

Speaker 1 ([00:00](#)):

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Mike ([00:38](#)):

Welcome, everyone, to the next episode of the Workplace Safety Review Podcast. Today's special guest is my friend, Nadine Mancini, general counsel for the Occupational Safety and Health Review Commission. Nadine has been general counsel of OSHRC since 2008. She's a lifelong public servant and began her career with the review commission in 1992 - wow, that's a long time - working for the administrative law judges in the former Boston regional office, which no longer exists. And after that office was closed, Nadine relocated in 1999 to work in the agency's office of the general council where prior to her appointment as general counsel, she served as an attorney, a team leader and a senior counsel.

During that time, she was temporarily assigned to the role of chief counsel twice. First for review commission chairman, Scott Railton, who I used to work for, and then for Commissioner James Stevens. Wow, it seems like such a long time ago, Nadine. Nadine is originally from Pittsburgh, Pennsylvania, where she received her bachelor's degree from the University of Pittsburgh. She is an honors graduate of the University of Connecticut Law School and is admitted to the state bars of Pennsylvania and Massachusetts. Welcome, Nadine.

Nadine ([02:03](#)):

Thank you, Mike. Thanks so much for having me.

Mike ([02:06](#)):

We're so excited to have you here. Nadine is a real gem. I've been friends with Nadine for a long time. She's one of the nicest people I've ever met and extremely intelligent, and the review commission is very lucky to have her as the general council. That being said, Nadine, can you tell the audience a little bit about your background and how you ended up working for the review commission?

Nadine ([02:32](#)):

I came to the review commission right out of law school and I had some uncertainty about what I really wanted to do. I came out of law school at a time when jobs were not really plentiful so I had applied to a lot of different opportunities and one of them happened to be the opportunity in the Boston regional office of the review commission, working with the ALJs there. And I was fortunate enough to get the interview, which I thought went well, and the very next day, I had a phone call from the chairman at the time who was Ed Folk. And he called and talked to me for about an hour, interviewed me and said, "Hey, come on board." And I said, "Sure, sounds great." And it's been one agency for me for all these years.

And I feel fortunate to have worked pretty much at every level of the decision process at the agency. So I worked with the ALJs and then when I came to DC, I was in the OGC office working as an attorney at a staff attorney position, and then worked my way up into leadership and had those two stints working with the chairman and then a commissioner, so I got to see that side of the process as well. The agency has been very good to me.

Adam ([03:53](#)):

Nadine, can you help us understand because maybe some folks in the audience don't know, what is the review commission? Who's on it? And what does the general council do? It's a strange title.

Nadine ([04:09](#)):

Yeah, absolutely. So the review commission was created by the Occupational Safety and Health Act and it was deliberately created to be an independent agency, independent from the Department of Labor and of the Occupational Safety and Health Administration. And so the review commission consists basically of two levels of adjudication. We have our ALJs who handle the trial level, and then we have a three member presidential appointed Senate confirmed review commission, and they review cases at their discretion that come up from the ALJs. And that's our main mission, that's our sole mission.

The general counsel's office assists the agency in two ways. On the mission work, which is the case work, we assist the review commission members, the three presidential appointed members, we provide them advice on pending cases and other issues related to the cases, and then we provide advice to the agency as a whole on the operations side of things, so we're involved with budget and procurement and all sorts of other issues that every agency in the federal government has to comply with, work with and implement.

Adam ([05:24](#)):

And as general counsel, are there attorneys under you at lower levels? And if so, how many? Just to give our audience a sense of who's working on these cases?

Nadine ([05:33](#)):

Sure. There's 12 of us, including me. I have a supervisory attorney who's my deputy, and then a paralegal who helps all of us, and the rest of us are staff attorneys. It's a good team. It's a small team but it's a good team, and the case work that we do is spread out among the attorneys. It's a truly collaborative group. I'm really proud of the work that we do.

