

Mike Taylor:

Hello everyone and welcome to the next episode of the Work Place Safety Review podcast. I'm your host, Mike Taylor, chair of the OSHA practice group at Greenberg Traurig, based out of our Washington, DC and Northern Virginia offices. I've been practicing OSHA law for roughly about 20 years now. If you want to find out more about me or our OSHA practice group, you can go to www.gtlaw.com. Joining me today is my colleague, Adam Roseman, who's a member of our national OSHA group. Adam's based out of our Philadelphia office.

Mike Taylor:

Today, we have the privilege of having Amanda Wood Laihow as our special guest. Amanda is a commissioner at the Federal U.S. Occupational Safety and Health Review Commission, and was appointed by President Donald Trump and confirmed by the Senate on January 9th, 2020. Prior to her appointment as commissioner, Amanda recently served as chief counsel to former chairman, James Sullivan, Jr., where she was the primary legal advisor to the chairman, giving critical, independent, and innovative legal advice on all kinds of pending matters.

Mike Taylor:

Prior to working at the review commission, Amanda was the director of labor employment policy for the National Association of Manufacturers. I believe Amanda, that's where you and I first met several years ago. I think I gave a presentation there and I think the topic was something to do with unions having the right to do a walk-around when the employer wasn't a unionized workforce. I could be mistaken. I am getting old.

Amanda Wood Laihow:

I think you're right. I think you're right.

Mike Taylor:

Welcome, Amanda. We're glad you're here.

Amanda Wood Laihow:

Thank you so much, Adam and Mike. Yes, Mike, I think ... Gosh, that was probably back in the, I don't know, 2011/2012 timeframe, so some of these, I guess policy issues will probably be back in town sometime soon.

Adam Roseman:

Yeah.

Mike Taylor:

Yeah. We totally agree. Before we get into the interview session, I'd like to give the audience a little bit of background about who OSHRC is. OSHRC is a federal independent agency that's not housed under the department of labor where OSHA resides. The review commission is an independent agency that tries cases when employers want to challenge or contest citations that OSHA issues to them in the regulatory enforcement process.

Mike Taylor:

The review commission has ... I don't know the current number of ALJs that they have, but it's anywhere from 12 to 14 administrative law judges that hear only these kind of cases. They are housed in Atlanta, Washington, DC, and Denver. If you do have the privilege of going to trial before one of these administrative law judges, you have the right to file what's called a petition for discretionary review, which would go before Amanda and her colleagues to decide, do they want to grant review from an appellate perspective and decide the case that way.

Mike Taylor:

Then if you don't like the decision you get from Amanda and her two colleagues, you can appeal it to the appropriate U.S. Court of Appeals. That gives the audience a little bit of background about what OSHRC is at the federal level. Amanda, one of the questions that I have is as a former legal counsel to former chairman, James Sullivan, how did that experience shape you or help you in the decision-making process as a commissioner now?

Amanda Wood Laihow:

Great question. I guess I will just back that up to my prior experience at National Association of Manufacturers, where I was doing mostly policy work on behalf of manufacturers, our member companies. Through that policy work, we were engaged in quite a few mitigation efforts from a couple of administrations ago. I became really interested in changing my mind from a policy-driven person from prior years on Capitol Hill and then at NAM, to then focusing on the real meaty legal issues at the time.

Amanda Wood Laihow:

I obviously had the opportunity to work with Commissioner Sullivan who had been practicing law for a good part of his career. That really helped me get very focused and honed in on specific standards that come up from these citations, as you mentioned, what OSHA was citing, the words of the standard, how the standard applies to the set of facts and a very pure legal analysis on that and putting the policy issues aside.

Amanda Wood Laihow:

Not listening to the noise of Washington, DC and what was good for an employer or not for an employer, but really just looking at the words of the standards themselves and how they're applied to the facts that occurred at the time. I'll say that the ALJ will have their decision. Then we get that entire record, take a look at, whether it's photos, depositions, whatever is in the record comes to us at the full commission.

Amanda Wood Laihow:

We are able to see everything that the ALJ has seen on paper, as well as reading the entire trial transcript. We get the whole thing. It's just not a brief that, Mike, you and Adam may file. It's the whole record.

Adam Roseman:

Yeah. That's interesting, but one thing that I was thinking about when looking over your bio is, do you think ... I mean, I know you were chief legal counsel for a commissioner, but do you have any regrets maybe not going the ALJ route first to see that in action rather than to what you alluded to, getting everything in paper? Do you think that provides a disadvantage? Advantage? I'm just curious where you land on that. I know hindsight's always 20/20, of course.

