been filed by employers.

TABLE 6

Party Filing for Judicial Review
in Cases Decided with Opinion—1973-1978³⁴

Party	N = 149	Percent
Employer	109	73.1
Secretary	38	25.5
Union	1	0.7
Employee	1	0.7
TOTALS	149	100.0

30. See OSHA COMPLIANCE ACTIVITY REPORT FOR FY 1978 (Oct. 28, 1978); OSHA COMPLIANCE ACTIVITY REPORT FOR FY 1977 (Oct. 27, 1977); OSHA COMPLIANCE ACTIVITY REPORT FOR FY 1976 (JULY 23, 1976); OSHA COMPLIANCE ACTIVITY REPORT FOR FY 1975 (JULY 22, 1975); OSHA COMPLIANCE ACTIVITY REPORT FOR FY 1974 (APR. 30, 1976); OSHA COMPLIANCE ACTIVITY REPORT FOR FY 1973 (May 7, 1974).

31. Similarly, the increase cannot be attributed to the Commission assessing higher penalties than originally proposed by the Secretary. In fact, the opposite is true. According to Commission figures, as of August, 1976, the citation was vacated in twenty-seven percent of the cases, the penalty was reduced to \$0 in nine percent of the cases, the penalty was reduced in forty-two percent of the cases, the Secretary's proposal was affirmed in twenty percent of the cases, and the penalties were increased in only two percent of the cases.

32. *Turner Co. v. Secretary of Labor*, 561 F.2d 82 (7th Cir. 1977).

33. 29 C.F.R. § 1910.95(b)(1) (1976).

34. This excludes withdrawn, dismissed, or settled cases, and summary affirmances.

Because employers were more likely to seek judicial review, the Commission was more likely to have affirmed the citations in these cases. Consequently, with the deference accorded administrative findings, the citations have tended to be affirmed on appeal. *Table 7* supports these assumptions.

TABLE 7

Success Rate of Parties Seeking Judicial Review—1973-1978

N = 137 (includes 12 consolidated cases)

A. <u>Employer Appealed</u>	N = 98	Percent
Won on Appeal	27	27.6
Lost on Appeal	68	69.4
Won in Part/Lost in Part	3	3.0
TOTALS	98	100.0
B. <u>Secretary Appealed</u>	N = 37	Percent
Won on Appeal	20	54.1
Lost on Appeal	14	37.8
Won in Part/Lost in Part	3	8.1
TOTALS	37	100.0
C. <u>Union Appealed</u>	N = 1	Percent
Won on Appeal	0	0.0
Lost on Appeal	1	100.0
Won in Part/Lost in Part	0	0.0
TOTALS	1	100.0
D. <u>Employee Appealed</u>	N = 1	Percent
Won on Appeal	1	100.0
Lost on Appeal	0	0.0
Won in Part/Lost in Part	0	0.0
TOTALS	1	100.0

The foregoing statistics suggest that cases decided by the courts of appeals have tended to involve: (1) a high percentage of serious, repeated, willful, and failure to abate charges; (2) high penalties; (3) high abatement costs; (4) an appeal by an employer that had lost at the Commission; and (5) a higher probability of the employer losing upon judicial review.

ANALYZING THE DECISIONS OF THE ADMINISTRATIVE LAW JUDGES

In a controversial interview in 1974, then Chairman Moran argued that the Commission should be abolished.³⁵ In his view, the review procedure was an "unnecessary" and "superfluous" step between deci-

35. Newark Star-Ledger, Nov. 14, 1974.

sions of the ALJs and judicial review. Referring to the ALJs, Moran stated: "The judges are good, and we aren't any better than they are."³⁶

While it is venturesome to generalize about the Commission's fifty ALJs, it is possible, at least to some extent, to evaluate the performance of the ALJs in cases ultimately decided by the courts of appeals.

TABLE 8
Percentage of Cases in Which
Violations Affirmed and Vacated

A. <u>ALJs</u>	<u>N = 137</u>	<u>Percent</u>
Affirmed	88	64.2
Vacated	53	38.7
TOTALS	141³⁷	102.9³⁸
B. <u>Commission</u>	<u>N = 110³⁹</u>	<u>Percent</u>
Affirmed	72	65.5
Vacated	28	25.5
Affirmed in Part/ Vacated in Part	3	2.6
Affirmed by an Equally Divided Commission (1 to 1)	6	5.5
Vacated by an Equally Divided Commission (1 to 1)	1	0.9
TOTALS	110	100.0
C. <u>Courts of Appeals</u>	<u>N = 135⁴⁰</u>	<u>Percent</u>
Affirmed	91	67.4
Vacated	39	28.9
Affirmed in Part/ Vacated in Part	5	3.7
TOTALS	135	100.0

Table 8 indicates that the ALJs have been less inclined to affirm violations than either the Commission or courts of appeals. ALJs affirmed violations in 64.2 percent of the cases. For the Commission,

36. *Id.*

37. Some cases dealt with more than one issue and the ALJ affirmed some items and vacated others.

38. *Id.*

39. This does not include unreviewed ALJs' decisions.

40. This includes cases consolidated on judicial review.

depending on the method of computation, the figures ranged between 69.6 percent and 72.3 percent.⁴¹ For the courts of appeals, violations are affirmed in 69.3 percent of the cases.⁴²