Mike ([06:03](#)):

Nadine, this is Mike. I remember during my tenure at the review commission, the advice you're talking about giving to the commissioners, we would draft or you guys would draft, I think they were called DMs, decisional memorandums, recommending a particular disposition in a case. Is that what it's still called and is the process still somewhat the same where you give the DMs to the commissioner and chairlady, and then you have a huddle at some point and then votes are taken? Is that still the same process or has it changed?

Nadine ([06:35](#)):

That's pretty much the same process. We assist throughout the entire case process, so it starts when a petition is filed and we provide advice there, and developing a briefing notice for the case if there is one, and then all aspects of preparing to solve the case. So that includes participating in the agenda meetings with the commission members, meeting with their councils, going through a memo, working up a case for consideration that they can look at and it be in conjunction with the record, and then we assist with decision writing as well. So we're involved pretty much in every step of the decision process on the commission side. We are walled off from the judges. We do not work with the judges.

Adam ([07:22](#)):

So, Nadine, when you say you're walled off from the judges, you don't meet with the judges or the commissioners about a case. So when you have a decisional memo or some written work product, who are you providing that to?

Nadine ([07:36](#)):

That's to the three members who are the appeal level of the adjudication process, so when I speak about the judges, I mean the administrative law judges who hear the cases at the trial level, develop the record and issue a decision that then can come up for review to the three member review commission. The names are difficult to follow, but they're commissioners. We have judges and commissioners.

Adam ([08:01](#)):

Right. Now, Nadine, a wise OSHA practitioner who I think is on this podcast named Mike Taylor told me that you are the Rich Fairfax of the review commission. You've been there a long time and you're not pro employer, pro employee, you're pro safety and your pro facts and law. But I'm sure in the 15 years you've been in this role, it's changed a bit. Can you talk to us about how it's changed if at all, and just the relationships amongst your colleagues and the judges and just how you've seen the evolution move forward?

Nadine ([08:40](#)):

Very flattering to compare me to Rich Fairfax. I feel fortunate, as I said earlier, to have worked at the same agency in different roles. I haven't seen it change a whole lot over the years other than we are all public servants committed to doing the work that we're charged with doing, and that's due process. It's definitely calling the cases as we see it based on the precedent that we have. There's a long rich history of commission precedent out there. We also look at the circuit court precedents that are involved in each case, depending on where the case arises. So the relationships depend on the leadership, I've been fortunate to have great leadership at this agency throughout the time that I've been here, particularly as general counsel where I'm working directly with the agency leadership, senior management. So it hasn't changed a whole lot other than maybe the technology we deal with. And I was thinking back to my early days in Boston writing decisions out on notepads. Well, that's all gone by the wayside.

Mike ([09:47](#)):

So Nadine, when you guys get a case... Well, first of all, what I want to ask you is today compared to 15 years ago, the numbers of cases that are directed for review, has that pretty much been stable throughout the last say 15 years or is it peaks and valleys? And what's the caseload like now?

Nadine ([10:18](#)):

I would say it's pretty steady. I don't have the numbers in front of me. It's definitely something that obviously ebbs and flows depending on how much OSHA is enforcing and how many citations are issued and then how many citations are contested and percolate up through the judges. So the judges handle a pretty steady stream of cases, and then a small portion of those make their way up to the review commission.

Mike ([10:49](#)):

I know that folks often ask me about my tenure there and about if you do go to trial and you lose, should you appeal and what's the appeal process like, or the petition for review process like? And I tell

them, if you're going to make some factual arguments, you're going to have a hard time getting a case directed for review, but if you're making more legal arguments, you would have a better shot of a commissioner saying, "Hey, that's an interesting legal question. Let's take that one up because we haven't decided that issue before," or this is a something like we dealt with three years ago or whatever. Is that pretty much still the same?

Nadine ([11:34](#)):

I would say it just depends on the commissioner. They all look at different things in deciding whether or not to pull a case in. It just takes one commissioner to decide to direct a case for review, so it's not something that we need a forum for, which we do need to resolve the case in the end and issue a decision. I think the factors vary from commissioner to commissioner. Obviously, cases that present issues of first impression are always interesting and something that I think a commissioner might be more interested in.