Amanda Wood Laihow:

Yeah. I think there are certain cases where looking at the record now and you have your mind working through what's going on and anticipating what's going to happen in the transcript, and then you think, "Why didn't somebody ask this question or why didn't the ALJ ask this question?" I don't have an answer for that. Commissioner Sullivan obviously couldn't anticipate that. I think there's a good point to your question, Adam, in terms of would it be helpful to go the ALJ route first?

Amanda Wood Laihow:

I think there are some instances where it would be, but I also think it's good for us to have, I guess, a fresh set of eyes and ears, if there's any kind of audio that we have to listen to, to give a different perspective if we don't agree with ALJ.

Adam Roseman:

Sure. Makes sense.

Amanda Wood Laihow:

Yeah.

Mike Taylor:

Speaking about petitions for discretionary review, so when I was at the review commission many, many years ago, I was under Scott Railton and this has stuck with me ever since. I'll never forget the conversation that I had with him, which his advice to me was, unless a party raises a novel legal issue, his opinion was he would never grant a petition for discretionary review. In other words, if the basis for the petition, if you will, was that the judge erred in fact finding or credibility terminations, he took the position that he just would always defer to the ALJ because they're the ones that witnessed everything.

Mike Taylor:

During your tenure, as a commissioner, as well as legal counsel, have you seen quite a few petitions for discretionary review and are they mostly attempt to be novel in nature in terms of what the law is or should be? Or do you get a combination of that as well as the judge failed to consider this particular fact?

Amanda Wood Laihow:

Just backing up a little bit, Mike, I think what's important is that it only takes one of the three of us to grant that. We don't need to have two of the three. That's interesting and unique because what one of us might think is fairly novel, the other two may not and vice versa. I do have some statistics that I pulled, and in 2019, and this is particularly interesting, former chair, MacDougall, left her seat in the middle of the fiscal year and now chair, Attwood, her previous term expired.

Amanda Wood Laihow:

We don't have the ability to keep Chair Attwood on while she's going through confirmation so she had to actually vacate the agency. You were down to just Chair Sullivan. For the majority of that year, for example, we had 30 petitions come in, in 2019 and eight were directed.

Mike Taylor:

Wow.

Adam Roseman:

Wow.

Amanda Wood Laihow:

It goes to your point of that novel issue, and I think you brought up a good point. Credibility determinations as commissioners, we don't really try to delve into that unless we see a really grave error. If an ALJ decides that they're not going to give weight to a witness because of certain testimony or demeanor, then we tend to give deference to that ALJ. Just because they're there in person, looking at documents, but they're also observing how the witness' demeanor is. I think that's important going along what you said, Mike.

Amanda Wood Laihow:

In 2020, so then when Chair Attwood and I were confirmed early on in 2020, now you have a different statistic. We had 34 PBRs and 22 of those were directed. I think it might shift depending on if there's one or three of us currently sitting. What's also important to know is at the time when Chair Sullivan was by himself, the only thing he could do was look at PBRs and direct them or not direct them because we have to have at least two of the three of us sitting in order to look at a case and decide it.

Adam Roseman:

Right. Right.

Mike Taylor:

Right. Now that you have a full court, if you will ... Because people ask me all the time ... Well, first they always say, "Oh yeah, you used to work for OSHA." I'm like, "No."

Amanda Wood Laihow:

No.

Mike Taylor:

I used to work for the OSH Review Commission. I refer to you guys, meaning you, the chairwoman and Commissioner Sullivan as the Supreme Court of OSHA law. Then when I say that, it makes sense for them in terms of, do we litigate this case? If we lose before the ALJ, what are our options and how we go about doing that? That's filing the petition for discretionary review. A lot of folks may not know once a case is granted you have a general counsel's office. What happens next? If you could educate the audience on that.

Amanda Wood Laihow:

Sure. We grant a review and then we usually send the parties what we're looking at for the issues. It could be anything that was in say the post-hearing brief that either party filed before the ALJ, or it could be something that the judge decided, well, obviously an issue to look at, but maybe looked at it in a different way than say other commission precedent has looked at that issue before. We would send the parties what we want to focus on. It could be one, or it could be all the issues, depending.

Amanda Wood Laihow:

It's usually after that briefs are exchanged between the secretary's office and the employer's legal counsel. Depending on what the commission makeup is at the time, there could be cases sitting for a long time. With Chair Sullivan, he was by himself for nine months and we were getting PBRs in, but he couldn't decide cases by himself, so you could be looking at a long period of time, which is unfortunate.