TABLE 9

The Affirmance Rate of Decisions of ALJs
Ultimately Decided by the Courts of Appeals

A. Where ALJ's Decision <i>Not</i> Reviewed by Commission		
	N = 26	Percent
ALJ Affirmed	20	77.0
ALJ Reversed	5	19.2
ALJ Affirmed in Part/ Reversed in Part	1	3.8
TOTALS	26	100.0
B. Where ALJ's Decision Reviewed by Commission		
	N = 108	Percent
ALJ Affirmed	58	53.7
ALJ Reversed	43	39.8
ALJ Affirmed in Part/ Reversed in Part	7	6.5
TOTALS	108	100.0
C. Total of Reviewed and Unreviewed ALJs' Decisions		
	N = 134 ⁴³	Percent
ALJ Affirmed	78	58.2
ALJ Reversed	48	35.8
ALJ Affirmed in Part/ Reversed in Part	8	6.0
TOTALS	134	100.0

Table 9 indicates that 79.1 percent of judicial decisions with opinions were of reviewed ALJs' decisions and only 20.9 percent were of

41. One method of computation would be to add the percentage of cases affirmed by the full Commission (65.5), one-half the percentage of the cases affirmed in part and vacated in part (1.3), and one-half the percentage of cases affirmed by an equally divided Commission (2.8) for a total of 69.6 percent. A second method would be to add the percentage of cases affirmed by the full Commission (65.5), the percentage of cases affirmed by an equally divided Commission (5.5), and one-half the percentage of cases affirmed in part and vacated in part (1.3) for a total of 72.3 percent. A third method of calculation would delete from consideration all one-to-one Commission decisions, because they in effect are unreviewed ALJs' decisions; it would then add the percentage of cases affirmed by the full Commission (69.9) and one-half the percentage of cases affirmed in part and vacated in part (1.5) for a total of 71.4 percent.

42. This figure is computed by adding the percentage of cases in which violations were affirmed (67.4) and one-half the percentage of cases in which violations were both affirmed and vacated (1.9).

43. One case decided by the court of appeals was not decided by an ALJ.

unreviewed ALJs' decisions. This contrasts sharply with the total percentage of cases decided by the Commission. Between 1972 and 1978, there were 19,681 final orders of the Commission, excluding petitions for modification of abatement,⁴⁴ of which 18,576 or 93.7 percent were unreviewed ALJs' decisions and 1,240 or 6.3 percent were reviewed ALJs' decisions.⁴⁵

A noteworthy statistic revealed in *Table 9* is that unreviewed ALJs' decisions were affirmed in full in 77.0 percent of the cases and affirmed in part in 3.8 percent of the cases. At first glance, this figure might appear to be an endorsement of the ALJs. But the overall figures of reviewed and unreviewed ALJs' decisions indicate that ALJs' decisions were affirmed in only 58.2 percent of the cases and affirmed in part in 6.0 percent of the cases. Thus, the relatively high rate of affirmance for unreviewed ALJs' decisions should be considered as validating the Commission's judgment in not directing review in those cases.

Perhaps the most interesting statistics of the relative success of the ALJs and the Commission are revealed by analyzing what happened in the courts of appeals in cases where the ALJ and Commission majority reached different results.

TABLE 10

Result on Judicial Review Where
ALJ and Commission Disagreed

	N = 49 ⁴⁶	Percent
ALJ Upheld	23	46.9
Commission Upheld	26	53.1
TOTALS	49	100.0

Table 10 shows only a slightly better record for the Commission. The more important column is the actual number of cases won, where the advantage is twenty-six to twenty-three. Obviously, if one case had been decided differently on appeal, the result would be a virtual tie between the ALJs and the Commission.

44. There were 3,191 PMAs decided in 1974 and 1975. See generally ROTHSTEIN, *supra* note 3, at §§ 288-89.

45. This discrepancy may be explained in part by the Commission increasingly requiring parties to file exceptions to ALJs' decisions in order to obtain Commission review. See generally ROTHSTEIN, *supra* note 3, at §§ 461-63. Thus, a party that is willing or able to file exceptions to an ALJ's decision is also more likely to petition for judicial review. The failure to exhaust remedies before the Commission will preclude obtaining judicial review. See *Keystone Roofing Co. v. OSHRC*, 539 F.2d 960 (3d Cir. 1976). It may also be explained by the theory that cases with issues of sufficient importance to be reviewed by the Commission are also likely to be appealed and to result in a written opinion by the court of appeals.

46. This figure does not include cases that were affirmed in part and vacated in part by the courts of appeals.

It is possible to break down these figures into smaller, more meaningful categories, as shown in the following tables.

