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## *Whose interpretation of Occupational Health and Safety regulations is entitled to deference?*

by Jay E. Grenig

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**Elizabeth H. Dole, Secretary of Labor,  
U.S. Department of Labor**

**v.**

**Occupational Safety and Health Review  
Commission and CF&I Steel Corporation**

(Docket No. 89-1541)

*Argument Date: Nov. 27, 1990*

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### ISSUE

In this case the Supreme Court is asked to determine whether the interpretation of a Department of Labor regulation by the Secretary of Labor, or the interpretation of the regulation by the Occupational Safety and Health Review Commission, is entitled to deference where the two interpretations conflict.

### FACTS

In 1976 the Secretary of Labor determined that coke oven emissions are carcinogenic. The Secretary then promulgated a standard governing occupational exposure to coke oven emissions. (41 Fed. Reg. 46,472-46,790 (1976).) The standard requires that in "regulated areas" an employee's exposure to coke oven emissions be limited to a specified level. The standard permits the use of respirators when controls are not yet sufficient to reduce exposure to the permissible limit.

29 C.F.R. § 1910.1029(g)(3) requires an employer to "institute a respiratory protection program in accordance with § 1910.134 of this part." 29 C.F.R. § 1910.134(e)(5) provides that respirator users must "be properly instructed in its selection, use and maintenance." It further states that "[t]raining shall provide the men an opportunity to handle the respirator, have it fitted properly, test its face-piece-to-face seal, wear it in normal air for a long familiarity period, and finally to wear it in a test atmosphere."

In August 1979 the Secretary inspected CF&I Steel Corporation's coke oven facility in Pueblo, Colo. The inspection disclosed that CF&I had conducted two kinds of respirator tests with its employees. The first test was a

"positive/negative pressure test" in which a worker places the respirator on his face, inhales or exhales, and checks for leakage along the respirator seal. The second was a "banana oil" test in which a worker is exposed to isoamyl acetate ("banana oil") in order to determine whether he or she can detect the odor of the chemical despite the respirator. The Secretary discovered that, during the administration of the banana oil test, 28 CF&I's employees had detected banana oil. The Secretary also determined that CF&I had failed to furnish the employees with different respirators.

The Secretary issued a citation for a willful violation and proposed the maximum penalty of \$10,000. The Secretary cited CF&I only for a violation of 29 C.F.R. § 1910.1029(g)(3) and of the general standard on respiratory protection incorporated in that section (i.e., 29 C.F.R. § 1910.134). The citation charged CF&I with failing to "institute a respiratory protection program in accordance with § 1910.134" in that respiratory training did not provide the employees an opportunity to have their respirators fitted properly and to test their face-piece-to-face-seal.

The Secretary maintained that § 1910.1029(g)(3), which incorporates § 1910.134(e), requires employers to provide a different type or size respirator, if an employee's equipment fails the test. CF&I contested the citation, on the ground that it had not violated § 1910.1029(g)(3). CF&I contended that § 1910.1029(g)(3) does not require an employer to assure proper fit of a respirator.

Finding that 28 employees had failed their respirator fit test and were not provided with respirators that would fit, an Occupational Safety and Health Review Commission ("Commission") administrative law judge issued an opinion upholding the citation.

Five years later, in September 1986, the Commission reversed the administrative law judge's decision in a 2-1 decision. The Commission concluded that § 1910.134 only requires "the employer to instruct employees during training in such things as how to select a respirator, how to put on a respirator, how to achieve a proper fit and how to obtain a face-piece seal," and to give employees the opportunity to wear respirators in a test atmosphere during training. The Commission determined that the Secretary's interpretation of Section 1910.134 would eliminate the purpose and meaning of Section 1910.1029(g)(4)(i), which specifically covers an employer's duty to assure proper fit of a respirator.

Because CF&I's employees had received instruction and

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an opportunity to wear respirators in a test atmosphere, the Commission concluded that the requirements of Section 1910.134 had been met. According to the Commission, "[t]he fact that some employees detected the banana oil while in the test atmosphere does not establish by itself that the instructions or training otherwise provided were inadequate."

The Secretary petitioned for judicial review of the Commission's decision. In December 1989, the U.S. Court of Appeals for the Tenth Circuit denied the petition and upheld the Commission's determination. 891 F.2d 1495 (10th Cir. 1989).

## BACKGROUND AND SIGNIFICANCE

In 1970 Congress enacted the Occupational Safety and Health Act (the OSH Act). The legislation was intended "to assure so far as possible . . . safe and healthful working conditions for every working man and woman in the Nation." An employer has a duty under the OSH Act to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

The OSH Act charges the Secretary of Labor with a broad range of regulatory and enforcement responsibilities, including the setting of mandatory occupational safety and health standards applicable to businesses affecting interstate commerce. The Secretary is also charged with enforcing the Act and undertaking various enforcement activities, including issuing citations to employers determined to have violated the OSH Act, proposing civil penalties against cited employers, prescribing abatement periods for cited health and safety violations, and seeking injunctive relief.