Amanda Wood Laihow:

We've had some cases come through where we have decided them and now the company is disbanded or no longer in existence or companies are, I guess, in legal battles on multi-fronts and so the OSHA one has been so long that they have to dust off their brief, if you will. Then when the general counsel's office is involved, since most of them have been around for quite some time, they're the OSHA legal experts for the commission.

Amanda Wood Laihow:

They will issue us a memo where they think either the judge was correct or the judge was wrong, where the case law is, where the federal circuit courts are, because maybe it's an issue that the commission has decided many, many years ago, but the circuit has changed its position and so we should be aware. They do a lot of research for us and prepare a memo telling us where the issues would shake out in the federal courts, as well as at the commission.

Amanda Wood Laihow:

From there, we then schedule a meeting with three commissioners to decide the case where we exchange ideas and thoughts about where we think the case should come out. After that we take a vote and then we basically will have the general counsel's office along with our own personal counsels, because each of our commissioners has a personal counsel, as you noted Mike. They will work together to write dissents and/or majority opinions. That back and forth of drafting can take a little bit of time.

Amanda Wood Laihow:

What I will say is, it's public knowledge, but we've had a strategic plan in place to get cases under the two-year mark and we're really chipping away at that. If you go to our website, you can see we had 22 dispositions in 2020, and we've already had two cases out this year, one as recently as February 1st. We're really trying to get that docket down and really trying to be diligent because we don't want the parties to have to wait three/four years before we decide something.

Amanda Wood Laihow:

I will say that the general counsel's office is very integral because as commissioners come and go and counsels come and go, they're the body that stays in place and they know where the commission has been over decades.

Adam Roseman:

Right. Commissioner, I'm just curious. You were chief counsel to the chairman and I think when Mike was trying to explain the commission to people, you'd almost maybe call that a chief law clerk, so to speak. Can you talk a little bit about what you did as chief counsel to the chairman and then what has surprised you and what you're really enjoying about being a commissioner, right? It's a different role.

I'm curious, you've been in that role for, I guess, a little over a year, what has surprised you and then what has been not as exciting as you thought it was, right? To hear the good and the bad.

Amanda Wood Laihow:

Right. Right. I would say, as chief counsel, you really are the intermediary among the commissioners because since we only have three members, two commissioners can't actually discuss a case together outside of an official meeting. There's a joke around the commission that the commissioners can't even take the elevator together to go get a cup of coffee, because it could be perceived as them having a meeting outside of the official process. The counsels really act as the go-betweens.

Amanda Wood Laihow:

As counsel, you can go to any of the other two commissioners and chat with them about a case, or try to negotiate a point to try to influence them, to see it your way or your bosses way. Then also you go to the general counsel's office to say, "This is what Commissioner Sullivan is thinking. Has anyone ever thought that before? Is there a way we could work that into the decision or do we footnote it?"

Amanda Wood Laihow:

You're really trying to piece together the puzzle of the decision as the counsel and you end up becoming really close with the commissioners, not just your own one that you're working for. It's nice because you develop these relationships, even if it's agreeing to disagree sometimes. I think that's a great part of being counsel.

Amanda Wood Laihow:

Then for me, I think the hardest part, I'll answer that part first, is being very close with Commissioner Sullivan in that discussion and negotiation phases, and then having to basically put up a wall between us now.

Adam Roseman:

Lonely elevator rides, I guess, huh?

Amanda Wood Laihow:

Exactly. Has been hard in a way that it's not the same, I guess, intellectual exchange of ideas because the only time you really get to do that is at the commission meeting. We don't get to really spitball ideas or say, "How about this legal theory? How do you think this would fit?" I miss that back and forth with him. Now, obviously, I also can't do that with Chair Attwood and try to persuade her or her try to persuade me in a certain way. I would think that's the downfall.

Amanda Wood Laihow:

I think people wouldn't realize that that's the very strict rules that we have at the commission. There are other independent boards and commissions that have those same rules, even though they have more members, they still can't go beyond say two of them talking or three of them talking together. In terms of the great thing about being a commissioner now is that I can come up with these ideas and see if there's really some weight behind them and what I'm thinking.

Amanda Wood Laihow:

It's very satisfying that way, legally, to be thinking something and then knowing that this will be on paper and in Westlaw that I've decided to say this. It's nice to piece all of that legal stuff together and that it's my name or my work on it. That's a legal satisfaction that I have.

Mike Taylor:

Sure. That's terrific. Hey, Amanda, one of the questions that I have is, what are some interesting cases that are currently on review that you think are very interesting or novel? Or does any one of those stick out to say, "Wow, this could be a real game changer here."