Adam ([12:06](#)):

And Nadine, could you help us understand. A petition comes in for discretionary review. Are you the first one looking at that or is that someone under you and then they're raising it to you and you're looking at it and you're saying, "Yeah, that's really interesting." Or, "Nah, this isn't the right one." Help us understand and help our audience understand that process, because it is all discretionary, right? It's not [inaudible 00:12:31].

Nadine ([12:30](#)):

Yeah, it's discretionary. I would say a lot of eyes are on a petition that comes in and that ranges from people in my office to the commissioners themselves and their staff, and so when those come our way, we definitely look closely at them and decide, the commissioners decide whether or not it's something they're interested in bringing in for review. When a case is taken up for consideration, we provide our advice and a recommendation, and obviously, the commissioners are free to take or leave that. Our goal is always to help them reach the decision they want to reach, and hopefully, it's a consensus decision. I think it's helpful for the agency to speak with one voice whenever that's possible.

Adam ([13:15](#)):

And Nadine, question for you. I know you mentioned that you'll look of course at commission precedent and obviously the precedent of the circuit where the case arises. It's funny, I always have clients say, "Well, there's all these state OSHA things. What are they." And they've got their own commissions for the most part. Do you follow, I mean even informally, do you follow decisions that come out of the state review commissions to maybe see what's percolating out there in the ether? Or is that just not something that's part of your consideration?

Nadine ([13:50](#)):

I would say that's not really on our radar, but obviously, if a party were to point us to something that's happening in the states, we'd probably take a look at that. I don't know how much impact it might have but the precedent that we look at is our own commission precedent and then the possibility of an appeal to a circuit court that might weigh in. So we're cognizant of that, but yeah, the state plans have their own commissions.

Adam ([14:19](#)):

Right. That's a little hard for some clients to wrap their head around sometimes.

Mike ([14:23](#)):

Well, I do know, when I first got into private practice and I was doing some state plan litigation, Washington for example, I remember reading a case. If the review commission has decided an issue, we will take that under advisement, if you will, and consider it not binding authority but persuasive authority.

Adam ([14:42](#)):

So, Nadine, you've been in this role for 15 years and obviously worked at the agency for even longer. Certainly don't want to talk about pending cases but is there a case that was the most challenging for you that you can recall or the most interesting? Anything that stands out, sort of a war story to tell our audience a little bit about.

Nadine ([15:03](#)):

I'd have to say I'd go all the way back to my early days working in the Boston office. I was fortunate or unfortunate enough to work with a judge there who had heard the ergonomics case which was OSHA's I think first foray into that area. And it was one of the first decisions that I worked on as a new attorney right out of law school, and I still remember having the boxes of exhibits in my office and they had the little paper cups they would put the cookies in. It was all about how they did this all on an assembly line basically, and I remember thinking, "This is going to be a really cool job." I don't have the cookies but I have the actual cups, the papers and all of that in there. And so that was a fun experience for me as a new attorney to figure out this... And it was a new area. It was just fascinating to work with the judge on that case.

Adam ([16:09](#)):

That is interesting, and it's a well known case so it's funny that you go all way back to it.

Nadine ([16:15](#)):

Obviously, the judges' decision is not the precedent. It's the commission's decision who eventually took it up. But there was one other one I worked on. It was a long time ago, one of the lead paint bridge cases where they were working on a huge bridge, it might have been the Delaware Bridge, and they created these scaffold platforms that they could swing along the bridge frame. And they used high pressurized washers to strip the paint off and they were filled with broken up walnut shells. I remember thinking that was the most fascinating idea to how are we going to get this lead paint off this bridge? And let's shoot high pressure walnut shells at it to strip it off. [inaudible 00:16:59] high up in the air on these platforms that you would swing and slide on. Thank God we all work at a desk in front of a computer. I admire these people who do that type of work.

Adam ([17:08](#)):

Yeah, Nadine, it's funny you say that and I'm curious, as someone who obviously helps judges reach certain conclusions, do you ever sit back and say, my goodness, we've got some pretty interesting industries here and I'm not sure I'd be able to do them?