TABLE 11

Result on Judicial Review Where ALJ and Commission Disagreed—By Classification of Cases

Class		Results	
		N = 49	Percent
ALJ Upheld	I. ALJ Affirmed/Commission Vacated/Court Affirmed	12	24.5
	II. ALJ Vacated/Commission Affirmed/Court Vacated	11	22.4
Subtotal		23	46.9
Commission Upheld	III. ALJ Affirmed/Commission Vacated/Court Vacated	6	12.3
	IV. ALJ Vacated/Commission Affirmed/Court Affirmed	20	40.8
Subtotal		26	53.1
GRAND TOTAL		49	100.0

The most obvious point made in *Table 11* is the fact that the largest category of cases is classification IV, where the ALJ vacated, the Commission affirmed, and the court affirmed. A closer examination, however, reveals that the figures follow a clear pattern. For cases in which the ALJ affirmed and the Commission vacated (I and III), the courts affirmed the violation by a two-to-one ratio (12 to 6), thereby upholding the ALJ's decision. A similar outcome was reached for cases in which the ALJ vacated and the Commission affirmed (II and IV). In these categories the courts again affirmed the violation by nearly the identical two-to-one ratio (20 to 11), thereby upholding the Commission's decision.

In *Table 8*, it was observed that the courts of appeals affirmed a higher percentage of violations than either the ALJs or the Commission, but not by such a substantial percentage as shown in *Table 11*. Why, then, would the courts be so inclined to affirm citations in cases where the ALJ and Commission disagreed? To help answer this question, all of the cases were analyzed by issue.

TABLE 12-A

Issues Involved in Cases Where ALJ and Commission Disagreed and ALJ Upheld on Judicial Review

(Note: Many cases involved more than one issue.)

Issue	Class I (Aff/V/Aff)		Class II (V/Aff/V)	
	N = 12	Percent	N = 11	Percent
Statutory Interpretation Standards	7	58.3	1	9.1
Promulgation	0	0.0	0	0.0
Interpretation of Standards	3	25.0	4	36.4
Procedural Error	4	33.3	3	27.3
Prima Facie Elements	2	16.7	4	36.4
Defenses	1	8.3	0	0.0
Penalty Assessment	0	0.0	0	0.0
Burden of Proof	0	0.0	2	18.2
Question of Law	4	33.3	3	27.3

The most revealing statistic for Class I cases is that Statutory Interpretation was an issue in seven of twelve cases. Thus, the refusal of the ALJs to vacate a citation on the basis of a statutory interpretation was upheld by the courts.

In Class II, it is important that the courts upheld the ALJs' vacating of the citation where the issue was Interpretation of Standards. This supports the view of the courts that in some instances the Commission has been too prone to "strain the plain and natural meaning"

TABLE 12-B

Issues Involved in Cases Where ALJ and Commission Disagreed and Commission Upheld on Judicial Review

(Note: Many cases involved more than one issue.)

Issue	Class I (Aff/V/V)		Class II (V/Aff/Aff)	
	N = 6	Percent	N = 20	Percent
Statutory Interpretation Standards	0	0.0	7	35.0
Promulgation	2	33.3	2	10.0
Interpretation of Standards	3	50.0	6	30.0
Procedural Error	0	0.0	6	30.0
Prima Facie Elements	3	50.0	4	20.0
Defenses	2	33.3	2	10.0
Penalty Assessment	0	0.0	1	5.0
Burden of Proof	0	0.0	6	30.0
Question of Law	1	16.7	4	20.0

of words in a standard to affirm a violation.⁴⁷ The other main area in which the ALJs' vacating of citations was upheld was where the ALJ found that the Secretary failed to prove the Prima Facie Elements of a case.

In Class III, the most frequent issues raised in cases where the Commission's vacating of citations was upheld were Interpretation of Standards and Prima Facie Elements. The small sample (six cases), however, makes any conclusion highly speculative.

For Class IV cases, where the Commission's affirming of citations was upheld, some observations can be made. If all of the cases in which Statutory Interpretation was an issue (*Tables 12-A and 12-B*) are considered, a total of fifteen cases, in fourteen of the cases the citation was affirmed on judicial review. In half of those fourteen cases, the ALJ was upheld (Class I) and in the other half, the Commission was upheld (Class IV). A similar result is found for Procedural Error, in which the citation was affirmed on judicial review in ten of thirteen cases. The ALJ was upheld four times (Class I) and the Commission was upheld six times (Class IV). The other main issues on which the Commission's reversal of the ALJs' vacating of citations was upheld involved Interpretation of Standards and Burden of Proof.

This analysis leads to the need for a composite table indicating the percentage of cases in which the ALJs and Commission were upheld on each issue.

TABLE 13
Result on Judicial Review Where ALJ and
Commission Disagreed—By Issue

Issue	N = 49*	ALJ Upheld		Commission Upheld	
		Cases	%	Cases	%
Statutory Interpretation	15	8	53.3	7	46.7
Standards Promulgation	4	0	0.0	4	100.0
Interpretation of Standards	16	7	43.8	9	56.2
Procedural Error	13	7	53.8	6	46.2
Prima Facie Elements	13	6	46.2	7	53.8
Defenses	5	1	20.0	4	80.0
Penalty Assessment	1	0	0.0	1	100.0
Burden of Proof	8	2	25.0	6	75.0
Question of Law	12	7	58.3	5	41.7

*Total Number of Cases

47. *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 650 (5th Cir. 1976); *see also Bethlehem Steel v. OSHRC*, 573 F.2d 157 (3d Cir. 1978); *Amoco Oil Co. v. OSHRC*, 549 F.2d 1 (7th Cir. 1976); ROTHSTEIN, *supra* note 3, at § 106.