Congress created the Occupational Safety and Health Review Commission to adjudicate challenges to the Secretary's citations. The Commission consists of three members, appointed by the president and confirmed by the Senate. The Chairman of the Commission has the authority to hire administrative law judges to assist the Commission in the performance of its functions.

An employer may contest the Secretary's citation or notice of penalty before the Commission. When a citation or penalty is contested, the Commission must afford an opportunity for a hearing. Following the hearing, the Commission issues an order based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty. The Commission's decision may be reviewed by the courts. If the Commission affirms a citation, or if no challenge to a citation is filed, only the Secretary may seek enforcement of the citation in a court of appeals.

Here, the court is asked to determine whether deference should be given to interpretations of the OSH Act regulations by the policymaker (the Secretary of Labor) or by the adjudicator (the Commission).

In appropriate circumstances, courts defer to an adminis-

trative agency's reasonable interpretation of the agency's regulations. This judicial deference to administrative interpretation of a regulation recognizes that, by administering a statutory regime on a day-to-day basis, the administrative agency gains expertise from its experience and should be accorded interpretive discretion to discharge its duty.

Any deference owed to an agency's interpretation of a regulatory standard is owed only to the reasonable interpretation of the agency. If the Court holds that the Secretary's interpretation of the regulatory standard was unreasonable, it may avoid determining whether a court should defer to either the Secretary or the Commission's interpretation.

## ARGUMENTS

*For the United States Secretary of Labor (Kenneth W. Starr, Solicitor General, Department of Justice, Washington, DC 20530; telephone (202) 514-2217):*

1. An agency's reasonable interpretations of ambiguous provisions of a statute it is entrusted to administer are entitled to deference because those interpretations are an integral part of the agency's authority to implement statutory policy. The Secretary's interpretations of the Secretary's own regulations under the OSH Act are entitled to deference, because the Secretary is charged with policymaking and enforcement authority, while the Commission is purely an adjudicatory agency.
2. The legislative history confirms that the Secretary is the policymaker under the OSH Act and that the Secretary's interpretations of the Secretary's own regulations are therefore entitled to deference.
3. Principles established in analogous contexts support the view that deference is owed to the policymaking entity (the Secretary), rather than the adjudicatory entity (the Commission).

*For CF&I Steel Corporation (Counsel of Record, Randy L. Sego, 8400 E. Prentice Ave., STE 1040, Englewood, CO 80111; telephone (303) 740-0846):*

1. In those instances under the OSH Act when the Secretary's interpretation of a regulatory standard is clearly wrong or when the regulatory standard is genuinely ambiguous, deference should be accorded to the Commission's reasonable interpretation. The Commission's function as an adjudicator of contested citations necessarily includes the power to declare the law by interpreting regulations, and this power is necessary and important to preserve the notice and due process rights of employers.
2. The Commission's ability to interpret regulations is consistent with congressional intent and does not infringe upon the Secretary's rulemaking and policymaking functions under the OSH Act.
3. Because the facts and circumstances of this case demonstrate that the Secretary's interpretation of the regula-

tory standards was unreasonable and inconsistent with the plain language of the standards, the Tenth Circuit properly deferred to the reasonable construction of the standards by the Commission.

4. In order to preserve the integrity and function of the Commission, a reviewing court should be allowed to scrutinize both the Secretary's interpretation and the Commission's interpretation of a regulatory standard, and deference should be afforded to the most reasonable interpretation of both the Commission and the Secretary, as well as to the purpose and plain language of the regulatory standards at issue.

#### **AMICUS BRIEFS**

##### ***In Support of the U.S. Department of Labor***

1. The AFL-CIO (*Counsel of Record, Laurence Gold, 815 16th St., NW, Washington, DC 20006; telephone (202) 637-5383*).

##### ***In Support of the Occupational Safety and Health Review Commission and CF&I Steel Corporation***

1. The National Association of Manufacturers and the Motor Vehicle Manufacturers Association (*Counsel of Record, W. Scott Railton; Brooke Bashore-Smith, Reed Smith Shaw & McClay, Ring Bldg., 1200 18th St., NW, Washington, DC 20036; telephone (202) 457-6162*).
2. The Chamber of Commerce of the United States of America; the Industry Council on the Environment, Safety, and Health; and the United States Hispanic Chamber of Commerce (*Counsel of Record, Stephan A. Bokar, National Chamber Litigation Center, Inc., 1615 H St., NW, Washington, DC 20062; telephone (202) 463-5337*).
3. The American Iron and Steel Institute (*Counsel of Record, Albert J. Beveridge, III; Beveridge & Diamond, P.C., 1350 I St., NW, STE 700, Washington, DC 20005; telephone (202) 789-6000*).
4. The Occupational Safety and Health Review Commission (*Counsel of Record, Robert C. Gombar; Jones, Day, Reavis & Pogue, 1450 G St., NW, Washington, DC 20005-5701; telephone (202) 879-3939*).