Nadine ([17:24](#)):

Absolutely. No, Adam, you hit on what I think has been great about my career at this agency, is that every case presents something new. A new workplace sometimes. Sometimes we see some of the same types of conditions and hazards. Sometimes you come across something really unique and different, and you learn a lot about what America's workers are involved in. What are they up to? What are they doing? And what are employers doing? How does this work process happen? So there's always something new and interesting to learn. I'm still learning, even after all these years.

Adam ([18:00](#)):

It's funny, do you ever find yourself... I mean, I'll read a case or I'll read a case file, and you sit there and go, "I don't even know what this means. I've got to just Google what this piece of equipment looks like or what this means." And I find myself just Googling just to frame it and picture it in my head. Do you still have to do that or do you feel like you've got a good enough sense now?

Nadine ([18:21](#)):

We always stick with the record. If there's something in the record to explain it, great. I'm going to really date myself here, Adam, but I came up without the internet and Google, so if it's not on the record, short of going to the library to try to find it on a shelf, I wasn't going to find it. So the record really needs to tell you what you need to know about a machine or a work process.

Adam ([18:46](#)):

Right.

Mike ([18:47](#)):

Yeah. I've often told clients that if you're going to try a case, you've got to do just that. I remember I had a case when I was there, I think it's called Subtles Trucking. It was some kind of chicken processing plant where some guys fell off the back of a tractor trailer and got carbon monoxide, and trying to learn about how these chickens are processed was just fascinating. And I learned at that point why it was necessary to make sure you had a good clean record so that if you do go on appeal before the commission, folks like you can get a good idea of what it's really all about.

Nadine, one of the questions that I have is oral argument. I get that question quite often. The last time I remember, one deals with multi-employer I think, but does the commissioners, do they... When's the last time an oral argument has been granted? Do you know?

Nadine ([19:47](#)):

We had oral argument. It's on our website. I think we have posted the materials associated with it but we had our oral argument in the workplace violence case, Integra Health.

Mike ([19:59](#)):

Oh, okay.

Nadine ([19:59](#)):

Also, the heat stress case [inaudible 00:20:03]. So those were the two that I recall recently.

Adam ([20:07](#)):

Oh, wow.

Nadine ([20:09](#)):

[inaudible 00:20:09] a lot, it really just depends on the commission. The chair of the agency and the commission, it's really up to them to decide.

Mike ([20:19](#)):

And is that something that just a commissioner or chairlady has to approve or is that require a majority? Do you remember?

Nadine ([20:25](#)):

I would say to the extent that we get motions for oral arguments and any type of motion like that has to be agreed to by a majority, it has to be a quorum. So those sorts of decisions have to be made by the commission.

Adam ([20:41](#)):

And last question, we've got some OSHA practitioners, including ourselves of course, that listen to this. Now, you've been now at the agency for 15 years. The floor is yours here. What piece of advice would you tell OSHA practitioners practicing in front of the commissioner, ALJs? Any words of wisdom from a veteran of the agency?

Nadine ([21:05](#)):

Probably the best advice I could say is read our rules. [inaudible 00:21:10] You really need to be paying attention to the commission's rules. We recently revised them, we spent a lot of time on them. Our rules govern, and if our rules don't, then you've got to look at the federal rules, so pay close attention to them.

Adam ([21:26](#)):

I suspect that given how quickly you answered that question, that that issue probably pops up quite a bit.

Nadine ([21:32](#)):

And it's definitely something, practitioners on both sides.

Mike ([21:38](#)):

Awesome. Hey, Nadine, thank you so much for being on the podcast. We really appreciate it. Best of luck to you going forward and I'm sure our audience is going to learn a lot from just listening today.

Nadine ([21:52](#)):

Thanks, Mike and Adam.

Adam ([21:55](#)):

Thanks, Nadine. Thanks for coming on.

This transcript was exported on Jul 28, 2022 - view latest version [here](#).

Mike ([21:57](#)):

You bet. And stay tuned to the next episode of the Workplace Safety Review Podcast. Stay safe out there, everybody.