In only three of the nine issue categories is there any appreciable difference between the success rates of the ALJs and the Commission. First, in all four cases in which Standards Promulgation was an issue, the Commission was upheld. As indicated in *Tables 12-A* and *12-B*, in two cases the violation was affirmed and in two cases the violation was vacated. Second, the Commission was upheld in four of five cases where an issue was Defenses. Again, the violation was affirmed in two cases and vacated in two cases. Finally, where the Burden of Proof was an issue, the Commission was upheld in six of eight cases. Here, however, the violation was affirmed in all six cases.

Based on *Tables 8* through *13*, it is fair to say that the success rate on judicial review of ALJs' decisions has not been appreciably less than that of the Commission. Nevertheless, as both the foregoing and following sections of the study make clear, there is sufficient room for improvement for both decision makers.

ANALYZING THE DECISIONS OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION AND ITS MEMBERS

In the preceding section, the results reached by the ALJs have been compared with the results reached by the Commission. It would be inaccurate, however, to consider the Commission in monolithic terms. The Commissioners have displayed a great degree of divisiveness in decision-making, sometimes reaching the level of acrimony.⁴⁸

The lack of consensus among Commission members is apparent in *Table 14*.

TABLE 14
Incidence of Separate Opinions in Cases Decided by
Three-Member Panels of the Commission

	N = 94	Percent
Unanimous Decision	5	5.3
Concurring Opinion (in whole or part by one or more members)	14	14.9
Dissenting Opinion	50	53.2
Concurring Opinion <i>and</i> Dissenting Opinion	25	26.6
TOTALS	94	100.0

48. See, e.g., *Francisco Tower Serv., Inc.*, 4 OSHC 1459, [1976-77] OSHD ¶20,917 (1976); *Francisco Tower Serv. Inc.*, 3 OSHC 1952, [1975-76] OSHD ¶20,401 (1976).

With nearly eighty percent of Commission decisions in the study containing a dissent, it is obvious that the members seldom reached agreement on cases.⁴⁹ Moreover, some critics might assert that the differences of opinion have not always been limited to the merits of the cases, and reflect a fundamental philosophical divergence approaching dogmatism.

TABLE 15
Relief Granted or Urged by Commission
Members—Including Minority Views⁵⁰

	Burch ⁵¹	Van Namee ⁵²	Moran ⁵³	Cleary ⁵⁴	Barnako ⁵⁵
Total Cases	11	57	104	98	44
Cases Affirmed	8	35	13	88	32
Percent	72.7	61.4	12.5	89.8	72.7
Cases Vacated	3	20	80	3	11
Percent	27.3	35.1	76.9	3.1	25.0
Affirmed in Part/Vacated in Part	0	2	11	7	1
Percent	0.0	3.5	10.6	7.1	2.3

Table 15 illustrates the wide disparity in the percentage of cases affirmed and vacated by each member. For example, Commissioner Moran voted to affirm alleged violations in only 12.5 percent of the cases. On the other hand, Commissioner Cleary voted to vacate alleged violations in only 3.1 percent of the cases. The other members' records more closely approximate that of the Commission majority (65.5 percent complete affirmance) and the courts of appeals (67.4 percent complete affirmance) which are set out in Table 8.

49. By way of comparison, during its 1978 term, the United States Supreme Court (composed of nine members, rather than three, as on the Commission) had dissenting opinions in 63.8 percent of those cases with full opinions. Note, *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 59, 277 (1979).

50. For example, if two members form a majority to affirm a citation and one member dissents, for statistical purposes the dissenting member will be considered to have "vacated" the citation.

51. Alan F. Burch served on the Commission from 1971 to 1973.

52. James F. Van Namee served on the Commission from 1971 to 1975.

53. Robert D. Moran served on the Commission from 1971 to 1977. He was chairman from 1971 to 1975.

54. Timothy F. Cleary began serving on the Commission in 1973 and was reappointed in 1979 to a term that will expire in 1985. He has been chairman since 1977.

55. Frank R. Barnako began serving on the Commission in 1975. He was chairman from 1975 to 1977.

As indicated in *Table 8*, the Commission vacated the citation in twenty-nine cases. The following table further points out that the citations were vacated on three main issues.

TABLE 16
Issues on Which the Commission
Vacated Citations

<u>Issue</u>	<u>N = 29</u>	<u>Percent</u>
Statutory Interpretation	1	3.4
Standards Promulgation	1	3.4
Interpretation of Standards	8	27.7
Procedural Error	9	31.0
Prima Facie Elements	7	24.2
Defenses	0	0.0
Penalty Assessment	0	0.0
Burden of Proof	1	3.4
Question of Law	2	6.9
TOTALS	29	100.0

Tables 12-A and 12-B recognize that the vacating of citations on these grounds, especially Procedural Error, is likely to be reversed on appeal. Indeed, the following table indicates that the Commission was twice as likely to be upheld on appeal if the citation was affirmed.

