

Administration (OSHA) under the Occupational Safety and Health Act (OSH Act), 29 U.S.C. §§ 651 – 678, pursuant to 29 U.S.C § 660 and FRAP 15. The parties completed briefing in the matter on May 30, 2025. The case then came before the Court for oral argument on December 11, 2025.

On January 9, 2026, the Court issued its unpublished opinion and judgment. The Court ruled that the Commission Administrative Law Judge’s (ALJ) opinion did not cite substantial evidence to support a finding that Sofidel had knowledge of the hazardous condition of two-person jogging. The Court, therefore, vacated in part the Commission’s order and remanded the matter to the Commission for further proceedings. Initially, the Court entered the following judgment:

THIS MATTER came before the court upon the petition for review of an order of the Occupational Safety and Health Review Commission.

UPON FULL REVIEW of the record and the briefs and arguments of counsel,

IT IS ORDERED that the petition for review is GRANTED, and the Commission’s order is VACATED IN PART and REMANDED for further proceedings consistent with the opinion of this court.

The Court later withdrew this order for the following:

On Application for Enforcement of an Order of the Occupational Safety and Health Review Commission.

UPON CONSIDERATION of the court's contemporaneously filed [sic] vacating in part the Commission's order and remanding the case for further proceedings, and

PURSUANT TO FRAP 19—Settlement of a Judgment Enforcing an Agency Order in Part,

IT IS ORDERED that the Commission must file with the clerk and serve on Sofidel America a proposed judgment conforming to the opinion within 14 days. If Sofidel America disagrees with the Commission's proposed judgment, Sofidel America must within 10 days file with the clerk and serve on the Commission a proposed judgment that Sofidel believes conforms to the opinion. The court will settle the judgment and direct entry without further hearing or argument.

Given the change in the nature and substance of the Court's instructions, the Secretary seeks clarification as to whether the Court's judgment remanded the matter to the Commission for additional findings on the issue of knowledge. If this is the Court's intent, the Secretary believes the original judgment was properly worded. *See Caterpillar Logistics Servs., Inc. v. Solis*, 674 F.3d 705, 710 (7th Cir. 2012) (using similar language in a case where the court granted the

employer's petition, vacated the Commission's order, and remanded to the ALJ to incorporate further considerations in their decision); *Donovan v. A. Amorello & Sons, Inc.*, 761 F.2d 61, 66 (1st Cir. 1985) (same). Furthermore, the Secretary believes this to be the appropriate outcome under *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943). When a reviewing court does not know the basis for the agency action and seeks to ascertain the reasons therefor, the usual course is to remand the case. *See Donovan*, 761 F.2d at 66 ("Having rejected the Commission's rationale for affirming the ALJ, we must now decide whether to review the ALJ's findings here or to remand to OSHRC for further review." (citing *Chenery Corp.*, 318 U.S. at 93-95)); *Dole v. Williams Enters., Inc.*, 876 F.2d 186, 190 n.8 (D.C. Cir. 1989) (noting that remand for further consideration by the Commission was the appropriate remedy as opposed to affirming based on a finding not made by the ALJ).

The Secretary also notes that FRAP 19, cited as the basis for the Court's judgment, is inapplicable to the current proceedings. This matter was initiated by a petition from the employer, Sofidel, seeking review of an order of the Commission affirming OSHA citations against it under 29 U.S.C. § 660 and FRAP 15. FRAP 19 applies only to

enforcement proceedings, and thus, does not apply to this review proceeding.¹ See 20 James Wm. Moore et al., *Moore's Federal Practice—Civil* § 319 (3d ed.) (noting that FRAP 19 does not apply in a proceeding to review an agency order). The Secretary did not petition for enforcement of the Commission's order.

Finally, the Secretary wants to clarify for the Court that the Commission is not an adversarial party to the current proceeding and is instead the independent tribunal that will oversee any remand proceedings. See *In re Perry*, 882 F.2d 534, 545 (1st Cir. 1989) (“[W]hen—as in this case—a litigant seeks to overturn a Commission ruling, OSHRC is at most a nominal party (not charged with defending the correctness of the decision).”). The Commission has not appeared in this proceeding; instead, to the extent that the Court is seeking input on the judgment that will govern any remand, the Secretary should have an opportunity to participate as well.