Amanda Wood Laihow:

Well, I'm a little hesitant about the current docket, but what I can tell you is ... To discuss that just because I don't want to say something that we're currently looking at and reviewing, just because it's currently in review. What I can tell you, what's been interesting and we just had a case that came out on this issue was the process of the 15 days that you have, how do you notify OSHA that you're going to contest the citation?

Amanda Wood Laihow:

The process by which ... We've had a few cases early on at the commission when I was working for Chairman Sullivan, but we've also had them come up and it's, is there a process by which somebody collects the mail and you get the certified piece of mail that says you've been cited based on this? Then what do you do with that? Because you have small businesses who may have one person wearing five hats and that person might be sick for a day. Then what happens to the citation notice?

Amanda Wood Laihow:

It's on someone's desk and then the 15 days toll and then what do you do even though you wanted your day in court? We've also had a case recently where the local location was given the citation, even though someone had indicated to OSHA that they at the corporate office should get it. The communication between OSHA and the employer is very important in those situations.

Amanda Wood Laihow:

I think those are really, at the very [inaudible 00:24:21], at the beginning of your case, it's as an employer, do you want to fight this? If you miss that window of opportunity, is there a way for you to get that opportunity back?

Adam Roseman:

Yeah. Commissioner it's so-

Mike Taylor:

Adam is laughing right now because he had this [crosstalk 00:24:37].

Adam Roseman:

I've had this case. It's so funny you say that. It's always been an interesting issue, but the last issue you raised, which is you've got a large company or a company with multiple work sites and a corporate office, and there's some miscommunication somewhere about where the citation should be sent. I have had this very issue and it's pretty challenging, right?

Amanda Wood Laihow:

Yeah.

Adam Roseman:

There are a lot of different policy concerns at play. I'm sure you, as a commissioner, think about that of, well, rules are rules on one hand and also an entity is entitled to litigate their issue or have their day in court, as you say. It's very funny that you raise that very issue that I had, gosh, I don't know, Mike, three years ago, maybe, two years ago.

Mike Taylor:

Yeah. Because the site was in Florida, right?

Adam Roseman:

Correct.

Mike Taylor:

The citations were issued to the parent in-

Adam Roseman:

In Illinois.

Mike Taylor:

... in Illinois. [crosstalk 00:25:36].

Adam Roseman:

Yeah.

Amanda Wood Laihow:

Yeah. With these, I think for the audience, it's important to know that these cases come to us because they're thrown out before there's even a trial. You don't have the depositions. You don't have evidence in the record. You don't have testimony. You just have the 15 days expired. Here's what happened. They were served by certified mail and then we didn't hear from them. Then that's really what happened. That comes to us and we have very slim documents to look at. It's a high hurdle, but there have been some cases that have come before us.

Amanda Wood Laihow:

There is a case that Commissioner Sullivan had dissented with his colleagues on and then the circuit ended up reversing for the grounds that he had articulated in his dissent that giving this company a chance to have their day in court. I think it's important that if you lose that 15 days, it's really important for the legal minds that ... or even if it's a small employer who doesn't necessarily hire an attorney to look at your process and was there something peculiar that day or that week about your process that you'd want to argue to the commission?

Amanda Wood Laihow:

Because, well, we would certainly take a look at it and we have. Those are interesting ones. Then I think, Mike, going just the last few years, we've had a lot of what's referred to as the general duty clause. I think for your audiences, if they're not cited for a specific standard, there's this catch-all in the act that is that you have a duty to protect your employees at all times, et cetera, et cetera, et cetera. We've had cases come through where there's been workplace violence issues.

Amanda Wood Laihow:

Normally you might not see OSHA coming in for that, but there's been either some kind of very, very bad injury or even a death and so OSHA comes in to inspect and then there, the company is cited for the general duty clause violation. Again, it's one of those ... There's a four-prong test. We've seen them come in. We've decided three to one on some of them, two to one on some of them. Another one we had was there was a roofing company and there was a heat stress issue.

Amanda Wood Laihow:

Since there is no heat stress standard, the company was cited under the general duty clause, and so what does that mean? Is there a foreseeability element to it, whether the company should have known that this particular person was under heat stressful situation? Or whether the company should have known that in a case that we decided a few years ago, Integra Health, whether the clientele that this company was dealing with, should the employees have known that they had potential violent criminal backgrounds, and that could have been harmful?

Amanda Wood Laihow:

Which unfortunately in the case that we decided a poor woman was killed from the client that she was interacting with because she was alone and didn't know the background of this person. Those I think are very fascinating cases. I think as the COVID cases and PPE cases with COVID come before us, I think those will be very novel and interesting and pre-standard how the commission is going to look at that, because I think we will get some, in this time period now, prior to a standard being issued in the coming months. I think those will be particularly interesting.