TABLE 17
Result on Judicial Review—
By Commission's Determination⁵⁶

A. Where the Commission Affirmed the Citation		
	<u>N = 77</u>	<u>Percent</u>
Commission's decision affirmed on appeal	52	67.5
Commission's decision reversed on appeal	24	31.2
Commission's decision affirmed in part and reversed in part	1	1.3
TOTALS	77	100.0
B. Where the Commission Vacated the Citation		
	<u>N = 29</u>	<u>Percent</u>
Commission's decision affirmed on appeal	10	34.5
Commission's decision reversed on appeal	19	65.5
TOTALS	29	100.0

56. Figures do not include cases where the Commission affirmed a citation in part and vacated a citation in part. Figures do include cases where the ALJ was affirmed by an equally divided Commission.

The above figures are in accord with *Table 7's* finding that the Secretary was much more likely to win an appeal than the employer. The reasons for this were generally described in the discussion of *Table 7*.

The following table combines the elements of earlier tables to provide a detailed summary of the results reached on judicial review on the basis of issues decided at the Commission level.

TABLE 18

	Result on Judicial Review by Commission Determination of Controlling Issue ⁵⁷			
	Affirmed by Court		Reversed by Court	
		Percent		Percent
<u>1. Statutory Interpretation</u>				
Where Commission Affirmed Citation (21 of 32 cases—65.6%)	19	90.5	2	9.5
Where Commission Vacated Citation (11 of 32 cases—34.4%)	2	18.2	9	81.8
<u>2. Standards Promulgation</u>				
Where Commission Affirmed Citation (3 of 6 cases—50%)	3	100.0	0	0.0
Where Commission Vacated Citation (3 of 6 cases—50%)	3	100.0	0	0.0
<u>3. Interpretation of Standards</u>				
Where Commission Affirmed Citation (25 of 34 cases—73.5%)	13	52.0	12	48.0

57. Figures do not include cases where the Commission affirmed a citation in part and vacated a citation in part, nor where the court of appeals affirmed a citation in part and vacated a citation in part. Figures do include cases where the ALJ's decision was affirmed by an equally divided Commission. Some cases involved more than one issue.

Where Commission Vacated Citation (9 of 34 cases—26.5%)	4	44.4	5	55.6
4. <u>Procedural Error</u>				
Where Commission Affirmed Citation (18 of 28 cases—64.3%)	13	72.2	5	27.8
Where Commission Vacated Citation (10 of 28 cases—35.7%)	3	30.0	7	70.0
5. <u>Prima Facie Elements</u>				
Where Commission Affirmed Citation (20 of 29 cases—69%)	13	65.0	7	35.0
Where Commission Vacated Citation (9 of 29 cases—31%)	4	44.4	5	55.6
6. <u>Defenses</u>				
Where Commission Affirmed Citation (8 of 11 cases—72.7%)	7	87.5	1	12.5
Where Commission Vacated Citation (3 of 11 cases—27.3%)	2	66.7	1	33.3
7. <u>Penalty Assessment</u>				
Where Commission Affirmed Citation (5 of 5 cases—100%)	4	80.0	1	20.0
Where Commission Vacated Citation (0 of 5 cases—0%)	0	0.0	0	0.0
8. <u>Burden of Proof</u>				
Where Commission Affirmed Citation (19 of 20 cases—95%)	15	78.9	4	21.1
Where Commission Vacated Citation (1 of 20 cases—5.0%)	1	100.0	0	0.0
9. <u>Question of Law</u>				
Where Commission Affirmed Citation (19 of 25 cases—76.0%)	14	73.7	5	26.3
Where Commission Vacated Citation (6 of 25 cases—24.0%)	1	16.7	5	83.3

Table 18 graphically illustrates the issues on which the Commission has been successful and unsuccessful on judicial review. The most successful issues have been Standards Promulgation, in which all three decisions affirming citations and all three decisions vacating citations were upheld; Defenses, in which seven of eight decisions affirming citations and two of three decisions vacating citations were upheld; and Burden of Proof, in which fifteen of nineteen decisions affirming citations and the one decision vacating the citation were upheld.

The least successful issues on judicial review for the Commission have been Statutory Interpretation, in which only two of eleven decisions vacating citations were upheld; Procedural Error, in which only three of ten decisions vacating citations were upheld; and Question of Law, in which only one of six cases vacating citations was upheld.

Where the Commission was successful, it was affirmed regardless of whether the citation was affirmed or vacated. But, where the Commission's view did not prevail on judicial review it was because citations were erroneously vacated.

The Commission's overall success rate is indicated in the following table.

TABLE 19

Success Rate on Judicial Review of
Decisions of Commission Majority

	N = 109	Percent
Commission Affirmed	64	58.7
Commission Reversed	43	39.5
Commission Affirmed in Part/Reversed in Part	2	1.8
TOTALS	109	100.0

One would be tempted to hypothesize that a reason for the Commission's relatively low success rate is the fact that the Commission is often divided on cases, as is illustrated in *Table 14*. But the following table refutes such a hypothesis: the Commission was about as likely to be upheld when there were separate opinions.