Unlike tribunals within unitary administrative agencies, such as the National Labor Relations Board, the Securities and Exchange

¹ Section 11(b) of the OSH Act authorizes the Secretary to petition for either review or enforcement of any final order of the Commission. 29 U.S.C. § 660(b). Upon such petition for enforcement, “the clerk of the court, unless otherwise ordered by the court, shall forthwith enter a decree enforcing the order.” *Id.*

Commission, and the Federal Trade Commission, the Occupational Safety and Health Review Commission is a wholly independent agency that is not within the Department of Labor (DOL) or under the Secretary of Labor. *See Martin v. OSHRC*, 499 U.S. 144, 151 (1991) (“Under the OSH Act . . . Congress separated enforcement and rulemaking powers from adjudicative powers, assigning these respective functions to two *different* administrative authorities.”) (emphasis in original). The Commission does not exercise prosecutorial discretion or engage in OSHA rulemaking or any other policymaking. *See id.*

As an independent adjudicatory agency, the Commission serves as a neutral arbiter between an employer contesting an OSHA citation and the Secretary seeking to enforce the citation.² *See Cuyahoga Valley Railway v. United Transp. Union*, 474 U.S. 3, 7 (1985) (“The Commission’s function is to act as a neutral arbiter and determine whether the Secretary’s citations should be enforced . . .”). The

² The Secretary has delegated most of her responsibilities under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 – 678, to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 90 Fed. Reg. 27878 (June 30, 2025).

Commission does nothing other than adjudicate cases under the OSH Act and has no further relationship with OSHA or DOL. *See Martin*, 499 U.S. at 151 (explaining the split-enforcement structure in the OSH Act).

If it is the Court's intention that the January 9, 2026 Order itself acts to remand the matter to the Commission to reexamine the evidence Sofidel and the Secretary presented as adversaries on the issue of knowledge, both the Secretary and Sofidel should be given an equal opportunity to participate in the proceedings as adversaries. And, due to the adversarial nature of any remand proceedings below, sufficient time would be needed for such proceedings.

Based on the Commission's January 16, 2026 filing, which this Court construed as a motion on January 20, 2026, the Commission will be unable to take further action on this case on remand until such time as it has a quorum. *See* 29 U.S.C. § 661(f) (“[O]fficial action can be taken only on the affirmative vote of at least two members”). Even assuming the Commission is unable to act on the matter until it has a quorum, remand is still the proper remedy under *Chenery*.

If, conversely, the Court intends to vacate Citation 1, Items 3 and 4, the Secretary believes the proper judgment would be to grant Sofidel's petition for review and vacate those items. For the reasons explained above, the Secretary does not believe this would be the correct judgment based on the Court's opinion.

WHEREFORE, the Secretary requests the Court to clarify its January 9, 2026, Order as to whether the Court intends to remand to the Commission for further consideration of evidence on employer knowledge, or instead to simply vacate Citation 1, Items 3 and 4.

Respectfully submitted,

s/Joseph Quick

Joseph Quick

United States Department of Labor

Office of the Solicitor, Suite S4004

200 Constitution Avenue, NW

Washington, DC 20210-0001

(202) 693-5703

Attorney for Respondent

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CERTIFICATE OF SERVICE

I hereby certify that all parties have consented to service by electronic transmission and that on the **23rd day of January, 2026**, I served a copy of the foregoing Motion For Clarification using the appellate CM/ECF system on:

William E. Curphey
Curphey & Badger, P.A.
816 137th St., NE
Bradenton, FL 34212
Telephone: (727) 599-4785
E-Mail: billcurphey@gmail.com

J. Micah Dickie
Fisher Phillips, LLP
1230 Peachtree St., N.E., Suite 3300
Atlanta, GA 30309
Telephone: 404-260-3419
Facsimile: 404-240-4249
E-Mail: mdickie@fisherphillips.com

s/ Joseph Quick

Joseph Quick
Staff Attorney
U.S. Department of Labor
Office of the Solicitor, Room S-4004
200 Constitution Avenue, NW
Washington, D.C. 20210-0001
(202) 693-5703
quick.joseph.j@dol.gov