Adam Roseman:

Yes.

Mike Taylor:

Amanda, that leads me to the final question that we have. Do you think that due to the COVID situation, whether that will have a dramatic effect on the commission's resources? Any insight whether you think there'll be lots of litigation over this? Because I know that one of the issues is that ... Let's take recordkeeping for example, is whether something's work-related, and proving that you get COVID in the workplace, unless you're a hospital, is pretty tough to do.

Mike Taylor:

I think where there may be lots of litigation over this is that, if you have a large company and decides on their own that a lot of their COVID cases are work-related, now all of a sudden their injury and illness rates go up. Then they're going to be exposed to potential OSHA enforcement over that when they may not have been so in the first place. I just didn't know if the commission itself had thought about, "Hey, we may have a big uptake in cases in the near six to 12 months. Do we have the resources to handle all this?"

Amanda Wood Laihow:

That's a really interesting question. I haven't been able to talk to the chief judge about that because that would be something she might be looking at herself. Right now they're not having any in-person hearings. As you both probably know, it's all done virtually. Yeah. I'm not quite sure how that's going to all flesh out really. I think you were asking ... There are 12 ALJs right now. I don't know if she's thinking strategically, whether we'd have to account for that in the future years.

Amanda Wood Laihow:

I also think in addition to the injury illness rate, you might have industries that maybe not really had to deal with OSHA, like who are now having to wear a masks and whether the masks are the KN95s, or whether they're something equivalent, or what that's going to look like. Maybe you have the restaurant industry or the retail industry who historically may not have had a lot of litigation, say with OSHA on a daily or weekly or monthly basis, but may start being cited, or just having to comply with things that they're not sure if they're in compliance or out of compliance.

Amanda Wood Laihow:

That could also lead to a higher docket, if you will, higher numbers in the docket and also a strain on resources for us. We're a small agency and I guess if the resources have to increase, I'm sure that we will account for that and make sure that we have what we need. In terms of the full commission, in order for us to grow, we'd actually have to open up the act and add more commissioners through congressional actions. I'm not sure if I foresee that happening anytime soon for us.

Adam Roseman:

Right.

Mike Taylor:

Yeah. I know there've been talks about that for a long time, because I believe MSHA has five, right? And then-

Amanda Wood Laihow:

They do. Yes, they do.

Mike Taylor:

Yeah. Yeah. You guys have three. Well, it'll-

Amanda Wood Laihow:

We have three. Yeah.

Mike Taylor:

Yeah. It'll be interesting to see whether Judge Rooney will need to bring on some more ALJs depending upon whether there's a major increase in caseload due to all the COVID litigations.

Amanda Wood Laihow:

Yeah. I agree with you, Mike, on that. I will just note for the full commission, we're going to go down to two of us in about a two months' time here because Commissioner Sullivan, his term is up in April, at the end of April, and we are all staggered. I'm on for two more years and Chair Attwood will be on until 2025.

Adam Roseman:

Wow.

Amanda Wood Laihow:

Right now we'll be a one to one so I'm not sure ... Goes back to how long will cases be hanging around. I guess it depends if they get another person who can get confirmed quickly in the Senate. You may see more two to ones, or you may see three to zeros. I mean, we've had quite a few three to zeros in this last go-round. We've been on the same page, a lot of the cases, which is good.

Mike Taylor:

Right. Just following up, I remember ... So if he is not reappointed and it's just you and Chairwoman Attwood, that leaves just the two of you. If you get a case and decide it and it's a one-to-one, it's not really commission precedent is my understanding.

Amanda Wood Laihow:

Correct. Yeah. Yeah. I think at that point, it would be up to the circuit if the parties wanted to go to the circuit, which I think if it's one to one you probably would go to the circuit to get a more definitive decision. You could see more things going to the circuit until we get that third person.

Adam Roseman:

Right.

Mike Taylor:

Yeah. Well, Hey, Amanda, we really appreciate you being on our podcast today. We know you're very busy. This is very valuable information to our audience. We can't thank you enough and we really appreciate it.

Amanda Wood Laihow:

I really appreciate being asked to come on. I think this is a great venue to reach out to folks. Mike, you and I were talking and a lot of people, as you said at the beginning of the podcast, confuse us with OSHA themselves or the department of labor, and so I just want to stress that we are independent. We are actually located all the way across town from department of labor. Our website is really informative. If folks want to go on and learn more about us, it's oshrc.gov. We are there and please look us up. Just happy to be with you guys, and thanks again.

Mike Taylor:

You bet. Thanks, Amanda. That's it for this edition of the podcast. Stay tuned for the next podcast, which will be coming out relatively soon. Thanks everyone.