TABLE 20
Success Rate on Judicial Review of Commission Majority—By Separate Opinions

A. Where there was a concurring opinion⁵⁸

	N = 41	Percent
Commission Affirmed	25	61.0
Commission Reversed	15	36.6
Commission Affirmed in Part/Reversed in Part	1	2.4
TOTALS	41	100.0

B. Where there was a dissenting opinion⁵⁹

	N = 86	Percent
Commission Affirmed	54	62.8
Commission Reversed	32	37.2
TOTALS	86	100.0

The Commission’s overall success rate of 58.7 percent affirmed in full and 1.8 percent affirmed in part is no better than the overall rate for ALJs’ decisions of 58.2 percent affirmed in full and 6.0 percent affirmed in part, which is illustrated in *Table 9*.

In the following table, the Commission’s success rate in each circuit is identified.

TABLE 21
Success Rate on Judicial Review of Decisions—
By Commission Majority and by Circuit

N = 109

Circuit	Total Cases	Affirmed Majority	Percent	Reversed Majority	Percent	Affirmed in Part/Reversed in Part	Percent
D.C.	4	3	75.0	1	25.0	0	0.0
1st	6	4	66.7	2	33.3	0	0.0
2d	10	2	20.0	7	70.0	1	10.0
3d	12	5	41.7	7	58.3	0	0.0
4th	7	5	71.4	2	28.6	0	0.0
5th	20	11	55.0	8	40.0	1	5.0
6th	3	2	66.7	1	33.3	0	0.0
7th	11	6	54.5	5	45.5	0	0.0
8th	15	12	80.0	3	20.0	0	0.0
9th	11	8	72.7	3	27.3	0	0.0
10th	10	6	60.0	4	40.0	0	0.0

58. This includes cases with more than one concurrence *and* cases in which there was a concurrence and a dissent. This also includes cases decided by only two members.

59. This includes cases in which there was a dissent *and* a concurrence. This includes cases where the ALJ was affirmed by an equally divided Commission.

According to *Table 21*, the Commission has been affirmed most often in the Eighth Circuit and has been reversed most often in the Second and Third Circuits. Given the leeway in section 11(a) of the Act⁶⁰ with regard to venue,⁶¹ this might account for some degree of "forum shopping." Nevertheless, the small number of cases from each circuit upon which the study was based and the unaccountability of panel selection in the courts of appeals make any choice of forum speculative.

Table 15 focused on the relief granted or urged by the various Commission members in each case. The remaining question relating to the Commission is the success rate of each Commission member on judicial review.

TABLE 22
Success Rate on Judicial Review
of Relief Granted or Urged by Each
Commission Member

<u>Member</u>	<u>Total Cases</u>	<u>Affirmed by Court</u>	<u>Percent</u>	<u>Reversed by Court</u>	<u>Percent</u>	<u>Affirmed in Part/ Reversed in Part</u>	<u>Percent</u>
Burch	11	6	54.5	5	45.5	0	0.0
Van Namee	57	30	52.6	25	43.9	2	3.5
Moran	103	30	29.1	65	63.1	8	7.8
Cleary	97	59	60.8	29	29.9	9	9.3
Barnako	44	32	72.7	12	27.3	0	0.0

Commissioners Burch, Van Namee, and Cleary are all close to the Commission's overall rate of 58.7 percent. Commissioner Barnako is well above the rate and Commissioner Moran is extremely low.⁶² Also, the original three members, Burch, Van Namee, and Moran are all below the success rate of the ALJs, 58.2 percent. Interestingly, with the exception of Commissioner Burch, whose sample is so small as to render it meaningless, the success rate of each Commissioner's majority opinions was higher.

60. 29 U.S.C. § 660(a) (1976).

61. See discussion in text accompanying notes 1-6 *supra*.

TABLE 23
 Success Rate on Judicial Review
 of Majority Opinions—By Commission
 Members⁶³

Member	Total Cases	Affirmed by Court	Percent	Reversed by Court	Percent	Affirmed in Part/ Reversed in Part	Percent
Burch	7	3	42.9	4	57.1	0	0.0
Van Namee	25	14	56.0	11	44.0	0	0.0
Moran	24	13	54.2	11	45.8	0	0.0
Cleary	35	22	62.9	11	31.4	2	5.7
Barnako	25	19	76.0	6	24.0	0	0.0

Commissioner Moran’s dramatic increase and the smaller increases of the other members suggest that as a member’s view was moderated by agreement with another member, it was more likely to be upheld on judicial review.

ANALYZING THE DECISIONS OF THE COURTS OF APPEALS

Table 8 demonstrated that the courts of appeals affirmed a higher percentage of citations (67.4 percent) than either the Commission (65.5 percent) or the ALJs (64.2 percent). The affirmance percentage for the courts can be further broken down by circuit.

TABLE 24
 Percentage of Cases in Which Violations
 Affirmed and Vacated on Judicial
 Review—By Circuit
 N=135

Circuit	Total Cases	Affirmed	Percent	Vacated	Percent	Affirmed in Part/ Reversed in Part	Percent
D.C.	4	3	75.0	1	25.0	0	0.0
1st	8	6	75.0	2	25.0	0	0.0
2d	13	10	77.0	3	23.0	0	0.0
3d	14	6	43.0	7	50.0	1	7.0
4th	9	7	78.0	2	22.0	0	0.0
5th	28	19	67.8	8	28.6	1	3.6
6th	4	2	50.0	2	50.0	0	0.0
7th	11	6	54.5	5	45.5	0	0.0
8th	19	13	68.4	4	21.1	2	10.5
9th	14	11	78.6	2	14.3	1	7.1
10th	11	8	72.7	3	27.3	0	0.0

62. Former Chairman Moran’s statement that “[t]he judges are good, and we aren’t any better than they are,” see note 36 *supra* and accompanying text, takes on a different meaning in light of Table 22.

63. For statistical purposes, opinions designated “By the Commission” are considered to be the majority opinions of each participating member.

The highest rate of affirmance was in the Ninth Circuit and the lowest rate of affirmance was in the Third Circuit. Certainly, these figures should be considered with those in *Table 21* in evaluating which circuit is likely to be more receptive to a petition for judicial review.

While the study has established the overall reluctance of the courts to vacate citations, it is important to analyze the basis of decision for the cases in which citations *were* vacated.

TABLE 25
Controlling Issues in Cases
Where Courts of Appeals Vacated Citations⁶⁴

Issue	N = 44 Cases	Percent
Statutory Interpretation	3	6.8
Standards Promulgation	2	4.5
Interpretation of Standards	11	25.0
Procedural Error	8	18.2
Prima Facie Elements	8	18.2
Defenses	3	6.8
Penalty Assessment	1	2.3
Burden of Proof	5	11.4
Questions of Law	3	6.8
TOTALS	44	100.0

In contrasting *Table 25* with *Table 16* (issues on which Commission vacated), several distinctions emerge. As already pointed out, the courts have been less likely to vacate a citation based on a Procedural Error (31.0 percent to 18.2 percent). Also, the courts have been less likely to vacate a citation on the ground that the Secretary failed to prove the Prima Facie Elements (24.2 percent to 18.2 percent). On the other hand, the courts have been more likely to vacate a citation because of a failure of the Burden of Proof (3.4 percent to 11.4 percent) and because the employer had sustained a Defense (0.0 percent to 6.8 percent).

SUMMARY OF FINDINGS

The value of any statistical study is the accurate and relevant conclusions which can be drawn from the data. With a final caveat based on the unique sample of cases involved in the study, the following findings may be presented.

64. Figures include cases where the citation was affirmed in part and vacated in part.

1. *Directions for review.* The Commission appears to have done an excellent job in separating those cases with troublesome facts and issues from the more mundane cases. This is evidenced by the fact that 77.0 percent of unreviewed ALJs' decisions were affirmed on judicial review.⁶⁵ It is not clear to what extent this result was caused by the Commission's amending of its Rules of Procedure in January, 1977, which made Commission review unlikely⁶⁶ unless specific exceptions were filed by the aggrieved party.⁶⁷

2. *ALJs vs. Commission in reviewed cases.* Even if the Commission properly decided which cases to review, it was not able to reach the "right" result after review was directed. For reviewed cases, the ALJ's original position was upheld by the courts in 53.7 percent of the cases.⁶⁸ After Commission review, the percentage of success was only up slightly—to 58.7 percent.⁶⁹ Where the Commission and ALJ disagreed, the ALJ's position prevailed on judicial review in 46.9 percent of the cases; the Commission's position prevailed in 53.1 percent of the cases.⁷⁰ Despite a variety of other factors, where the ALJ and Commission disagreed, the courts of appeals usually agreed with whomever voted to affirm the violation.⁷¹

3. *Rate of affirmance of violations on judicial review.* The courts of appeals have affirmed a slightly higher percentage of violations (67.4 percent) than the Commission (65.5 percent) and ALJs (64.2 percent).⁷² Moreover, the Commission was twice as likely to have been upheld on judicial review if it affirmed the citation.⁷³

4. *The Commission's decisionmaking, by issue.* The likelihood of the Commission's position being upheld on judicial review depended to a great extent on the issues involved in the case. The Commission was successful when the issues were Standards Promulgation, Defenses, and

65. See Table 9.

66. In 1978, the Commission disposed of 3,859 cases, comprised of the following: settled—2,706; decided on motions—537; decided after a hearing—616. Of the 277 petitions for discretionary review [hereinafter referred to as PDRs] filed, review was directed in 107 cases and 6 cases were pending. Thus, review was ordered in 30.5 percent of the cases where a PDR was filed. Thirty-eight cases were directed for review when a PDR was not filed. In 1978, an unspecified and unusually high number of cases involving settlements and motions were directed for review. Even assuming that all directions for review not based on PDRs were of cases in which there was a hearing, the rate of direction for review was 11.2 percent. If only directions for review of cases decided on the merits were included, the rate would be much lower.

67. See generally ROTHSTEIN, *supra* note 3, at §§ 461-64.

68. See Table 9.

69. See Table 19.

70. See Table 10.

71. See Table 11.

72. See Table 8.

73. See Table 17.

the Burden of Proof.⁷⁴ Contrarily, there is considerable evidence that the Commission vacated too many citations because of alleged Procedural Error.⁷⁵ In addition, where the Commission vacated a citation based on Statutory Interpretation or a Question of Law, reversal was likely.⁷⁶ The Commission was also reversed by the courts where it adopted an overly broad Interpretation of a Standard.⁷⁷ In these cases, the Commission had affirmed the violation and the courts of appeals vacated the charge.

5. *The role of the Commissioners.* Decisions of the Commission were seldom unanimous (5.3 percent) and nearly 80 percent of the cases studied contained a dissenting opinion.⁷⁸ This divergence of opinion may, arguably, result from the alleged inflexibility and predisposition of Commission members. Commissioner Moran voted to affirm violations in only 12.5 percent of the cases. Commissioner Cleary voted to vacate violations in only 3.1 percent of the cases.⁷⁹

Despite the presumed divisiveness of separate opinions, the Commission majority was about as likely to be affirmed on judicial review if there was a concurring or dissenting opinion.⁸⁰ In any event, the success rate for an individual member was highest when that member authored the majority opinion.⁸¹ This may reflect judicial deference to the Commission majority, but it also suggests that a tempered or moderate view was more likely to be upheld. Commissioner Barnako's overall success rate (72.7 percent) was the best. Commissioner Moran's overall success rate (29.1 percent) was the worst.⁸²

6. *The Courts of Appeals.* The study revealed distinct differences in the affirmance rates for the various circuits. The Ninth Circuit has affirmed the highest percentage of violations (78.6 percent) and the Third Circuit has affirmed the lowest percentage of violations (43 percent).⁸³ Decisions of the Commission majority have been upheld most often in the Eighth Circuit (80 percent) and least often in the Second (20 percent) and Third (41.7 percent) Circuits.⁸⁴

74. See Table 18.

75. See Table 16 and Table 18.

76. See Table 18.

77. See Table 12-A.

78. See Table 14.

79. See Table 15.

80. See Table 20.

81. See Table 23.

82. See Table 22.

83. See Table 24.

84. See Table 21.

CONCLUSION

Judicial review in the United States courts of appeals plays an important role in OSHA's adjudicatory system by preserving due process for affected persons and by providing guidance to the Commission. By studying the decisions of the courts of appeals, it is possible to draw some significant conclusions about the performance of the ALJs and the Commission. The performance of the courts of appeals themselves, however, remains a topic for another day.

CHICAGO-KENT LAW REVIEW

ILLINOIS INSTITUTE OF TECHNOLOGY CHICAGO-KENT COLLEGE OF LAW

PUBLISHED BY THE STUDENTS OF THE
ILLINOIS INSTITUTE OF TECHNOLOGY/CHICAGO-KENT COLLEGE OF LAW
77 SOUTH WACKER DRIVE, CHICAGO, ILLINOIS 60606

BOARD OF EDITORS

DELILAH BRUMMET
Editor-in-Chief

FAYE M. COULTAS
Lead Articles Editor

ANNE WEBBER EPSTEIN
Lead Articles Editor

YURI B. ZELINSKY
Lead Articles Editor

RAETTA HANKEL MIRGAIN
Notes and Comments Editor

RONALD B. SCHWARTZ
Notes and Comments Editor

JOHN J. MURPHY
Notes and Comments Editor

ANNE E. WHITNEY
Notes and Comments Editor

FRANCES J. SKINNER
Managing Editor

STAFF

JAMES L. BEARD

MICHAEL J. COHEN

HOWARD A. DAVIS

MICHAEL DOLESH

JOHN H. DOLL

GAIL M. EPSTEIN

KATHY KOSNOFF ERLINDER

PATTY D. FERRAILOLO

RANDY GUSSIS

IRWIN I. GZESH

ADRIANNE S. HARVITT

CYNTHIA MCKEE HINMAN

STEPHEN D. HURST

JOEL S. HYMEN

SCOTT B. JACOBSON

SHARON NELSON KAHN

FREDERICK M. KAPLAN

RICHARD KARR

ROBIN N. KITE

ALICE KEHL KUSH

LINDA LACY

VINCENT A. LAVIERI

MARK LISS

SUSAN HILLARY LOEB

TERRY A. MAZURA

MARY K. MCCARTHY

PETER C. MORSE

MICHAEL NASH

KATHLEEN R. SCHWAPPACH

ESTHER JOY SCHWARTZ

MARSHALL SEEDER

MARY ROSE STRUBBE

DARRELL WIDEN

PAMELA H. WOLDOW

PROFESSOR JEFFREY SHERMAN, *Faculty Advisor*

DEAN LEWIS M. COLLENS
MEMBER, NATIONAL CONFERENCE OF LAW REVIEWS

The Illinois Institute of Technology/Chicago-Kent College of Law
assumes no responsibility for any statement appearing in the
columns of this publication.